

DRAFT CROFTING REFORM (SCOTLAND) BILL

March 2005



SCOTTISH EXECUTIVE



SCOTTISH EXECUTIVE

DRAFT CROFTING REFORM (SCOTLAND) BILL

Consultation Paper

March 2005

© Crown copyright 2005

ISBN: 0-7559-4519-0

Scottish Executive
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Executive by Astron B39949 03/05

Published by the Scottish Executive, March 2005

Further copies are available from
Blackwell's Bookshop
53 South Bridge
Edinburgh
EH1 1YS

100% of this document is printed on recycled paper and is 100% recyclable

CONTENTS

	page
Foreword	1
1 Introduction and policy background	3
2 Consultation to date	5
3 Outcome of consultation	7
4 Issues for consideration	31
5 Draft Bill and Explanatory Notes	45
6 Regulatory Impact Assessment	193
7 Next Steps	215

FOREWORD



The reform of crofting legislation is the latest in a series of measures by the Scottish Executive to deliver land reform to Scotland. It follows the Land Reform (Scotland) Act 2003 which gave crofting communities the right to seek to purchase croft land itself. This draft Bill is consistent with the land reform agenda and will allow crofters and crofting communities greater rights and enhance their ability to determine and secure their own future.

The Crofters (Scotland) Act 1955 and its later additions have served crofting well and assisted the retention of population in the more remote and fragile communities of the Highlands and Islands. Tenants' rights have remained secure and crofters' use of croft land for principally agricultural pursuits has been unimpeded. But society and our economy have greatly changed during the intervening years and the need now is for crofting legislation which, while continuing essential protection, also enables crofters to take advantage of these changes.

Our aim is to amend the legal framework of crofting to increase the opportunities open to croft tenants and croft owners, to enable those living in some of our most remote rural areas of the Highlands and Islands to use their land in new ways as well as continuing in traditional ways. We aim to allow crofters, for the first time, to make use of their whole croft for purposes other than agriculture. This is not to say that agriculture on crofts is no longer valued. On the contrary, we continue to make specific grants available to crofters to encourage good agricultural use of crofts. However, we have also recognised that it is time to allow crofters greater freedom to derive income from their crofts in other ways.

We have been careful to suggest reducing the amount of bureaucracy which crofting legislation imposes on crofters and landlords, while still retaining the role of the Crofters Commission in administering the system.

The draft Bill would enable the Crofters Commission themselves to change to become self-standing and independent of central government. The Commission's powers would be expanded to include power to make grants and they will be given new roles in ensuring croft land is well used and grazing regulations are observed.

We propose to balance these new powers by introducing a comprehensive system of appeal against all decisions of the Crofters Commission in order to provide crofters and landlords with the rights which they already expect under other forms of law administered by Government bodies.

I hope that the proposals put forward in this draft Bill will be carefully considered by all connected with crofting and interested in ensuring that crofting continues to give Scotland its cultural and environmental distinctiveness. Details of how to respond to the draft Bill proposals are set out in Chapter 7 and I hope good use will be made of this opportunity.

A handwritten signature in purple ink, appearing to read "Ross Finnie", with a small dot at the end.

ROSS FINNIE

1 INTRODUCTION AND POLICY BACKGROUND

1.1 In January 1999 the Land Reform Policy Group published its recommendations for land reform in Scotland, including proposals for amended crofting legislation.

1.2 In July 2002 the Scottish Executive published a White Paper: *Crofting Reform: Proposals for Legislation* addressing the five main objectives identified by the Land Reform Policy Group:

- more sustainable crofting communities
- more local involvement in, and accountability for, crofting administration
- much simplified crofting legislation and administration
- more (or at least not fewer) active crofters
- undertaking a wider range of land-based and other economic activity in addition to agriculture.

Key Development Since the White Paper

1.3 The White Paper was issued for consultation prior to the recent growth of interest in development of wind farms on croft land and the significant benefits which this would have for the community. It was also clear that the protective nature of current crofting legislation did not encourage developers to choose croft land as their first choice for wind farm sites. The Minister advised in responding to the views received from consultation on the White Paper that he would consider proposals to reduce the disadvantages which developers saw in crofting legislation; these proposals are now detailed in Chapter 4 of this consultation document.

Conclusion

1.4 Chapter 2 of this document sets out the various consultations which have been undertaken on revised crofting legislation.

1.5 Chapter 3 sets out the main themes arising from consultation responses and how they have influenced the development of the draft Bill. The written comments on these consultations have been lodged with the Scottish Executive library and all – except those submitted in confidence – may be viewed on request.

1.6 Chapter 4 identifies aspects of the draft Bill and some other issues on which comment is particularly sought.

- 1.7 Chapter 5 is the draft Bill itself, with explanatory notes.
- 1.8 Chapter 6 is the Regulatory Impact Assessment.
- 1.9 Chapter 7 explains how consultation on the draft Bill and those new proposals will work and how comments should be submitted.

2 CONSULTATION TO DATE

Land Reform Policy Group 2.1 Consultation on land reform in Scotland – including reform of crofting law – began in 1998 with the first consultation paper of the Land Reform Policy Group, which set out to identify the problems and opportunities which land reform could address. A second paper in the same year set out and sought views on various options for solutions and new measures. Finally, a paper in 1999 set down the Group’s recommendations for action, both legislative and non-legislative. Each of these papers was widely available and the subject of public comment and advice.

The Scottish Executive 2.2 Taking forward these recommendations, the Scottish Executive developed a Land Reform Action Plan to take forward an integrated programme of action and legislation, including legislation to reform crofting law.

The Crofting Consultative Panel 2.3 The Crofting Consultative Panel was set up for the purpose of advising the Scottish Executive on each theme of crofting law reform developed from the Land Reform Action Plan. This Panel consisted of member organisations representing those with a direct interest in crofting, legal experts on the subject of crofting law, commercial organisations with experience in various aspects of crofting and land use, public agencies whose remit touched on crofting and land, relevant local authorities, and individual experienced and active crofters and landlords with considered views on the future direction which crofting should take. The membership of the Panel is given in Annex B of the White Paper on crofting law reform.

White Paper on Crofting Reform: Proposals for Legislation 2.4 Having considered the views of the Crofting Consultative Panel, the Scottish Executive prepared and issued the White Paper: *Crofting Reform: Proposals For Legislation* in July 2002. Around 2,500 copies were issued and 57 written responses received within the consultation period. Public meetings chaired by the National Farmers Union of Scotland were held in crofting areas of the Highlands and Islands at which the White Paper was presented and discussed by speakers from the Scottish Executive and the Crofters Commission.

2.5 Following analysis of the response to the consultation, separate meetings were held by officials of the Scottish Executive with representatives of the Scottish Crofting Foundation, the National Farmers Union of Scotland, and the Scottish Rural Property and Business Association. The purpose of these meetings was to establish the views of these membership organisations on the implications of responses. The contributions made by these organisations greatly assisted the Executive in considering how to take forward the reform of crofting legislation.

3 OUTCOME OF CONSULTATION

General

3.1 There were 57 responses to the White Paper received during the consultation period ending 26 September 2002; 32 from organisations or agencies, 4 from grazings committees and 21 from individuals. Few of these responses commented on all the matters covered in the White Paper, most comments covering a selection of individual aspects of the White Paper proposals. There was general support for a revision of crofting law, with only one individual suggesting nothing whatever should be done at this point, and one other arguing that the whole system should be wound up.

The Crofters Commission in the 21st Century

3.2 There were 20 comments on the proposals to modernise the constitution of the Crofters Commission, 15 being wholly or generally supportive. Of the others, 2 called for the Commissioners to retain executive powers, 2 called for the Commission to be closed and 1 suggested winding up the crofting system. There was a view among some that the Commission should be more involved in SEERAD policy formation and work more closely with other agencies active in rural development.

Outcome: The draft Bill provides for the Crofters Commission to be reconstituted as a modern non-departmental public body with finance and personnel responsibilities. They will be empowered to make grant schemes subject to agreement of Scottish Ministers and they will be expected to co-operate with other public bodies in the Highlands and Islands for the benefit of rural and crofting communities.

3.3 Extension of Crofting Lands

Although not included in the White Paper as a specific issue the majority of comments received opposed the extension of crofting tenure to other areas of Scotland.

Outcome: The draft Bill does not provide for the extension of crofting tenure beyond the current geographical boundaries.

Creation of New Crofts

3.4 There was strong support expressed for the creation of new crofts, only 2 responses out of 27 opposing the principle. However, amongst the expressions of support for the creation of new crofts, there was no consensus about how this objective should be pursued. Only 9 responses fully supported the White Paper proposals to encourage landowners to create new crofts not allowing the new tenant or successor to exercise their right to purchase the croft house site at 15 times the annual rent. The majority of the remaining responses was to give the tenants of these crofts the same rights as existing crofters.

Outcome: The draft Bill will enable landowners to create new crofts from non-croft land with the tenants of these new crofts having the same rights as current crofters.

Enlargement of Crofts

3.5 There was little comment on the proposal that the rent of an enlargement of a croft should be a matter for the landlord and tenant to decide, subject to an approach to the Land Court after seven years.

Outcome: The draft Bill provides for the rent in respect of an enlargement of a croft to be determined as proposed.

Reorganisation of Crofts

3.6 This particular proposal in the White Paper addressed a procedure which has been rarely used in recent years. The proposal was to simplify procedures and reduce the time which a reorganisation must take, while continuing safeguards to ensure that all factors were taken into account and individuals heard. Of the 10 responses, 7 were supportive of the proposals in general.

- 3.7 There were several thoughtful suggestions which were carefully considered:
- whether unanimity of crofters should be a pre-requisite for a scheme
 - whether landlord and tenants should be able to jointly request the Crofters Commission to draw up a scheme
 - whether the landlord's interest was sufficiently acknowledged by the proposal
 - whether Scottish Ministers' role remained necessary were the Land Court to serve as an appeal body against a Commission decision on a scheme.

Outcome: The draft Bill provides that crofters, landlords or both may request the Crofters Commission to prepare a reorganisation scheme and the support of a majority of the crofters concerned will continue to be required in order for such a scheme to be effected. The Land Court will hear appeals from both crofters and landlord against Crofters Commission decisions on schemes.

Exchange of Crofts

3.8 The White Paper proposed that, although the Act makes no formal mention of the practice of recasting by crofters with approval of their landlord, there were grounds for formalising this means of exchanging or ceding croft land among crofters. There was little response to this proposal.

Outcome: The draft Bill provides that any arrangements arrived at between crofters and their landlord for recasting of holdings shall require the approval of the Crofters Commission in order to have legal effect.

Refocusing Financial Assistance to Crofters

3.9 The proposal to widen the focus of financial assistance to assist wider principal use of croft land attracted 25 responses of which 16 were broadly supportive. Six responses were against any shift from support for agriculture, partly on cost grounds, while others were concerned about other issues, including the availability of support to those with a similar lifestyle to crofters.

Outcome: The draft Bill provides that the Crofters Commission may make grant schemes, subject to approval by Scottish Ministers. It will also permit support for non-agricultural developments and allow grant to continue to be available to both crofters and people of similar status.

Owner-Occupied Crofts

3.10 Of 20 responses, 12 were broadly in favour of the proposal to provide for term lets by owner-occupiers which would not allow the tenant a right to purchase. Concern was expressed by other respondents that absentee tenants would be able to purchase and let as owner-occupiers.

3.11 The period of term-letting attracted some discussion, mostly as the limited duration tenancies provided by the Agricultural Holdings (Scotland) Act 2003 allow for a minimum let of 15 years rather than the maximum of 10 years proposed in this draft Bill. The choice of 10 years in the context of crofting and crofting communities reflects the difference between a business arrangement and one which has community implications requiring a balance between stability and change.

Outcome: The draft Bill provides that owner-occupiers of crofts can let their crofts for periods of up to 10 years without the tenant having a right of purchase. Owner-occupiers living more than 16 kilometres from the croft will require approval of the Crofters Commission to such letting.

Modernising Conditions of Tenure

3.12 The great majority of the 23 responses to the proposal to allow wider principal use of croft land than agriculture alone were broadly in favour. There was concern among a minority of respondents that the best land should not be so developed as to become permanently unfit for agriculture.

3.13 The draft Bill will be valuable in enabling principal use by croft tenants which goes beyond agriculture, but the need for capital and construction for permanent development still implies that a tenant wishing to so develop would ordinarily need to purchase and perhaps consider whether to decroft the land concerned.

Outcome: The draft Bill will enable crofters to make wider use of their crofts, subject to Commission approval and a right of appeal to the Land Court.

Compensation for Wider Principal Use of Croft Land

3.14 There were no responses to the White Paper proposals for compensation arrangements where crofters leave crofts which have been put to wider principal use. These proposed arrangements are that compensation in respect of that wider use shall only be required of the landlord where that has originally been agreed by both himself and the crofter. Nor were there comments on the proposal that a croft tenancy should commence on any date agreed by the tenant and landlord.

Outcome: The draft Bill provides that compensation to a crofter for improvements required for, or arising out of principal use other than cultivation will only be payable by a landlord who has previously agreed that such compensation should be paid. It also provides that the tenancy of a croft may commence on any date agreed between landlord and tenant.

Ensuring Beneficial Use

3.15 There was strong support for the proposition in the White Paper that the Crofters Commission should have the role – where they believe it merited and the landlord does not object – of approaching the Land Court for action against a crofter who does not make beneficial use of his croft.

3.16 Responses highlighted how difficult it would be to arrive at a satisfactory definition of beneficial use. Paragraph 5 of Schedule 2 to the 1993 Act provides that the crofter should not take action which results in deterioration of the soil. This is imprecise and gives little guidance as to what deterioration may mean in practice. As a consequence this provision has proved to be difficult to enforce where a croft is misused or neglected even to the extent that it represents a nuisance to neighbouring crofters. One possibility might have been to amend Schedule 2 to introduce a requirement to observe the Rules of Good Husbandry which are currently binding on tenants of farms, other than where the land is used for recognised conservation schemes as provided for in the Agricultural Holdings (Scotland) Act 2003. See also paragraph 4.31.

Outcome: The draft Bill modifies the conditions of tenure to enable unacceptable neglect or misuse of croft land to be identified and resolved and revises the requirement that the croft should be kept in a fit state for cultivation with an indication of the measures likely to be required to achieve compliance. The Crofters Commission will be empowered to act in place of the landlord to enforce compliance with conditions of tenure provided the landlord does not object to the Commission doing so.

Is the approach taken in the draft Bill appropriate or should the rules of good husbandry be applied to crofts? In particular, are there cogent reasons why these rules should not apply to crofters as they do to tenant farmers?

Croft Purchase: Legal Costs

3.17 The proposal to relieve the landlord of all legal costs incurred when a tenant purchases his croft drew 4 responses in favour and 1 comment that the landlord should not then be able to drag out the process and so raise legal fees beyond a reasonable amount.

3.18 It is impossible to put a figure on what costs may be reasonable in all cases. The question of whether costs are reasonable in any particular instance should therefore remain a matter for the Land Court to determine where the crofter applies for permission to purchase his croft.

Outcome: The draft Bill provides that, where a crofter purchases her/his croft, the crofter will pay an amount determined by the Land Court to meet the landlord's legal costs thus bringing the arrangements applicable to the purchase of a croft into line with those that already apply where the crofter is acquiring the site of the croft house.

Encouraging Crofter Forestry

3.19 There was strong support for the White Paper proposals that crofters' rights to the products of crofter forestry schemes should be clarified and that landlord's refusal of consent to plant trees should be subject to challenge by crofters to the Land Court. The Court would then determine whether consent had been unreasonably withheld.

3.20 The Scottish Rural Property and Business Association argued strongly that tree planting should continue to be subject to landlord consent with no mechanism for overriding a refusal of consent. There was also a suggestion that the legislation be clear that joint landlord/crofter forestry projects would be permitted.

3.21 A right to challenge a refusal of consent in the Land Court would bring crofters' rights on forestry applications in line with the provisions of the Agricultural Holdings (Scotland) Act 2003.

3.22 There appears to be no bar in current legislation to joint forestry projects involving crofters and their landlord, but introducing explicit permission would make this clearer and more easily enable those projects where desired.

Outcome: The draft Bill provides that crofters may challenge in the Land Court a refusal of consent by the landlord to a crofter forestry application with the possibility of that refusal being overturned by the Court if a reason for refusal is not given by the landlord or the refusal is found by the Court to be unreasonable. The draft Bill also makes clear that joint forestry projects involving landlord and crofter are permitted.

Wider Use of Common Grazing

3.23 Consultation responses welcomed the White Paper proposals for wider use of common grazing than is currently permitted by legislation. These proposals would enable crofters sharing in common grazing to use this land for purposes other than grazing of animals, peat-cutting and crofter forestry. An example of possible use would be enclosure of a portion of the land to allow growth of winter feed for collective use.

Outcome: The draft Bill provides for wider use and control of deer on enclosed land. Introduction of wider use would need consent of the majority of shareholders and the Crofters Commission. There would be a right of appeal to the Land Court by the owner and individual shareholders against a Commission decision. The duties of grazings committees are expanded to enable appropriate self-regulation of wider use.

Regulation of Common Grazing

3.24 Responses to the White Paper largely supported the proposal that the Crofters Commission take an important role in enforcing the observation of Common Grazing regulations by shareholders in those grazings.

Outcome: The draft Bill provides that the grazings committee, grazings constable where there is no committee, or the owner could approach the Crofters Commission where grazings regulations were breached by a shareholder. The Commission would then be able to require the shareholder to observe the regulations and make restitution for any damage resulting from the breach. Where the offence continued, the Commission would be empowered to apply to the Land Court to suspend or terminate all or part of the shareholding of the offending shareholder, in the latter case effectively removing that shareholder from the common grazing.

Apportionments of Common Grazing

3.25 Apportionments are currently permanent under the existing legislation. The White Paper proposed that apportionments should also be possible for limited periods and that those which had fallen into disuse should be returned to the common use of shareholders. The balance of responses was strongly in favour of these proposals. Concerns were raised over implications relating to compensation for improvements, the possibility that investment would be discouraged and the implications if an apportionment had been purchased.

3.26 The question of compensation for improvements does not arise either where an apportionment is granted for a limited period, as any expenditure on improvements would be incurred to meet the short-term need and would be expected to be written off at the end of the period of use. Where the apportionment is no longer used then any improvements made are clearly deemed to have been written off.

3.27 Where an apportionment is purchased by the crofter, it ceases to be tenanted and becomes property which he owns. In those circumstances, a possibility of returning the former apportionment to common grazing use would deter investment or use of the land as security.

Outcome: The draft Bill provides that apportionments may be granted by the Crofters Commission for finite periods and that the Commission may extend these periods. It also provides that the Commission may review the use of an apportionment at fixed intervals. Purchase by the crofter of an apportionment would end any possibility of the Commission returning that land to common grazing use.

Devolution of Decision-Making

3.28 The White Paper proposed that local crofting communities should be empowered, with the approval of crofters in the community and at the discretion of the Crofters Commission, to undertake crofting regulation in their community. Local bodies set up for this purpose should comprise both crofters and other members of the community in order to ensure that local interests were heard when decisions were taken.

3.29 There was little support for this proposal from crofters and others and comment to the effect that local regulation would divide crofting communities. There was deep concern expressed by some on the proposal that others beside crofters should have a voice in crofting regulatory decisions. It was therefore clear that there would be little or no take-up of the proposal and that its existence in statute would have potential to create the seeds of deep division within communities.

Outcome: The draft Bill makes no provision for delegation of Crofters Commission regulatory duties to crofting communities.

Area-based Policy

3.30 The White Paper proposed that the Crofters Commission should be specifically empowered to develop individual regulatory policies to meet the particular needs of specific areas. A requirement would be that each area for which regulatory policies were proposed would have an advisory panel of local crofters and, where appropriate, suitably qualified experts. The panel's role would be to comment and advise on policy needs and policies themselves.

3.31 Responses to these proposals were generally favourable. The considerable doubts expressed about appointment of local regulatory panels (see 3.29 above) suggested that additional safeguards should accompany the introduction of advisory panels.

Outcome: The draft Bill provides that, where the Crofters Commission decides that local regulatory policies are advisable, they must seek approval from Scottish Ministers for the constitution of a proposed advisory panel and the area which is to be the subject of local policies.

Simplifying the Controls

3.32 The White Paper proposed to reduce the extent of controls required by the current legislation and instead require that applications currently made on regulatory matters should be considered and determined by the Crofters Commission only:

- if they would change the land or form of tenure – such as decrofting of the whole or part of the croft, apportionment of common grazing, crofter forestry schemes;
- where there were either objections from interested parties or other good reasons for intervention.

3.33 There was majority support among responses for this proposal to streamline the processes of regulatory control.

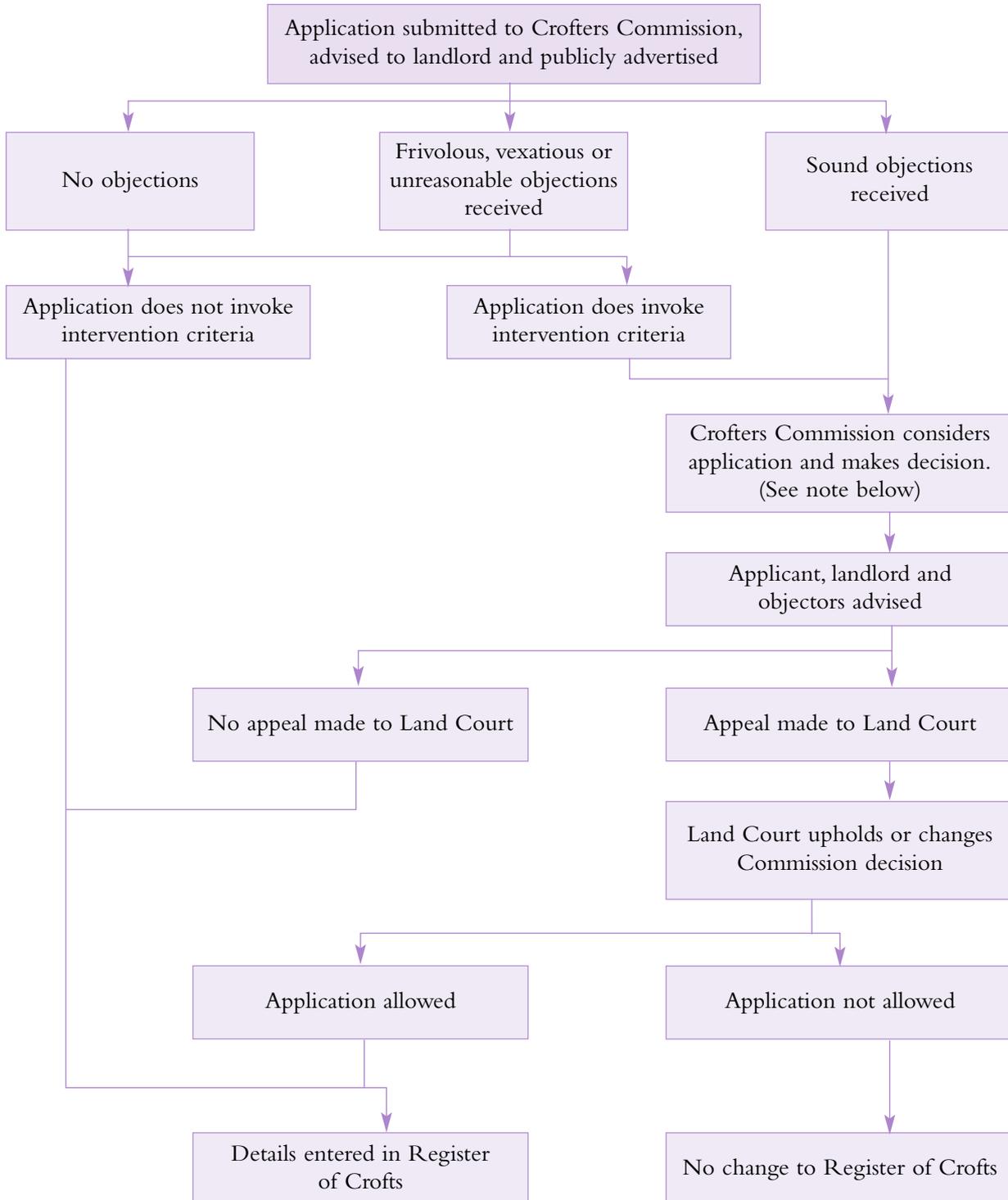
Outcome: The draft Bill provides for the new regulatory approach proposed. The Crofters Commission will consider applications where there are objections from interested parties.

The Crofters Commission will intervene in applications to which there are no objections where:

- there are identifiable grounds for concern that the interests of the estate, or the local crofting community or the wider public interest may be jeopardised;
- the sustainable development of the local crofting community is in question;
- the Commission have reason to believe the information provided in the application is inadequate;
- there is one or more of a range of circumstances relevant to particular application types (details of these are given against each application type following this paragraph).

The following algorithm sets out the new processes of regulatory applications

Application



Note: hearings on applications will be conducted by the Crofters Commission where requested by those with an interest, or where the Commission themselves believe that a hearing is required to obtain the information necessary to arrive at a sound decision.

Non-family Assignment

3.34 There was a modest and positive response to the proposals in the White Paper that the application process should be simplified. These responses included a suggestion that the Crofters Commission be given powers to control the amount of money changing hands when a tenant of a croft sells that tenancy to his successor.

3.35 The suggestion that there should be control over the price of croft assignments is not new. In the case of a croft with a house the price paid for the assignment of the tenancy will tend to reflect local house prices. Prices paid for bare land crofts will tend to reflect potential value for housing wherever there is a reasonable prospect of obtaining planning permission. These concerns about croft prices therefore tend to reflect more general concerns about affordability of housing in the Highlands and Islands. In addition, individual crofters are concerned at being expected to pay housing-related prices for tenancies of land which they want purely for agricultural purposes.

3.36 For a number of years, ending only recently, the Crofters Commission attempted to control prices paid for crofts on assignment and when they were re-let. This ceased for a number of reasons, including the ease with which these attempts to control prices could be circumvented by private transactions. It is therefore most unlikely that the prices of croft tenancies could be controlled without giving the Commission much more extensive powers to intrude into the financial affairs of individual crofters. More fundamentally it is not clear that such a policy would deliver any benefits unless the Commission are also given power to determine who should be granted a croft tenancy in each case.

Outcome: The draft Bill provides that applications to assign crofts to non-family members should succeed without a decision by the Crofters Commission in the following circumstances:

Where there are no objections from other crofters in the township, the landlord, or, where a share in the common grazing is involved, other shareholders in that common grazing; and

Where the application does not invoke Crofters Commission criteria for intervention as set out in the bold text immediately after paragraph 3.33 above or in one of the following particular circumstances:

- the proposed tenant lives more than 16 kilometres away from the croft;
- the proposed tenant already tenants or owns one or more crofts;
- there are reasonable grounds for believing the proposed tenant may not have the skills and experience to carry out his plans for the croft.

- the proposed tenant is the grazings clerk, a member of the grazings committee or a member of the landlord’s family;
- the landlord is a company or trust rather than an individual, and the proposed tenant is a member or employee or related to a member or employee of that company or trust;
- there are reasonable grounds for concern over proposed uses for the croft.

Where the relevant criteria apply, the Commission will consider and determine whether the application should succeed.

Family Assignment

3.37 Responses to the White Paper proposals for family assignment were almost all in favour. Agreement that legislation give a closer definition of what comprises the crofter’s family was accompanied by suggestions that the category of children should include stepchildren, adopted and partner’s children. The proposal that the concept of “partner” be introduced in the definition of “family” brought a request that this be carefully defined.

Outcome: The definition of a crofter’s family for assignment purposes is restricted by the draft Bill to:

- spouse, or where there is no spouse, a civil partner or an unmarried partner resident on the croft for at least two years prior to the assignment
- the crofter’s siblings and their spouses
- siblings of the crofter’s spouse
- parents of the crofter
- the crofter’s children and their spouses
- the crofter’s grandchildren and their spouses
- the crofter’s uncles or aunts, nephews or nieces.

The definition of siblings, children and grandchildren includes adoptive, step and half-blood relations of the crofter. The definition of children includes children of the crofter’s partner, subject to the same residency conditions as the partner.

The tenant will no longer be required to have the landlord's consent to assign to a family member, but the landlord will have a right to object to the Crofters Commission.

Where there are no objections the application will succeed without a decision by the Crofters Commission, unless the application invokes the criteria for the Commission's intervention (these are the same as set out in the bold text immediately after paragraphs 3.33 and 3.36). Where these criteria apply, the Commission will consider and determine whether the application should succeed.

Re-letting

3.38 There was a modest response to the proposals in the White Paper for simplified processes, of which the majority were in favour. One response suggested that a landlord should be able to separately re-let the croft house site and the croft land, but there is no bar to this under the current legislation and no change would therefore be required.

Outcome: The draft Bill provides that a re-letting application by a landlord shall succeed unless there are objections by crofters in the local crofting community, or, where there is a share in the common grazing, shareholders in that common grazing. Where there are objections, the Crofters Commission will consider the application and determine whether it should succeed.

Where there are no objections, but the criteria for intervention apply, the Crofters Commission shall determine whether the application will succeed. (These criteria are the same as set out in the bold text immediately after paragraphs 3.33 and 3.36.)

The right of a landlord to apply to Scottish Ministers for permission to re-let a croft where the Crofters Commission has refused the application will be replaced by a right to appeal to the Land Court against the Commission's decision (see paragraph 3.73 for Appeals provisions).

Where the croft is vacant and the landlord has not submitted proposals for re-letting, or his proposals have been refused, the Crofters Commission will continue to act in place of the landlord to effect a re-let. An appeal by interested parties may be made to the Land Court against the Commission's decision on a re-let at their own hand (see paragraphs 3.73 for Appeals provisions).

Subdivision

3.39 The White Paper proposed that sub-division applications should be treated as other simplified applications and that the landlord's permission should no longer be required. There was a modest response to this proposal and concern expressed that it would lead to fragmentation and loss of the best croft land available in crofting communities.

3.40 The safeguards against the fears expressed allow both objection to the Crofters Commission and a right of appeal to the Land Court against a decision by the Commission. The opportunity to enable further housing and businesses in crofting communities should therefore continue to be available to crofters.

Outcome: The draft Bill allows an application to divide a croft to succeed without the approval of the Crofters Commission where there are no objections and the criteria for intervention are not invoked. Where there are objections from the landlord, crofters in the local crofting community, shareholders in a common grazing where a share is involved in the application or any other relevant person with an interest, the Commission must consider the application and determine whether it should succeed.

The Crofters Commission will also consider the application where criteria for their intervention are invoked. These criteria are as set out in the bold text immediately after paragraph 3.33 and in the case of division of a croft are extended to include applications where the proposal is for more than one additional croft or there has been a previous proposal to divide the croft.

Where an application is successful, the draft Bill provides that the rents are a matter for agreement between the crofter and the landlord. Failure to agree may be resolved by application to the Land Court, the costs being borne by the crofter involved.

Succession

Value of Tenancy

3.41 The White Paper proposed that the value of a deceased crofter's tenancy be included in the estate to be set against debts. To give one example of the effect of this proposal, where public money had been paid to the crofter under the Crofters Building Grants and Loans Scheme, this would allow direct recovery from a crofter's intestate estate rather than continuing to require repayment by the landlord where the croft is subsequently declared vacant. Since the value of the croft may be subject to dispute the White Paper also proposed a mechanism whereby disputes over the value of the tenancy can be resolved by the Land Court. There was only one comment on this proposal, and that expressed concern about the effect on the heritable property of a croft tenant.

3.42 Croft tenancies possess real value, including the capital invested in permanent improvements. It would be unreasonable to continue to allow the accumulation of capital on a croft without that being subject to claims against the deceased's estate.

Outcome: The draft Bill provides that the value of a croft tenancy is to be set against claims on the deceased's estate and provides a mechanism for resolving disputes about value. In addition there is provision to allow the executor to recover certain costs and expenses from the legatee.

Family Definition

3.43 The White Paper proposed that the definition of the crofter's family for purposes of succession to the croft be that used for family assignation as set out in the bold text immediately after paragraph 3.37.

3.44 There were 14 responses either approving or not objecting to the principle of a narrower family definition, and 1 against.

Outcome: The draft Bill provides a definition of family member which will apply for the purposes of determining whether the landlord will have a right to object to the legatee.

Legatee and Value

3.45 The White Paper asked for comment on whether the legislation should specifically state that a person refusing the bequest of a croft tenancy also refused the value of the tenancy.

3.46 It seems likely that where a crofter leaves a person the tenancy of his croft in his will he intends that person to become the tenant. Had he wished the beneficiary to inherit the value rather than the tenancy itself he would have instructed that the tenancy be assigned to a third party, with the value going to the beneficiary. It had been suggested that the law should be clarified so as to make it clear that a beneficiary who refused the tenancy of a croft would not be entitled to demand the value of the croft tenancy instead. This would not mean that a beneficiary who accepts the bequest is permanently bound to the croft, as the new tenant that person would subsequently be able to assign the croft for value.

3.47 However, having now investigated this matter thoroughly, our view is that if the legatee refuses the tenancy that is a refusal of the bequest which then becomes null and void. As in the case where the Crofters Commission declares the bequest null and void we consider that section 10(5) of the 1993 Act then applies. That section provides that if a bequest becomes null and void the right to the croft is treated as intestate estate of the deceased crofter.

Outcome: There is no provision in the draft Bill to specify that a person refusing the bequest of a croft tenancy also refuses the value of that tenancy.

Bequests

3.48 The White Paper proposed that:

- The legatee should continue to be able to claim the bequest of the tenancy by advising the landlord.
- The periods of 2 and 4 months (where there is unavoidable cause for delay) currently allowed to the beneficiary to claim the bequest should be increased to 4 and 6 months.
- Approval of the Crofters Commission to bequests to non-family members should only be required where a member of the family of the deceased or the landlord objects, or the bequest invoked criteria for Commission intervention.
- Where a bequest of tenancy is accepted, the new crofter's tenancy should begin from the date of death of the deceased tenant.

3.49 There was modest, supportive comment on these proposals, including suggestions that the legatee should be permitted 6 months to claim the tenancy.

3.50 Following further consideration of the proposal that the crofter's family should have a right to object to the bequest of a croft tenancy it was concluded that this was not appropriate. It would provide the family of a crofter a means of challenging a bequest not available to other people in Scotland with a real risk that it would simply be misused as a mechanism for seeking to overturn decisions made by a deceased relative.

3.51 To allow a legatee 6 months to claim a tenancy without his having been prevented from doing so earlier would allow a considerable break in the process. While there is an argument that the current 2 months is too tight, a basic period of 6 months could imply that little importance is attached to crofts having tenants and being worked.

Outcome: The draft Bill provides with one exception for the proposals in the White Paper and repeated above at paragraph 3.48. In the case of criteria for intervention by the Crofters Commission in a bequest to a family or non-family member (these are as set out in the bold text immediately after paragraphs 3.33 and 3.36 above). The exception is that the draft Bill does not provide that an objection to a bequest by the family of the deceased will trigger Crofters Commission scrutiny of the bequest.

Intestacy

3.52 Responses to the proposals in the White Paper for new procedures for dealing with intestate succession to crofts were generally welcoming. These proposals were:

- The family should have 12 months to appoint an Executor, and be able to apply for an extension to that period.
- The Executor should have 12 months to advise the landlord of a tenant.
- The Executor should be empowered to assign the tenancy for value and if that is done the process applicable to family or non-family assignation will apply as appropriate.
- If the Executor fails to find a tenant, the Commission should offer the landlord an option of seeking to re-let.
- The Executor should be empowered during the executory to act in place of a tenant for administrative purposes and for the benefit of the deceased's estate.
- The landlord should have 4 months to achieve a re-let.
- If the landlord succeeds in re-letting the croft then when the re-let takes effect the landlord should then pay the value of permanent improvements to the Executor.

- If the landlord declines or fails to re-let, the Commission should be empowered to seek a tenant.
- The Commission should have 4 months to find a tenant and, if they decline or are unsuccessful, the landlord should then be able to require the Commission to declare the croft vacant and subsequently to request the Commission to decroft the croft. If the Commission agrees to decroft the croft, the landlord should then pay the value of permanent improvements to the Executor.
- The date of tenancy should commence from the date of decision in the case of objection or appeal, or, if there is neither of these, from the date following the last day for objection or appeal.
- As discussed at paragraph 3.41 above the landlord should no longer be responsible for ensuring that loans made to croft tenants by Scottish Ministers are repaid. The White Paper proposed that loans made to the deceased should be recovered from that person's estate.

3.53 The White Paper also proposed that where the croft tenant occupied a house on the croft there should be a presumption that the surviving spouse, or where there is no spouse, a partner living in the croft house at the time of the tenant's death should be treated as if there had been a bequest of the croft to that person. Coincidentally, it became clear later that the Executive would be introducing legislation to provide similar partners' rights in other areas of Scots law.

3.54 One response suggested that a child of the deceased crofter living on the croft should also be able to inherit as of right. Legal advice was that this would constitute a considerable diversion from the provisions on inheritance governing property in the Succession (Scotland) Act 1964.

Outcome: The draft Bill provides for the procedures described in paragraphs 3.52 above in cases of intestate succession and for a right of partners to inherit the croft.

The draft Bill also gives effect to the proposal discussed at paragraph 3.53 above by providing that prior rights under the Succession (Scotland) Act 1964, insofar as these apply to a croft, should be modified so that the spouse or partner should be entitled to the tenancy of the croft rather than only having a right to the croft house.

We have been advised that the Succession (Scotland) Act 1964 provides sufficiently wide powers to enable executors to act in place of the tenant.

Resumption

3.55 The White Paper proposed that it should be possible for the Land Court to order that land previously resumed from crofting tenure should be returned to crofting use where the purpose for which it was resumed had expired or where it had never been used for that purpose. It also proposed that the Crofters Commission be able to give evidence to the Land Court on all resumption applications and that the purposes for which resumption could be granted by the Court should include the interests of the local community. Most responses supported these proposals.

3.56 The White Paper also sought views on whether the legislation should provide that an application to the Land Court may be made to have land previously resumed returned to crofting tenure. This has potential application to energy developments when the developments do not proceed or when the land is later restored to its original condition but would have wider application.

3.57 One response suggested that where crofters and landowner were in agreement that resumption should be more easily approved. The Land Court employ a fast-track system whereby applications for resumption which have the written approval of crofters and landowner, and for which all legal papers are in order, are determined within 6 to 8 weeks of lodging and at reasonable cost. This seems sufficient to meet the need identified in the response.

3.58 A response to the White Paper proposals on decrofting is also relevant to resumption. In order to avoid discouraging investment, it is necessary to ensure that lenders do not believe there would be a risk of the resumed land returning to crofting use where there is a standard security over the land resumed. Accordingly, the draft Bill provides that resumed land may not be returned to crofting use in that circumstance.

Outcome: The draft Bill provides for changes as outlined at paragraphs 3.55, 3.56 and 3.58 above and the process of temporary resumption should facilitate a range of time limited developments such as mineral extraction where planning conditions require restoration of the land after completion. In addition, the draft Bill provides that on reversion of resumed common grazing land to crofting tenure, the Land Court will have power to increase grazing entitlement or alternative disposal of these entitlements as it thinks fit. It also provides that the Land Court should determine whether compensation should be repaid by the crofters to the landlord on reversion of land to crofting tenure and, if so, the amount to be repaid.

Decrofting

3.59 The White Paper proposed that decrofted land could be returned to crofting tenure where the Direction allowing the decrofting provided that this could occur if the land was not used for the purpose for which the Direction was given. The majority of responses supported this change, with the point on security of investment being made as described in 3.58 above.

3.60 The White Paper also proposed that all decrofting applications must cite a reasonable purpose for their application and that an application could be on the basis of public or local community interest. The majority of responses supported these proposals.

3.61 There was also support from the majority of responses to the proposal in the White Paper that where the tenancy of a crofter was terminated owing to absence from the croft, the period of 6 months in which the Crofters Commission should be able to seek a new tenant should be capable of extension by application to the Land Court. In that instance, the Commission would be liable to compensate the landlord of the croft for rent foregone.

3.62 While the White Paper proposed no change to the decrofting of whole and part crofts, it did suggest that the decrofting of house sites be treated as other simplified applications. Responses to the proposals on simplification were generally approving.

Outcome: The draft Bill provides the measures outlined in paragraphs 3.59 to 3.62 above. In decrofting applications for dwelling-house and garden ground, these will succeed where the Crofters Commission are satisfied that:

- the crofter has entitlement to conveyance of the land in question
- the extent of garden ground appears reasonable
- the proposed decrofting would not interfere with access to the remainder of the croft or other croft land.

Sub-letting

3.63 The White Paper proposed that an application to sub-let a croft or part of a croft should succeed without the approval of the Crofters Commission unless there were objections from other crofters in the township or the landlord, and shareholders in the common grazing where the application involved sub-letting a share. The sub-tenancy may be for a period of up to 10 years.

3.64 The modest response was equally divided between those agreeing the proposals and those against, though the latter were not unanimous on what they wished to see instead, some being in favour of the status quo and others recommending complete deregulation. A further comment was to permit sub-letting to communities as well as individuals.

3.65 A case for complete deregulation was put by professional people and landowners, but there is no indication that removal of all controls would be acceptable to crofters in general. There is no legal bar at present to sub-letting a croft to a community and therefore no need to act on that suggestion.

3.66 The current legislation does not afford a sub-tenant protection other than any terms which may have been included in the Missive of Let. Given that a sub-tenancy may be for an extended period and therefore involve investment in the croft, it seems right that this should be rectified. The draft Bill therefore provides that in order to terminate a sub-tenancy before its due date, a sub-tenant must be given at least 6 months' notice to quit by the croft tenant.

Outcome: The draft Bill provides that a crofter may sub-let his croft as discussed in paragraphs 3.63 and 3.66 above without the approval of the Crofters Commission unless there are objections by any of the parties mentioned in paragraph 3.63, or where the criteria for intervention by the Crofters Commission applied. These criteria are as set out in bold text immediately after paragraph 3.33 above and in the case of subletting also include:

- Where there are reasonable grounds for concern over the proposed use of the croft.
- Where the proposed subtenant lives more than 16 kilometres from the croft.

An Open Register of Crofts

3.67 There was considerable support for the White Paper proposal that the Register of Crofts should be open to the public.

Outcome: The draft Bill provides for public access to the Register of Crofts.

Charging for Access to the Register of Crofts

3.68 There was very little objection in responses to the proposal that public access to the Register should be subject to a charge, but there were suggestions that the Crofters Commission should be able to employ discretion whether to charge, e.g. where the information would be useful in combating spread of animal disease.

Outcome: The draft Bill provides that the Crofters Commission will have a discretionary power to levy charges and that the scale of these will be subject to approval by Scottish Ministers.

A Map-based Register of Crofts

3.69 There was good support for the concept of a map-based Register of Crofts, but less for the proposal in the White Paper that the production of plans of crofts should be the responsibility of the person first transferring the croft following the introduction of the legislation.

3.70 However, although alternatives such as use of IACS maps were proposed, it is unclear how many such maps would be acceptable or accurately show the whole extent of the croft, and it therefore remains likely that the production of maps will involve some expense for crofters and landowners.

3.71 One alternative proposed was that the provision of the map should be the responsibility of the Scottish Executive. Given that the real beneficiaries of this exercise would be crofters themselves, it does not seem reasonable to ask the taxpayer to bear this cost in addition to the other forms of financial support made available to crofters.

Outcome: The draft Bill provides for the production of maps of crofts at the expense of the person transferring the croft. The Crofters Commission is given powers to refuse to process applications until a map is provided.

Crofters Commission Review of Decision

3.72 There was a small response supporting the White Paper proposal that the Crofters Commission should be able to review a regulatory decision on request of interested parties and determine whether the decision should stand or be changed.

Outcome: The draft Bill does not provide that the Crofters Commission will review a regulatory decision. It is intended that this should happen but the necessary arrangements can be put in place by administrative means. The appeal provisions in the draft Bill require the Crofters Commission to provide the Land Court with a written statement as to the circumstances of an application which has been appealed and the reasons for its decision.

Rights of Appeal

3.73 There was a modest response in favour of the White Paper proposals for a right of appeal to the Land Court against regulatory decisions of the Crofters Commission. It was proposed that the right of appeal, unlike the right of objection to an application to the Crofters Commission or a request for an internal review of a Commission decision, be open only to those with a strong interest in the outcome of the application and only where a review of the decision has been held by the Crofters Commission.

Outcome: A right of appeal to the Land Court against decisions by the Crofters Commission is provided in the draft Bill. Those entitled to appeal to the Land Court are an applicant and any person with an interest in the application.

4 ISSUES FOR CONSIDERATION

Background

4.1 The consultation on the White Paper evoked ideas and issues taking the scope of discussion on crofting legislation beyond what was originally envisaged. Some of these have been reflected in provisions included in the draft Bill others are measures which could be included in the Bill. This chapter discusses these issues and invites comments on the relevance of the measures included in the draft Bill and on whether the other measures discussed below should be developed for inclusion in the Bill.

Croft Boundaries

4.2 It was suggested that a simpler mechanism is required to deal with disputes over croft boundaries where croft boundaries of uncertain provenance have become accepted by neighbouring tenants and the landlord. The aim would be to avoid boundary disputes arising after many years of inexact or absent fencing. The intention is to provide that so far as tenanted crofts are concerned a boundary which has existed and been accepted by the parties as the *de facto* boundary for twenty years should become legally binding. This could only occur where there was no adequate documentation showing a different boundary.

Consideration

4.3 Where *de facto* boundaries have been accepted for 20 years it does not seem that to acknowledge these as the actual croft boundaries would lead either to hardship or injustice. It would encourage crofters to be careful over boundaries and ensure that these are properly delineated and recorded. This proposal would reduce the scope for expensive boundary disputes and relieve the Land Court of a number of difficult cases where documentation is poor or non-existent and decisions have to be made without satisfactory evidence. The relevant provisions can be found at section 22 of the draft Bill.

Do you agree that it is appropriate to provide, as at section 22 of the draft Bill, that in the absence of clear documentary evidence to the contrary a croft boundary which after 20 years has become the accepted boundary should be accepted as the legal croft boundary?

Deemed Crofts

4.4 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.

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

Are you content with the provision at section 7 of the draft Bill which would extend the information held in the Register of Crofts?

Energy Developments on Croft Land and Common Grazing

4.6 The upsurge of interest in energy development on common grazing has resulted in proposals that crofting legislation should be amended in order to facilitate development in the interests of crofters. Crofting tenure imposes certain burdens on land and gives crofters rights over that land which are not acceptable to developers or lenders. So in normal circumstances anyone proposing any kind of development on croft land would proceed only after the land has been removed from crofting tenure. Energy developers are no exception and at present to leave land on which a wind farm is to be erected in crofting tenure would be an unacceptable financial risk.

Existing provision

4.7 The Crofters (Scotland) Act 1993 currently provides that development may be secured on common grazing through Land Court approval of resumption of the land, with compensation paid to crofters for loss of their rights and further payment of a share of the income expected from the development. Unless the crofters all agree otherwise, the payment in respect of future income must be a lump sum amounting to half the difference between the market value of the land resumed and the crofting value of that land. Where the development requires a particular management regime on surrounding land (e.g. no burning of heather), it may also be possible to resume specific rights in that area of grazing with compensation payable to the crofters. However, rights in common grazing which may be resumed do not appear to include the right to apply for an apportionment.

Apparent difficulties 4.8 Experts involved in wind farm development have identified as difficulties from their perspective:

- The question whether the Land Court would agree a deal arrived at between developer, landlord and crofters.
- The constraint of providing payment (which could be considerable) to crofters in a lump sum rather than annual instalments, should that be their choice.
- The concern that section 5(3) agreements may not bind successors.
- The inability to secure surrounding land from apportionment except by resuming that land from crofting tenure.

Agreements between crofters and their landlord 4.9 One of the major difficulties facing renewable energy developers was the prospect that crofters would assert their rights to do things on common grazing which would be harmful to the development. There were particular concerns about the right to buy, the right to plant trees and the right of muirburn. The Crofters (Scotland) Act 1993 provides at section 5(3) that a crofter cannot enter into agreements with the landlord by which the crofter is deprived of his rights except with the consent of the Land Court. This control over agreements which reduce crofters' rights exists in order to ensure that the crofters involved receive fair treatment.

4.10 Crofters can nevertheless, with the consent of the Land Court, agree not to exercise certain rights but, for two reasons, this type of agreement is of limited value. First, because such an agreement does not enable a crofter to bind successors to the tenancy to the agreement. Secondly where the development is on a common grazing in order for this approach to work all the crofters must agree.

4.11 We considered how we might resolve these difficulties and the draft Bill includes a specific provision at section 11 to allow crofters to make agreements binding on their successors. This approach will also assist with creation of new crofts because it will mean that the tenant of a new croft can agree not to exercise the right to buy the croft and/or the house and garden site and that agreement can if desired bind the crofter's successor to the tenancy. This makes it more likely that landowners will be prepared to create new crofts. The second problem is dealt with by means of an alternative mechanism discussed at paragraphs 4.16–4.22 below.

Do you foresee any difficulties inherent in allowing a crofter, subject to the consent of the Land Court, to enter into an agreement which would be binding on successors to the croft tenancy?

Resumption

4.12 Crofting law allows a landlord to resume croft land for various reasonable purposes. The right to resume is not absolute. The landlord must apply to the Land Court for consent to resume the land and the Court will only consent to the resumption if it is satisfied that the proposed resumption is for a reasonable purpose and meets certain other tests specified in the legislation. The draft Bill therefore includes a number of provisions on resumption which will facilitate development of croft land whilst protecting the interests of the croft tenants.

Reasonable purpose

4.13 Although the law provides that land may be resumed for a reasonable purpose it also provides some examples of activities which are considered to be reasonable purposes. Energy development is not one of these. So, whilst it might be expected that energy development might nevertheless be construed by the Court as a reasonable purpose, in the interests of certainty, section 24 of the draft Bill would amend the legislation to designate the generation of energy as a reasonable purpose.

Do you have any concerns about the proposed provision to designate the generation of energy as a reasonable purpose?

Compensation for resumption: Payment by instalments

4.14 The other issue relating to resumption was in connection with the payments of a share of development value to crofters. The existing legislation does not allow staged payments or, part-equity payment for value. So, a crofter need not agree to other payment arrangements and is entitled in law to insist on a single immediate payment. However, the financing of most renewable projects is dependent on the revenue stream after completion and based on an arrangement whereby the landowner gets a share of the annual revenue. The prospect of having to pay to crofters half the difference between the market value of the resumed land and its value as croft land, where the market value will reflect the potential revenues over the lifespan of the project, involves a potentially huge capital outlay. The liability to make a single capital payment at the outset would thus be a major disincentive to the development of croft land for energy development. The draft Bill contains a provision at section 24 that would allow the Land Court, on application by the landlord and where it considers it appropriate to do so, to specify that the crofters share of the development value will be payable in instalments and that the determination by the Court should be binding on successors in title to the landlord.

Do you agree that it is essential to make provision whereby in certain circumstances the crofters share of development value derived from resumed land should be payable by instalments?

4.15 There is also a strong case for providing that the entitlement to receive the instalments should be attached to the croft rather than, as in the draft Bill, to the person who is the tenant of the croft at the time the land is resumed. This approach would go a long way to ensuring that revenues from such developments are retained in the area affected by the development. However, a problem with this approach would be that the price of a croft tenancy in those circumstances could be well beyond the resources available to most prospective tenants.

Do you consider that the right to receive instalment payments made in connection with the resumption of croft land should be attached to the croft or do you wish the payments to be made, as provided in the draft Bill, to the person who was the croft tenant at the time the land was resumed?

Development schemes

4.16 All of the measures covered in paragraphs 4.9–4.15 above help with development of energy projects on croft land but although they deal with some of the difficulties the process remains complex and uncertain. There is therefore a significant disincentive to using croft land for such developments where there is an alternative. Consequently the proposal to allow for approval of a comprehensive development scheme has been devised and provided for at section 32 of the draft Bill.

4.17 In essence this approach would involve the landlord in preparing a scheme for the construction of a development on the croft land and applying to the Land Court for consent to that scheme as a whole. This would be done instead of the landlord applying to resume land or seeking to negotiate agreements with individual crofters. There would be no restriction on what the scheme might provide for in relation to crofts and common grazing and removal or modification of crofters rights in that property. It would require to put in place enforceable arrangements for securing payments to crofters, it might also alter or reduce the landlord's rights, it could bind a third party such as a developer and it could set in place arrangements for enforcing the provisions of the scheme. The draft Bill proposes strict criteria to be applied by the Court which are designed to protect the interests of the crofters collectively and individually. Furthermore the crofters will have a right to be heard by the Court on issues arising from the application. If the Court consents, the scheme would bind the landlord, the crofters and any third parties covered by the scheme (typically that would be the developer and whoever will ultimately be the owner of the development). There is no provision for the Court to alter or add conditions to a Scheme. The Court must either give or refuse consent.

Discussion

4.18 The development scheme approach is envisaged as a more flexible alternative to resumption which would be fairer to the crofters and would enable complex management arrangements to be created and dealt with quickly. Like resumption it does not depend on the consent of the crofters and thus avoids the problems inherent in minority opposition. However, the barriers to obtaining the agreement of the Court are substantial and such schemes are only likely to succeed if crofters have either been involved in negotiating the terms or are left no scope for demonstrating that the scheme is either unfair or offers unfair recompense. Because these schemes can only be used in situations in which resumption is available as an alternative there do not appear to be any European Convention on Human Rights (ECHR) issues.

4.19 In order to protect the interests of the crofters the draft Bill would require the Land Court to be satisfied that:

- the development to which the scheme relates is for a reasonable purpose as defined in the legislation for the purpose of resumption.
- the scheme would not be unfair (there is a definition of unfair in the draft Bill which makes it clear that if particular individuals are disproportionately affected that is unfair).
- there is fair recompense to each member of the crofting community for the effects of the development (the draft Bill makes clear that to be fair the compensation to individuals should be determined by the effect of the development on that individual).
- in relation to the croft land involved in the scheme that the compensation paid to each crofter is at least equivalent to the compensation that crofter would have received if the land had been resumed.
- the community would be likely to benefit financially.
- the benefit to the community would be at least commensurate with the benefit that the community could expect to obtain if the development went ahead by any other means.

4.20 It will be possible for members of the community to make representations to the Court if they believe the scheme to be unfair to them either collectively or individually. However, no individual or group will be able to prevent a scheme being implemented on grounds of principle. This will mean that those opposed to energy development will not solely be able to use crofting law to prevent a development for which planning permission has been granted.

4.21 The safeguards for crofters' interests are clear and, financially, at least equitable with those provided by the current legislation. It is also clear that the interests of individual crofters are advanced, in comparison with resumption, by the requirement that any scheme must be fair to all.

4.22 These new arrangements would be available for all proposals to develop croft land. This is because they have potential uses beyond renewable energy generation and it would be legislatively complex to confine their use to such projects.

The Executive would appreciate comment on the Development Scheme concept, including views on the need for such a measure and in particular on how the proposals in section 32 might work in practice.

Return of Apportionment to Common Use

4.23 It was suggested that where a crofter or owner-occupier has no further use for an apportionment or where an apportionment is no longer in use it should be possible for a crofter to apply to the Crofters Commission for return of the apportioned land to the common grazing in exchange for return of the grazing shares that crofter originally surrendered when the apportionment was granted.

4.24 Paragraph 16 of Schedule 2 to the draft Bill makes provision whereby the Crofters Commission can provide that apportionments are for a fixed period or subject to review from time to time and that the conditions applicable to the apportionment can be varied by the Crofters Commission on the request of the grazing committee, owner or crofter.

You are invited to indicate whether you believe the provisions in paragraph 16 of Schedule 2 to the draft Bill meet the need for flexibility over long-term management of apportionments.

Existence of a Croft

4.25 Consistent with the acceptance of boundaries after 20 years (discussed at paragraphs 4.2 and 4.3 above), it was proposed that where land has been registered as croft land and treated as croft land for 20 years, its status as croft land should be beyond legal challenge.

Consideration

4.26 This proposal which was not discussed in the White Paper would secure the status of land which has been registered as croft for twenty years and seems useful in avoiding instances where individual hardship may result from challenge, whether successful or not. It is 50 years since the 1955 Act was passed with its requirement for the registration of holdings as crofts. It seems that 50 years ought to be sufficient time to permit challenge to the status of individual holdings which have been recorded in the Register of Crofts. Section 33 of the draft Bill would amend section 53 of the 1993 Act to provide that the Land Court may not be asked to determine that a holding recorded in the Register of Crofts for more than 20 years is not a croft.

Views are invited on whether the legislation should provide that where land has been registered as, and treated as, croft land for more than 20 years its status as croft land should be indisputable.

Tenancy Options

4.27 One of the responses to the White Paper proposed that a croft tenant should be able to form a limited company to hold the tenancy of his croft. This would bring crofting tenure into line with tenure of agricultural holdings where companies can be tenants.

Consideration

4.28 One advantage would be to allow financial risk to be minimised (i.e. the tenancy would be operated as a separate undertaking from any other business interests which the tenant pursued). Insolvency in that other business would thus halt at the croft gate, protecting the tenancy. This could also encourage enterprise on crofts, particularly in the context of wider uses of crofts by tenants. It would also permit the tenant to introduce others into the management of the croft (e.g. allowing a wife or child to take a 50% share). A further advantage is that it avoids succession problems as the tenancy does not require to be transferred on death of the tenant.

4.29 As against this, a company tenancy could effectively become a tenancy in perpetuity with transfers of ownership of the company becoming the means of transferring the tenancy thus avoiding existing controls over assignation of and succession to a croft tenancy. It is unfortunately likely that this would become the main purpose of a company tenancy.

4.30 On balance, therefore, we suggest that this interesting idea should not be pursued as it would involve a fundamental change from the concept of requiring that the croft tenant should be a particular individual with appropriate skills.

Do you agree that legislation should retain the principle that a croft tenancy must be held by a particular individual?

4.31 Section 11 of the draft Bill modifies the conditions of tenure to enable unacceptable neglect or misuse of croft land to be identified and resolved. It revises the requirement that the croft should be kept in a fit state for cultivation and indicates that in determining whether the croft is being kept in a fit state for cultivation regard should be had to whether appropriate measures, identified in the draft Bill, are being routinely undertaken. An alternative approach which is worthy of consideration would be to apply the rules of good husbandry to crofts as they apply to tenanted farms. This would be a more rigorous approach for which there is already good case law.

Are the measures in the draft Bill which deal with misuse and neglect appropriate or should the rules of good husbandry be applied to crofts? In particular, are there cogent reasons why the rules of good husbandry should not apply to crofters as they do to tenanted farms?

4.32 It had been suggested that the law should be clarified so as to make it clear that a beneficiary who refused the tenancy of a croft would not be entitled to demand the value of the croft tenancy instead. Our view is that if the legatee refuses the tenancy that is a refusal of the bequest which then becomes null and void. As in the case where the Crofters Commission declares the bequest null and void we consider that section 10(5) of the 1993 Act then applies. That section provides that if a bequest becomes null and void the right to the croft is treated as intestate estate of the deceased crofter.

Do legal practitioners agree with our view that the consequences of a refusal of a bequest of a croft by a legatee is the same as if the Crofters Commission declare the bequest null and void and that in such circumstances the right to the croft becomes part of the intestate estate of the deceased crofter?

4.33 The White Paper proposed that “The executor should be empowered during the executry to act in place of a tenant for administrative purposes and for the benefit of the estate”. In the bold text following paragraph 3.54 above we indicated that we believed that the Succession (Scotland) Act 1964 provides sufficiently wide powers to enable executors to act in place of the tenant. The original proposal in the White Paper was developed following discussions held with the Crofting Consultative panel that were the focus of discussion on a range of issues before publication of the White Paper. The White Paper therefore reflected real concerns about the role of the executor. In view of that this consultation paper is inviting comment on any issues surrounding the role of the executor which any consultees feel needs to be dealt with in this Bill.

Please provide details of any problems expected to arise in connection with croft management during a period of executory which it is believed that an executor does not have power to deal with.

Common Grazing

4.34 The White Paper proposals on common grazing drew out three further suggestions:

- that grazings clerks be empowered to enter into management agreements on behalf of shareholders;
- that a simple majority of shareholders in a common grazing should be sufficient to introduce regulations which are mandatory on all shareholders;
- that grazings committees should be empowered to purchase grazings shares which are not attached to a croft and distribute them among their members.

Empowerment of grazings clerks

4.35 The proposal to extend grazings clerks’ authority would allow a clerk to become an effective point of management of the common grazing, which could be useful where delay may impede arrangements with third parties and agencies. However, in order to ensure that the shareholders retain full authority, any such power would require to be permissive in the form of a delegation at their discretion rather than mandatory.

4.36 It is questionable whether this is an appropriate matter for legislation as it is clearly the case that grazings committees could, if they so wish, organise their constitutional arrangements to give the necessary authority to their grazings clerk. We believe in any case that the main problem is not so much finding someone to enter into agreements on behalf of the grazings committee but rather the problem lies in ensuring that all those with rights in the grazing comply with the terms of agreement once it has been entered into. There are measures in the draft Bill at section 31 which should allow grazings committees to ensure compliance with agreements they have entered into far more effectively than hitherto. We have therefore concluded that this measure should not be included in the draft Bill.

Do you agree that it is not appropriate or necessary to make legislative provision to empower grazings clerks?

Mandatory grazings regulations imposed by a majority of shareholders

4.37 The proposal that we should legislate to allow a simple majority of shareholders to impose mandatory regulations on all shareholders raises a question of the balance of need in making a common grazing work best. It would arguably be advantageous where the most active stockbreeders wished to join a particular animal quality or health scheme that they should be able to regulate the grazing so as to meet the scheme requirements. It is questionable whether this is an appropriate matter for legislation. The whole ethos surrounding the management of common grazing is one of mutual co-operation. It is certainly possible for a grazings committee to agree constitutional arrangements which can ensure effective management of the grazing and the draft bill provides at section 31 the means by which that management regime, once agreed and put in place, can be enforced. On balance, therefore, our view is that a measure to give a grazings committee power to impose grazings regulations based on a majority vote is not needed and should not be imposed by legislation.

Do you agree that there should not be legislative provision to empower grazings committees to impose requirements on shareholders by majority decision?

Purchase of grazings shares by the grazings committee

4.38 There are an unknown number of grazings shares which over the years have become detached from the crofts to which they originally belonged. It has been suggested that the law should be changed to allow the grazings committee to offer to purchase these shares on behalf of their members in order to distribute the grazing rights among the members of the committee. The proposal does not envisage that there should be any compulsion to assign on the part of the person currently holding the right.

Consideration

4.39 Where the existence of an unused grazings share and the person currently holding that grazings right is known there will clearly be active crofters interested in obtaining that grazings share. Such grazings shares already change hands on assignation or renunciation. They can also be sublet and are often unofficially made available to other individuals. In addition the grazings committee already has the power to temporarily re-allocate unused grazing shares. So although the idea that the grazings committee should buy out these shares so that they might be distributed to other active crofters seems attractive it does not appear to be necessary for the effective management of common grazing. Indeed there is a risk that it may be mostly used to prevent individuals getting exclusive use of these unused shares.

4.40 The reason that grazings committees cannot at present acquire such shares is that these shares are deemed to be crofts and the tenancy of a croft can only be held by an individual. To give effect to this proposal it would be necessary to provide that a grazing committee could be the tenant of a croft and assignation to the committee could then take place with the committee then being free to retain the share for communal use or divide and re-assign the rights to individual crofters. This would, however, breach the principle of crofting tenure that a croft must be held by an individual. In addition it would be a complicated and relatively expensive process so that in most cases given the very low value of grazing shares it would simply not be worth doing. Whilst legislation could be framed so as to allow a grazing committee to be a croft tenant it is questionable whether it is necessary given that there are existing effective mechanisms for dealing with unused grazing shares.

Is it necessary or desirable to legislate to allow a grazings committee to be the tenant of a croft?

Access Across Crofts

4.41 There are instances where the only practical or vehicle access to a croft is across that of a neighbour. This can result in difficulties when crofters fall out. The 1993 Act provides at Schedule 2, paragraph 11(e) that the landlord may open or make a road to provide access, but this is dependent on the landlord's willingness to become involved.

4.42 A partial remedy would be to enable a crofter to apply to the Land Court to direct the landlord to provide a right of access where there is no vehicular access and it appears necessary and appropriate to provide an access route over other land owned by the landlord.

Would it be appropriate to provide in the draft Bill that a crofter should be able to apply to the Land Court to direct the landlord to provide a route for vehicular access to a croft where none exists?

Extending crofting tenure

4.43 The White Paper indicated at paragraph 3.2 that Ministers had relinquished the concept of extending crofting tenure beyond the crofting counties. They believed it to be unnecessary because the provisions of the Bill which has since become the Agricultural Holdings Act 2003 gave the tenants of other agricultural holdings the same degree of security as crofters. In addition that Act has also provided a right to buy. It is now possible to create holdings in the rest of Scotland which in terms of tenant's rights and landlord's responsibilities can be identical to crofts without extending crofting legislation.

4.44 A particular issue relates to tenants holding land under the Small Landholders (Scotland) Act 1911. Crofting legislation made such holdings in the Highlands into crofts. So far as we are aware there are very few such holdings left in non-crofting areas. Most have become part of an agricultural tenancy or become owner occupied holdings. There may be an expectation that if crofting tenure was extended beyond the crofting counties any such holding would automatically become a croft and the tenant would have an absolute right to buy on the same basis as a croft tenant at a price approximating to 15 times the rent.

4.45 It should be understood that this matter is much more complicated. Just as in the crofting counties a tenant of a holding which is not registered as a croft would require to take Court action to prove that the property is a croft. Furthermore any legislation which would allow this to happen would need to take account of the European Convention of Human Rights which would require payment of compensation to the landlord to reflect the loss of value in the property in the event that such a property were to be re-classified as a croft. Inevitably responsibility for paying that compensation would fall to the tenant and it would be bound to take account of the loss of value that would result from the right to buy at a pre-determined price. In short there is no prospect that a measure of this nature would allow tenants of such holdings to acquire them for significantly less than the market value of the holding.

Land Reform Avoidance Issues

4.46 Ministers are aware of suggestions that landowners may seek to avoid the intention of the Land Reform (Scotland) Act 2003 by leasing or otherwise transferring property rights connected with their land prior to purchase by the crofting community. If this proves to be the case, this Crofting Reform Bill will be used to introduce measures to ensure that crofting communities buying croft land under the Act will be able to apply to purchase such resources.

4.47 In particular, consideration will be given to creating a crofting community right to buy any existing lease over the croft land which has been acquired through a crofting community right to buy. This would apply to leases other than those leases already specifically dealt with in the Land Reform (Scotland) Act and croft tenancies. Any such right to buy would be subject to the same requirements regarding public interest and compensation as apply to the right to buy the land. In addition we intend to consider whether any of the provisions of existing crofting legislation or any of the measures in this draft Bill could be used by a landowner to frustrate or delay a crofting community right to buy application and if necessary these provisions will be modified so as to prevent such use.

We would be grateful for information about ownership or management devices believed to have been put in place in order to frustrate attempts by a crofting community body to use the crofting community right to buy to acquire full control of relevant croft land. In particular information is required about how these mechanisms will operate.

Regulatory Impact Assessment

4.48 The Regulatory Impact Assessment of this legislation is included in this consultation document at Chapter 6. The purpose of that assessment is to assess the cost to business of the changes introduced in the draft Bill and to weigh these against the benefits brought by the draft Bill. For the purpose of the assessment we have assumed that crofts and crofting estates are businesses although certainly in the case of crofts perhaps the majority will not be operated as businesses.

4.49 The draft Bill is intended to deregulate many aspects of crofting tenure. It will reduce the regulatory burden on crofters and crofting landlords and in particular will remove some quite onerous responsibilities from crofting landlords. It will also extend the rights of crofters and landlords to challenge Crofters Commission decisions affecting their interests by appeal to a court. Nevertheless the assessment identifies some areas where additional costs might arise and discusses the impact of these on all relevant parties.

We would be grateful for comment on any or all of the matters discussed in that Regulatory Impact Assessment including views on the appropriateness of cost estimates and views on any other matters arising from the draft Bill which may have cost implications for businesses.

5 DRAFT BILL AND EXPLANATORY NOTES

Crofting Reform etc. Bill

CONSULTATION DRAFT

CONTENTS

Section

PART 1

THE CROFTERS COMMISSION

- 1 The Crofters Commission: constitution etc. and general duties
- 2 Particular duties and powers
- 3 Equal opportunities
- 4 Power of the Commission to make schemes and arrangements for grants
- 5 Obtaining Commission approval or consent
- 6 Obtaining of information by Commission
- 7 Maintenance of and provision of information from the Register of Crofts
- 8 Maps and scheme of charges
- 9 Grants to Commission by the Scottish Ministers

PART 2

CROFTS

- 10 New Crofts
- 11 The statutory conditions
- 12 Complaint as respects breach of the statutory conditions
- 13 Exchange of crofts or parts of crofts
- 14 Division of croft
- 15 Subletting
- 16 Assignation
- 17 Bequest of tenancy of croft
- 18 Prior rights, on intestacy, in relation to tenancy of croft
- 19 Transfer of tenancy of croft by executor: amendment of section 16 of the Succession (Scotland) Act 1964
- 20 Transfer of tenancy of croft by executor: special provision relating to the 1993 Act
- 21 Amendment of section 11 of the 1993 Act
- 22 Determination of the Land Court as to croft boundaries
- 23 Reorganisation schemes

PART 3

TERMINATION OF TENANCY, DECROFTING, ETC.

- 24 Resumption and reversion
- 25 Decrofting
- 26 Re-letting
- 27 Short-term croft tenancies
- 28 Compensation for improvements for purposes other than cultivation or grazing etc.

PART 4

COMMON GRAZING

- 29 Use of Common Grazing
- 30 New Common Grazing
- 31 Contravention of, or failure to comply with, common grazings regulations

PART 5

SCHEMES FOR DEVELOPMENT

- 32 Schemes for development

PART 6

GENERAL AND MISCELLANEOUS

General

- 33 Appeal to Land Court and jurisdiction of that court
- 34 Further amendments in relation to the Land Court
- 35 Public notification
- 36 “Members of a family”
- 37 “Crofting community”
- 38 “The 1993 Act”

Miscellaneous

- 39 Minor and consequential amendments
- 40 Savings
- 41 Transitional provisions etc.
- 42 Repeals
- 43 Short title, Crown application and commencement

Schedule 1—The Crofters Commission

Schedule 2—Minor and consequential amendments

Schedule 3—Repeals

Crofting Reform Bill

Explanatory Notes

It is important to note that this legislation has been drafted by way of amendment to the Crofters (Scotland) Act 1993 (the 1993 Act) and thus provides for changes to the provisions in the 1993 Act. Consequently anyone considering the detailed legislative provisions in the consultation will find it easier to understand if read in conjunction with that legislation. In order to make the new provisions more readily understandable where the issues are complex and also to enable the reader to view the amendments in context, **we will make available, on request, a document which shows how the 1993 Act would look as amended by the draft Bill. This document is available on the SE website at <http://www.scotland.gov.uk/topics/rural/crofting/17096/7527>**

Section 1: The Crofters Commission

This section replaces section 1 of the 1993 Act with two new sections and together with Schedule 1 provides for the constitution and general duties of the Crofters Commission (“the Commission”). There are a few changes from the 1993 Act the most obvious being that the detail of the functions of the Commission in section 1 of the 1993 Act has been replaced by general duties set out in new section 1A and these duties are more specific than the existing requirements. For example the function of “keeping under review matters relating to crofting” has been translated to a general duty of “keeping under review matters relating to crofting tenure, crofting communities and the crofting way of life”. This makes clear the Commission’s role in identifying crofting needs and opportunities. Similarly other duties extend responsibility to specifically cover crofting communities. Provisions relating to the membership of the Commission have been retained but are now to be found in new Schedule 1.

A further change to achieve consistency with the constitutional arrangements for other Non-Departmental Public Bodies is the provision at subsection (1)(b) of new section 1A that the Commission may at some future point have further general duties prescribed by regulation other than those specified in the Bill. This is to allow adaptability to meet new challenges and requirements in the future.

Crofting Reform etc. Bill

CONSULTATION DRAFT

An Act of the Scottish Parliament to make further provision as regards crofting; to amend the Scottish Land Court Act 1993; and for connected purposes.

PART 1

THE CROFTERS COMMISSION

1 The Crofters Commission: constitution etc. and general duties

For section 1 of the 1993 Act, there is substituted—

“1 The Crofters Commission

- (1) The Commission shall discharge such functions as are conferred on them by virtue of this Act and any other enactment.
- (2) Schedule 1 to this Act shall have effect with respect to the Commission.

General duties

1A General duties

- (1) The Commission shall have—
 - (a) the general duties of—
 - (i) regulating crofting tenure;
 - (ii) reorganising crofting townships;
 - (iii) promoting the interests of crofters and crofting communities; and
 - (iv) keeping under review matters relating to crofting tenure, crofting communities and the crofting way of life,
in the crofting counties; and
 - (b) such other general duties as may be prescribed.

The requirement in subsection (2)(a) of section 1A that the Commission shall “have regard to local circumstances and conditions” reflects provision currently in section 1(3) of the 1993 Act and enables the Commission to develop formal policies for particular local areas, a concept which is further developed in section 2 of the Bill as the new section 2A.

The requirement at subsection (2)(b) of section 1A is to ensure that the actions of the Commission are compatible with furthering sustainable development.

Section 2: Particular duties and powers

This section creates three new sections to replace the existing section 2 of the 1993 Act. The new section 2 details the particular duties and powers of the Commission. It largely mirrors in a simplified form the provisions of the existing section but a significant change is included at subsection (1)(a) which now provides that the Commission will keep under review croft-based businesses and products. This results from the extension of rights of crofters under Schedule 2 of the Bill to permit other principal use of crofts than the current requirement of cultivation. Subsection (4) now assigns responsibility for maintaining the Crofters Holdings Book to the Commission (in the 1993 Act this is a responsibility of the Land Court). In addition the provisions of subsection (4) of section 2 of the 1993 Act are now to be found in Schedule 1.

- (2) In discharging their functions, the Commission shall—
- (a) have regard to local circumstances and conditions; and
 - (b) act in the way they consider best contributes to the achievement of the sustainable development of crofting and of crofting communities.”.
- (2) In section 61 of the 1993 Act (interpretation), for the definition of “the Commission” there is substituted—
- ““the Commission” means “the Crofters Commission” established by section 1 of the Crofters (Scotland) Act 1955 (c.21);”.
- (3) Schedule 1 is to have effect.

2 Particular duties and powers

For section 2 of the 1993 Act, there is substituted—

“Particular duties and powers

2 Particular duties and powers

- (1) In discharging their general duties mentioned in section 1A of this Act, the Commission shall—
- (a) without prejudice to the generality of that section, keep under general review all matters relating to land settlement, croft-based businesses and products, the improvement of land and livestock, the planting of trees, the supply of agricultural equipment and requisites, the marketing of agricultural produce, experimental work on crofting methods, the provision of demonstration crofts, the needs of the crofting communities for public services of all kinds, the provision of social amenities and the need for industries to provide supplementary occupations for crofters or for their families;
 - (b) collaborate, so far as their functions permit, with any person or group of persons in the carrying out of any measures for the economic development and social improvement of the crofting counties;
 - (c) advise the Scottish Ministers on any matter relating to crofts and crofting conditions—
 - (i) which the Ministers may refer to them; or
 - (ii) on which they may think it appropriate to submit advice to the Ministers; and
 - (d) exercise the powers conferred on them by this Act and any other enactment in such manner as may seem to them in each case desirable.

New section 2A on local policy is a further significant change. This gives the Commission power to set policies for separate local areas, with the proviso that the Commission must first consult with grazings committees as to where boundaries should be drawn and establish local policy panels to advise on Commission policy proposals for that area. This section also provides that the arrangements for consulting on a scheme, preparing it and setting up local panels will be specified in regulations and that each scheme must be approved by Scottish Ministers.

- (2) For the purpose of assisting them in the local execution of their functions under this Act or any other enactment, the Commission may appoint a panel of persons whom they consider to be suitable and who are resident in the crofting counties to act as assessors, when required by the Commission so to act.
- (3) The Commission may make to any person acting as an assessor by virtue of subsection (2) above, such payments as the Scottish Ministers may determine in respect of—
 - (a) any loss of earnings;
 - (b) any expenses (including travelling and subsistence expenses), necessarily suffered or incurred and attributable to the person so acting.
- (4) The Commission shall keep a book called the “Crofters Holdings Book” in which they shall record—
 - (a) every order, determination, consent, authorisation or other proceeding of theirs which they consider it is appropriate to have recorded in that Book; and
 - (b) any agreement for a loan sent to them under section 43(3) of this Act.

2A Regulating crofting: local policy

- (1) In discharging any of their general duties mentioned in section 1A(1)(a) of this Act, the Commission may, where they consider it appropriate to do so, formulate and adopt a policy as respects an area which in their opinion is appropriate for that area (a “local policy”).
- (2) An area as respects which the Commission may formulate and adopt a local policy shall comprise a crofting township (or two or more such townships) and shall include any common grazing associated with that township (or all such townships).
- (3) If the Commission consider it appropriate to exercise their power under subsection (1) above, they shall—
 - (a) consult any grazings committee in the area they have in mind as respects what might be the appropriate geographical boundary of the area;
 - (b) prepare a scheme for the appointment of a panel of persons, whom they consider suitable, some or all of who are resident in the area to be identified in the scheme or who (if not resident there) in the Commission’s opinion have relevant expertise, for the purpose of—
 - (i) advising the Commission as to the views of crofting communities there, and its views, as respects the needs of the area;
 - (ii) assisting the Commission in the development of an appropriate local policy for the area;
 - (c) identify in that scheme, by geographical boundaries, the area as respects which the Commission consider that a local policy is appropriate.

New section 2B provides that the Scottish Ministers can give the Commission directions on the way that they carry out their functions. This reflects current provision at section 1(3) of the 1993 Act.

- (4) A scheme prepared under subsection (3)(b) above shall require the approval of the Scottish Ministers; and after having obtained such approval the Commission shall appoint a panel of persons in accordance with the scheme as approved.
- (5) In—
- (a) carrying out any consultation under subsection (3)(a) above;
 - (b) preparing any scheme under subsection (3)(b) above;
 - (c) appointing a panel of persons under subsection (4) above,
- the Commission shall satisfy such requirements as may be prescribed.
- (6) In formulating a local policy to adopt for the area, or modifying or revoking any such policy, the Commission shall—
- (a) consider the impact of their proposal on both crofting and non-crofting interests in the area;
 - (b) consult—
 - (i) the panel appointed under subsection (4) above for the area; and
 - (ii) such other persons, or groups of persons, as they consider appropriate,on their proposals.
- (7) The Commission may make to any person acting as a member of a panel appointed under subsection (4) above such payments as they may determine in respect of—
- (a) any loss of earnings;
 - (b) any expenses (including travelling and subsistence expenses),
- necessarily suffered or incurred and attributable to the person so acting.

2B Directions by the Scottish Ministers

The Commission shall discharge their functions in accordance with such directions of a general or specific character as may from time to time be given to them in writing by the Scottish Ministers.”.

Section 3: Equal opportunities

This section inserts new section 59A into the 1993 Act and is a new provision specifically requiring the Commission to observe equal opportunities in their work.

Section 4: Power of the Commission to make schemes and arrangements for grants

This section introduces, by means of the insertion of new section 42A in the 1993 Act, a power for the Commission to make schemes for grants to crofters and other occupiers of similar holdings. It also allows the Commission to provide assistance to the persons specified in subsection (5) in respect of building and improving houses, roads and utility supplies. Generally speaking, this gives the Commission the powers provided to Scottish Ministers by section 42 of the 1993 Act. However, it specifically prevents the Commission from borrowing and lending money. The persons mentioned in subsection (5) included tenants under the short term leases which section 27 of the Bill provides for but makes no provision to enable the Commission to pay grants to cottars. It also provides that the expenses of these grant schemes or arrangements under which assistance is provided are met by the Commission and that such schemes or arrangements must be administered by the Commission.

3 Equal opportunities

After section 59 of the 1993 Act, there is inserted—

“59A Equal opportunities

- (1) The Commission shall discharge their functions in a manner which encourages equal opportunities and, in particular, the observance of the equal opportunities requirements.
- (2) In subsection (1) above, “equal opportunities” and “equal opportunity requirements” have the same meanings as in Section L2 of Part II of Schedule 5 to the Scotland Act 1998 (c.46).”.

4 Power of the Commission to make schemes and arrangements for grants

After section 42 of the 1993 Act, there is inserted—

“42A Power of the Commission to make schemes and arrangements for grants

- (1) For the purpose of supporting any reasonable use which promotes the sustainable development of crofts and similar holdings, the Commission may, subject to the approval of the Scottish Ministers, make schemes for providing grants to crofters and occupiers of holdings which are, in significant respects and in the opinion of the Commission, similar to crofts.
- (2) Any provision in a scheme under subsection (1) above which purports to give the Commission power to borrow or lend money shall be void.
- (3) Subsections (1A), (2) and (10) of section 42 of this Act shall apply to a scheme made under subsection (1) as they apply to a scheme made under subsection (1) of that section but with the following modifications—
 - (a) in subsection (1A), the words “and loans” are omitted and after the word “croft” is inserted “or similar holding”;
 - (b) in subsection (2)—
 - (i) in paragraph (a), the words “, through the agency of the Commission,” are omitted; and
 - (ii) in each of the paragraphs (b) and (c) the words “or loan”, wherever they occur, are omitted; and
 - (c) in subsection (10), the words “or loan” and “or under subsection (4) above” are omitted and the reference to subsection (1) is to be construed as a reference to subsection (1) of this section.

- (4) The Commission may, in accordance with arrangements made by them with the approval of the Scottish Ministers, provide assistance to the persons listed in subsection (5) below by way of grants or by the supply for payment in cash of building or other materials towards the erection or improvement or rebuilding of dwelling houses and other buildings or towards the provision or improvement of roads, or water or electricity or gas supplies.
- (5) The persons are—
- (a) crofters;
 - (b) occupiers of crofts who are also the owners thereof and who, in the opinion of the Commission, use their crofts in a way substantially the same as that of a crofter;
 - (c) occupiers of holdings, other than crofts, situated in the crofting counties which are, in significant respects and in the opinion of the Commission, similar to crofts;
 - (d) subtenants of crofts; and
 - (e) short-term tenants.
- (6) Any arrangement under subsection (4) which purports to give the Commission power to borrow or lend money shall be void.
- (7) Subsections (6), (7), (8), (9) and (10) of section 42 of this Act shall apply to arrangements made under subsection (4) above as they apply to arrangements made under subsection (4) of that section but with the following modifications—
- (a) in subsection (6), after the word “made” where it first occurs there is inserted “, after consultation with the Commission,” and for the words “Secretary of State”, whenever they occur in paragraphs (b), (c), (d) and (e), there is substituted “Commission”;
 - (b) in subsection (7), after the word “may” where it first occurs there is inserted “, after consultation with the Commission,”;
 - (c) in each of subsections (8) and (9), the reference to subsection (4) is to be construed as a reference to subsection (4) of this section;
 - (d) in subsection (9), for the words “Secretary of State” there is substituted “Commission” and after the word “croft” there is inserted “or similar holding”;
 - (e) in subsection (10), the words “or loan” are omitted and for the words from “a scheme made” to “subsection (4) above” there is substituted “subsection (4) of section 42A of this Act”.

Section 5: Obtaining Commission approval or consent

This section in the form of new section 58A sets down the processes by which the majority of applications to the Commission will be determined. The Commission will no longer be required to determine every application made by crofters and landlords, but will still intervene where there are objections or where an application which raised no objections invokes separate criteria requiring the Commission to consider and decide whether it should succeed. Excluded from these new arrangements are those applications which make substantial change to croft land: decrofting, apportionment and crofter forestry. These will continue in every case to require the Commission's written approval in order to succeed.

Subsection (2) of new section 58A provides that in every case in which the applicant is required to apply to the Commission for consent or approval to make the proposed changes, the form on which the application is to be made and any documentation and fee will be specified by the Commission. The Commission will have powers to charge for regulatory work. (See Schedule 1 Paragraph 3 of the 1993 Act as inserted by Schedule 1 of the Bill). This is reflected in the reference to the accompanying fee in subsection (2)(b).

Subsection (3) requires the applicant to give public notice of his application and where the applicant is not the landlord or the owner of the common grazing affected by the application notify the landlord or owner in writing. This is to ensure that those who may wish to object have adequate notice of what is proposed. Subsection (4) specifies the time allowed for making an objection, how it must be made and who may do so. Subsection (6) provides that the Commission may ignore a frivolous, vexatious or unreasonable objection but that in every other case at the end of the period allowed for objections they must decide whether they should intervene to consider the application. The Commission is required by subsection (6) to intervene if there is a valid objection or, where there is no objection, if conditions specified in subsection (6)(b) arise.

- (8) Any scheme under subsection (1) above or arrangements under subsection (4) above shall be administered by the Commission and any expenses in connection with such administration shall be met by the Commission.
- (9) Any scheme under subsection (1) above or arrangements under subsection (4) above or scheme under subsection (1) or arrangements under subsection (4) of section 42 of this Act may provide that a person's economic status is a criterion for eligibility for grants or loans payable thereunder.”.

5 Obtaining Commission approval or consent

After section 58 of the 1993 Act, there is inserted –

“58A Obtaining Commission approval or consent

- (1) Any requirement, under or by virtue of this Act, to obtain the approval or consent of the Commission, shall (subject to any express provision made by this Act in respect of any category of case) be complied with as follows.
- (2) The application for approval or consent must–
 - (a) be in such form; and
 - (b) be accompanied by such documents and fee,
 as the Commission shall specify; and the Commission may make different provision for different categories of case.
- (3) The person making the application shall—
 - (a) forthwith give public notification of it; and
 - (b) if he is not the landlord (or, where the land to which the application relates is, or is part of, a common grazing, not the owner) give written notification of it to the landlord (or to the owner).
- (4) Within 28 days after public notification of an application made in compliance with subsection (2) above—
 - (a) the landlord (or where the land to which the application relates is, or is part of, a common grazing the owner);
 - (b) any member of the crofting community in the locality of that land (including, where that land is, or is part of, a common grazing, the grazings committee or any crofter who shares in the grazing); or
 - (c) any other person if he is identified for the purposes of this subsection by the provision which imposes the requirement mentioned in subsection (1) above,
 may submit to the Commission written objections as regards the application.

Subsection (7) specifies what the Commission must do if they decide not to intervene to consider an application on the basis of a timely objection. Subsection (8) deals with what is to come next if the Commission decide to intervene because one of conditions specified in subsection (6)(b) applies. Subsection (9) lists the general conditions that apply for the purposes of subsection (6). Subsection 10(a) provides that where there is no intervention the application succeeds without a written decision from the Commission and the details will be entered in the Register of Crofts. Subsection 10(b) deals with what should be done by the Commission following a decision to intervene. It requires the Commission to inform those parties with an interest that the application is to be considered by the Commission and why the Commission intervened. It also informs the party of their right to appeal to the Land Court against the decision by the Commission on the application.

- (5) The 28 days mentioned in subsection (4) above include the day on which the notification in question is given.
- (6) When those 28 days have elapsed the Commission—
- (a) must, in a case where they have received such objections by virtue of subsection (4) above and do not consider them to be frivolous, vexatious or unreasonable, intervene as respects the application;
 - (b) may, in any other case, decide to do so if it appears to them that any of—
 - (i) the general conditions; or
 - (ii) any conditions (if any) special to applications of the category in question,applies as respects the application.
- (7) If, as regards a written objection timeously received, the Commission decide not to have regard to it or that it does not provide them with grounds for intervention as respects the application they shall notify –
- (a) the applicant, the landlord (or owner) and, as the case may be, the grazings committee of the terms of the objection and of the reason for that decision; and
 - (b) the objector, of that reason.
- (8) If, other than by reason of any such objection, the Commission decide to intervene as respects the application, they shall notify the applicant, the landlord (or owner) and, as the case may be, the grazings committee of their decision to intervene, stating their reasons for intervention.
- (9) The general conditions are –
- (a) that, were the proposal to be implemented, there is reason to suppose that any or all of the following would be affected adversely—
 - (i) the interests of the estate which comprises the land;
 - (ii) the interests of the crofting community mentioned in subsection (4)(b) above;
 - (iii) the interests of the public at large;
 - (iv) the sustainable development of the community so mentioned; and
 - (b) that such information as is contained in the application and its accompanying documents is insufficient for them to come to a decision as respects the proposal.

Subsection (11) gives the Commission the power to set up procedures and arrangements for deciding whether or not to approve or consent to an application and makes it clear that a decision to intervene in an application is a decision to follow these procedures. It is important to note that this provision allows the Commission to delegate the task of making the decision to any person the Commission considers appropriate.

Subsection (12) provides that where the Commission following an intervention decides to approve or consent to the application the Commission will record details of the application they have consented to in the Register of Crofts and notify those who would have been notified if the Commission had previously decided not to intervene in the application.

Subsection (13) gives Scottish Ministers power to amend the general conditions set out in subsection (9) by means of a statutory instrument. Subsection (14) requires that any such statutory instrument must be approved by means of an order made by resolution of the Parliament.

- (10) If the Commission –
- (a) do not intervene, they shall enter the proposal or the matter consented to (and if and in so far as they think fit any information obtained by them by virtue of subsection (2) above and pertaining to that proposal or matter) in the Register of Crofts and notify—
 - (i) the applicant;
 - (ii) the landlord (or owner);
 - (iii) any person who objected under subsection (4) above; and
 - (iv) as the case may be, the grazings committee,that the proposal is approved and may be implemented or as the case may be that the matter is consented to and may be proceeded with accordingly;
 - (b) intervene, they shall, within 21 days after the 28 days mentioned in subsection (4) above have elapsed –
 - (i) notify the persons mentioned in sub-paragraphs (i) to (iv) of paragraph (a) above of their decision to intervene, stating their reasons for intervention;
 - (ii) inform those persons (provided in the case of a person who objected under subsection (4) above that the objection was not considered by the Commission to be frivolous, vexatious or unreasonable) that they may, after the Commission makes a determination under subsection (11) below, have the right to appeal to the Land Court as respects that determination.
- (11) Subject to any other provision of this Act as to procedure, the Commission may determine by such procedure and arrangements (including arrangements as to delegation and the powers and duties of persons delegated) as they consider appropriate whether or not to grant the approval or consent applied for; and references in this section to their intervening are to their proceeding to such a determination.
- (12) Where the Commission grant the approval or consent applied for they shall enter the proposal or the matter consented to (and if and in so far as they think fit any information obtained by them by virtue of subsection (2) above and pertaining to that proposal or matter) in the Register of Crofts and give such notification as is mentioned in subsection (10)(a) above.
- (13) The Scottish Ministers may by order made by statutory instrument amend –
- (a) subsection (9) above;
 - (b) any provision of this Act in which are set out criteria mentioned in subsection (6)(b)(ii) above,
- so as to add to, vary or revoke criteria.

Section 6: Obtaining of information by Commission

Section 6 amends section 40 of the 1993 Act. It changes section 40(1) to reflect the fact that the Commission will in future have another means of obtaining information about crofts. It changes section 40(1) and (2) so that these provisions of section 40 can also be used to obtain information from the executor of a crofter. It also inserts a new subsection (3) into section 40 which provides that the Commission can refuse to process any application made to them where information required in connection with that application is not provided.

- (14) A statutory instrument containing an order under subsection (13) above shall not be made unless a draft of the instrument has been –
- (a) laid before; and
 - (b) approved by resolution of,
the Scottish Parliament.”.

6 Obtaining of information by Commission

In section 40 of the 1993 Act (obtaining of information by the Commission)—

- (a) in subsection (1)—
 - (i) for the words “The Commission may by notice” there is substituted “Without prejudice to any other provision of this Act whereby information may or shall be obtained by them, the Commission may by notice under this section”; and
 - (ii) after the words “any holding” insert “, or on the executor of the person who most recently was the owner or occupier of any holding.”;
- (b) in subsection (2), for the words “owner or occupier” there is substituted “owner, occupier or executor”; and
- (c) after subsection (2) there is added—

“(3) Where the Commission impose a requirement—

 - (a) under subsection (1) above, to provide information; or
 - (b) by virtue of section 41A(1)(a)(i) of this Act, to provide a map,

on any person making an application under this Act (the requirement being for the purposes of the application), the Commission may if they think fit decline to do anything in relation to the application until they are satisfied either that the requirement has been complied with or that it is not practicable to comply with the requirement.
- (4) If the Commission are satisfied that it is not practicable to comply with the requirement (the “original requirement”) they may modify it; and subsection (3) above shall apply in relation to the modified requirement as that subsection applies to the original requirement.
- (5) This section applies in relation to a common grazing as it applies in relation to a holding except that for the purposes of that application references in the section to an occupier of a holding are to be construed as references to a crofter who shares in the common grazing.”.

Section 7: Maintenance of and provision of information from the Register of Crofts

Section 7 amends section 41 of the 1993 Act and provides for the modification of section 41(2) so that a range of information previously not held on the Register of Crofts can be held there. It also amends the requirement in that subsection for the Commission to insert, alter or omit entries to ensure the accuracy of the Register. The emphasis is to ensure so far as is possible that the Register is kept consistent with the information received. Section 41(3) is replaced by two new subsections which provide for the Register of Crofts becoming open to public scrutiny and to allow for the provision of certified extracts from the Register which will have legal status as evidence of the existence of a Register entry.

7 Maintenance of and provision of information from the Register of Crofts

In section 41 of the 1993 Act (Register of Crofts)—

(a) in subsection (2)—

(i) for paragraph (c) there is substituted—

“(ca) the landlord’s address and, where the tenant’s address is different from the address of the croft, the tenant’s address;

(cb) where the landlord’s estate is managed on his behalf by another person, a statement that it is so managed and the name and address of that other person;

(cc) where the tenant of a croft holds a right in a common grazing—

(i) the location and boundaries of the grazing;

(ii) the owner of the grazing and his address;

(iii) any use of the grazing as woodlands by virtue of section 50, or of woodlands as part of the grazing by virtue of section 50A, of this Act;

(iv) any other use of the grazing, except use for grazing purposes, as woodlands or use regulated by a scheme drawn up by the Commission under section 52(9) of this Act;

(cd) any—

(i) determination by the Commission under section 3A(3)(a) of this Act or by the Land Court on any question coming before it (whether or not on appeal) under this Act;

(ii) order under section 22(1) of this Act;

(iii) direction under section 24(3) or (4) or 25(4) of this Act;

(iv) reorganisation scheme prepared under section 38(8)(a) of this Act;
or

(v) apportionment under section 52(3) or (4) of this Act;” and

(ii) for the words “the accuracy of the Register” there is substituted “, so far as practicable, that the Register is consistent with such information as the Commission has obtained under or by virtue of this Act”; and

(b) for subsection (3) there is substituted—

“(3) A person requesting from the Commission a copy or extract of an entry in the Register of Crofts is entitled to receive it from them on payment of such fee (if any) as may be chargeable by virtue of section 41B(4) of this Act.

(3A) An extract of an entry in the Register of Crofts shall be certified as such by a person authorised for the purposes of this subsection by the Commission; and a document which bears to be an extract so certified shall be sufficient evidence that the Register contains the entry.”.

Section 8: Maps and scheme of charges

Section 8 provides new sections 41A and 41B for insertion in the 1993 Act.

The provisions of new section 41A(1) allows Scottish Ministers to make regulations to confer on the Commission power to require maps of crofts to be supplied to the Commission. Section 41A(2) requires these regulations to specify when and in what circumstances the Commission can require maps to be supplied and in what format. section 41A(3) specifies that these maps shall be held on the Register of Crofts.

The provisions of new section 41B allows the Commission a broad power to charge fees for maintaining the Register of Crofts, subject to the approval by Scottish Ministers of the charging arrangements.

8 Maps and scheme of charges

After section 41 of the 1993 Act, there is inserted—

“41A Provision of maps for inclusion in Register of Crofts etc.

- (1) The Scottish Ministers may by regulations—
 - (a) confer on the Commission power—
 - (i) to require, or permit, the provision to the Commission by any person mentioned in section 40(1) of this Act, whether for inclusion in the Register of Crofts or in relation to the exercise by the Commission of their functions under this Act, of maps of crofts and common grazings; and
 - (ii) to determine procedure and arrangements to apply as respects such provision; and
 - (b) specify requirements with which maps provided shall comply.
- (2) The regulations—
 - (a) shall in any event specify—
 - (i) the circumstances in which, the date from which and the timescales within which the Commission may require maps to be provided; and
 - (ii) the form and scale of any maps provided; and
 - (b) may make different provision for different cases or categories of case or for different purposes.
- (3) The Commission shall enter in the Register of Crofts such maps as are provided to them in accordance with the regulations.

41B Scheme of charges in relation to Register of Crofts

- (1) The Commission may, in accordance with a scheme to be compiled and maintained by them, charge fees in respect of maintenance by them of the Register of Crofts (including charges for inserting, altering or omitting entries or including or omitting maps).
- (2) The amount of any fees charged in accordance with such a scheme shall not be greater than is reasonably sufficient for defraying the expenses of maintaining the Register (including the expenses of the improvement of the system of maintaining the Register and including maps in it).
- (3) The Commission shall obtain the approval of the Scottish Ministers to a scheme compiled under subsection (1) above (including, without prejudice to that generality, any modifications to the scheme).

Section 9: Grants to Commission by Scottish Ministers

Section 9 makes new provision for the funding of the Commission and creates a funding arrangement consistent with that which applies to the majority of other Non-Departmental Public Bodies responsible to Scottish Ministers. It also repeals the existing provision that the expenses of the Commission will be met by Scottish Ministers contained in section 59 of the 1993 Act.

Section 10: New Crofts

Section 10 inserts a new section 3A into the 1993 Act which allows the creation of new crofts and croft tenancies. Section 3A(1) empowers the Commission to constitute land as a croft in response to an application to that effect from the owner of the land in question. Subsections (2), (3) and (4) specify a process that the Commission are required to follow before deciding whether or not to agree to the owner's application and constitute the land as a croft. Subsection (5) ensures that an agricultural holdings tenant cannot be dispossessed of the tenancy of land as a result of all or part of the holding being designated as a croft.

- (4) The Scottish Ministers may, after consultation with the Commission, make rules as to fees to be chargeable by the Commission for searching or providing information or extracts from the Register of Crofts.
- (5) The power to make rules under subsection (4) above shall be exercisable by statutory instrument; and a statutory instrument containing such rules shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

9 Grants to Commission by the Scottish Ministers

After section 58A of the 1993 Act (inserted by section 5 of this Act), there is inserted—

“58B Grants to Commission by the Scottish Ministers

- (1) The Scottish Ministers may make grants to the Commission of such amounts as they think fit.
- (2) Any grant under this section may be made subject to such conditions as the Scottish Ministers think appropriate, including (without prejudice to that generality) conditions as to the use of the money or requiring the repayment of all or any part of a grant in the event of non-compliance with any other condition; and the Ministers may from time to time after the grant is made vary such terms and conditions.”.

PART 2

CROFTS

10 New Crofts

After section 3 of the 1993 Act, there is inserted –

“3A New Crofts

- (1) The Commission shall have power, on the application of the owner of any land situated in the crofting counties, to constitute the land as a croft by entering it as such, in accordance with section 41 of this Act, in the Register of Crofts (in this Act referred to as the “Register of Crofts”); but no such entry shall be made until the period mentioned in section 52A(3) of this Act has elapsed without any appeal to the Land Court being made or until any such appeal timeously made is decided or abandoned.
- (2) The Commission shall, on receipt of any such application, give public notification of it; and such notification shall specify a period within which written comments as regards the application may be made.

Section 11: The statutory conditions

Section 11 makes a number of significant changes to the statutory conditions contained in the 1993 Act including changes to the statutory conditions governing a crofter's use of his croft land and to the ability of crofters and landlords to contract to waive rights conferred on the crofter by that Act. Subsection (1)(a) of section 11 adds a new subsection (1A) to section 5 of the 1993 Act which provides that the landlord can serve notice on the croft tenant where there is a breach of a new condition of tenure (new paragraph 3A of Schedule 2 which is inserted by section 11(2)(b)).

Section 11(1)(b) adds new subsections (4) – (9) to section 5 of the 1993 Act. New subsection (4) provides that any future contract or agreement between a crofter and landlord approved by the Land Court under the provisions of section 5(3) must be recorded in the Register of Crofts and new subsection (5) provides that such contracts or agreements once entered in the Register of Crofts are (depending on the terms of the contract or agreement) binding on the successors to the croft tenancy. This provision is primarily to allow the creation of binding agreements necessary to facilitate energy developments on croft land. However, it also provides the means by which a tenant of a croft can enter into a binding agreement with the landlord undertaking not to exercise his right to buy. It therefore makes it possible for a landowner to create new crofts without the risk of these crofts being subject to the right to buy.

- (3) After the period mentioned in subsection (2) above has elapsed the Commission shall –
 - (a) determine whether to exercise their power under subsection (1) above; and
 - (b) give public notification of that determination.
- (4) In so determining, the Commission shall have regard to –
 - (a) such written comments, if any, as are timeously made by virtue of subsection (2) above;
 - (b) the public interest and the interests of the crofting community in the locality of the land; and
 - (c) whether social or economic benefits might be expected as a consequence of so constituting it.
- (5) No application is to be made under subsection (1) above in respect an agricultural holding occupied by a tenant where the tenancy is –
 - (a) a 1991 Act tenancy (within the meaning of the Agricultural Holdings (Scotland) Act 2003 (asp 11)); or
 - (b) a short limited duration tenancy or limited duration tenancy (within the meaning of that Act),
 without the written agreement of the tenant; and on such a holding being constituted as a croft under that subsection the tenant shall be entitled to be registered, in accordance with section 41(2)(b) of this Act, as its tenant.”.

11 The statutory conditions

- (1) In section 5 of the 1993 Act (the statutory conditions)—
 - (a) after subsection (1) there is inserted—

“(1A) If the landlord considers that the crofter is failing to comply with the condition set out in paragraph 3A of that Schedule he may serve notice to that effect on the crofter.”; and
 - (b) at the end there is added—
 - “(4) On giving approval under subsection (3) above, the Land Court shall intimate to the Commission that it has done so and provide them with a copy of the contract or agreement; and the Commission shall enter that copy in the Register of Crofts.
 - (5) Where a copy is so entered then, subject to the terms of the contract or agreement, the deprivation in question is binding on the successors to the crofter’s interest.

New subsections (6) to (9) relate to the modification of paragraph 3 of Schedule 2 to the 1993 Act provided by section 11(2)(a). That modification allows for a croft to be put to a purposeful use other than agriculture. New subsection (6) specifies that a crofter must seek the consent of the landlord (whom failing, the Commission) to do so before putting the croft to a purposeful use other than agriculture and if that consent is obtained may put the croft to the new use subject to any conditions attached to that consent. New subsection (7) allows the crofter to apply to the Commission for consent to a proposed purposeful use if the landlord's consent has been asked for and has not been obtained within 28 days of the application to the landlord. New subsection (8) requires the Commission to consult on the application for consent and check whether any planning or other consents are required for the proposed use and, if so, have been granted before it makes a decision. New subsection (9) requires the Commission to decide an application within 28 days of receiving it and allow it to set conditions for any consent.

Section 11(2) amends Schedule 2 to the 1993 Act. Subsection (2)(a) amends paragraph 3 of Schedule 2 (the requirement to cultivate a croft). It provides that a crofter can now cultivate the croft or put it to a purposeful use or do both. Subsection (2)(i) inserts a definition of “purposeful use” into paragraph 13 of Schedule 2. In order that the amendment to paragraph 3 has no impact on existing arrangements there is a saving provision at section 11(3) to the effect that existing rights relating to ancillary use are unaffected.

Subsection (2)(b) inserts 2 new paragraphs into Schedule 2. New paragraph 3A is a new condition that requires a crofter to keep his/her croft in a fit state for cultivation. New paragraph 3B defines some of the measures that might need to be taken to ensure that a croft remains fit for cultivation

- (6) Before the croft is put to any such use as is mentioned in paragraph 3(b) of the statutory conditions, the crofter must apply for the landlord's written consent and either—
 - (a) obtain it unconditionally or subject to conditions which the crofter accepts; or
 - (b) obtain the consent of the Commission.
- (7) Any application for consent under paragraph (b) of subsection (6) above is to be made under this subsection but may be made only where consent under paragraph (a) of that subsection (whether unconditional or subject to such conditions as are mentioned in paragraph (a)) has not been obtained within 28 days after application under paragraph (a).
- (8) The Commission shall, on receipt of an application under subsection (7) above—
 - (a) consult, as regards the proposed purposeful use, the landlord and the members of the crofting community in the locality of the land; and
 - (b) if the proposed purposeful use—
 - (i) constitutes a change for which planning permission is required; or
 - (ii) by virtue of any enactment (other than this Act) requires any other permission or approval,
 require it to be shown that the permission or approval has been given.
- (9) The Commission shall decide the application within 28 days after receiving it; and if they give their consent may impose such conditions as they think fit.”.
- (2) In Schedule 2 to that Act (which sets out conditions to which every tenancy of a croft is subject)—
 - (a) in paragraph 3, for the words from “cultivate” to the end there is substituted “either or both—
 - (a) cultivate his croft;
 - (b) put it to some other use, being a purposeful use.”;
 - (b) after paragraph 3 there is inserted—
 - “3A The croft shall be kept in a fit state for cultivation except in so far as a use to which it is put by virtue of paragraph 3(b) above is incompatible with its being so kept.
 - 3B Without prejudice to the generality of paragraph 3A above, in determining whether that paragraph is complied with regard shall be had to whether appropriate measures (which may include the provision of drainage) are routinely undertaken, where requisite and practicable, to control or eradicate vermin, bracken, whins, broom, rushes, iris and harmful weeds.”;

Subsection (2)(c) modifies and rewords paragraph 5 to provide a new definition of what constitutes injury to a croft.

Subsection (2)(d) inserts in Schedule 2 a definition of what constitutes “relevant notice” by the landlord to the crofter to stop action which would prejudice continuation of a purposeful use.

Subsection (2)(e) inserts new paragraph 6A in Schedule 2 which makes the croft tenant responsible to the landlord for any breach of the statutory conditions by the subtenant of the croft.

Subsection (2)(f) makes a consequential change to paragraph 7 of Schedule 2 to reflect a proposed change to section 9 of the 1993 Act which is detailed at section 14 of the Bill.

Subsection (2)(h) would insert a new paragraph 11A into Schedule 2 which qualifies the landlord’s rights set out in paragraph 11 of Schedule 2 such that the crofter does not have to tolerate unreasonable exercise of such rights.

- (c) in paragraph 5, for the words from “persistently” to the end there is substituted “injure the croft—
 - (a) by allowing the dilapidation of buildings;
 - (b) where the croft is cultivated, by allowing, after relevant notice, the deterioration of the soil; or
 - (c) where the croft is put to some other purposeful use, by actings prejudicial to that use being actings carried out after relevant notice.”;
 - (d) after paragraph 5 there is inserted—
 - “5A In sub-paragraphs (b) and (c) of paragraph 5 above, “relevant notice” means notice given by the landlord to the crofter not to do, or not to allow, a particular thing or not to engage in a particular course of conduct (being a thing or course of conduct specified in the notice and relevant to the deterioration or prejudice in question).”;
 - (e) after paragraph 6 there is inserted—
 - “6A The crofter shall be responsible for ensuring, where the croft is sublet, that the subtenant adheres to the statutory conditions.”;
 - (f) in paragraph 7, for the word “subdivide” there is substituted “divide”;
 - (g) in paragraph 9, the word “persistently” is repealed;
 - (h) after paragraph 11 there is inserted—
 - “11A Nothing in paragraph 11 shall be held to allow, or require the crofter to allow, the landlord, or any person authorised by the landlord, to exercise unreasonably a right enjoyed by virtue of paragraph 11 above.”; and
 - (i) in paragraph 13, at the end there is added—
 - ““purposeful use” is any planned and managed use, being a use which subject to the exception in paragraph 3A above, does not adversely affect the croft, the public interest, the interests of the landlord or the use of adjacent land.”.
- (3) The amendment made by subsection (2)(a) above does not affect the right conferred by paragraph 3 of Schedule 2 to that Act, as originally enacted, in relation to a use for subsidiary or auxiliary occupations provided that such use subsists (having subsisted from before the coming into force of that subsection).

Section 12: Complaints as respects breach of the statutory conditions

Section 12 inserts new sections 5A and 5B into the 1993 Act. New section 5A provides a procedure whereby the Commission may take action in place of the landlord where there has been a breach of the statutory conditions and the landlord has not objected. This would include the right to approach the Land Court to determine sanctions against the crofter concerned and these can include terminating the tenancy and declaring the croft vacant. This measure provides the means for dealing with the dereliction of crofts in cases where the landlord has no incentive to act.

The legislation continues to allow the landlord to take action against the croft tenant but provides an alternative approach that the landlord or any other member of the crofting community can complain to the Commission of a breach of statutory conditions. Section 5A(2) provides that if the landlord is not already taking action then the Commission may apply to the Land Court in connection to the breach complained about subject to section 5A(3) which requires that the Commission must give the landlord prior notice of an intended application to the Land Court and if the landlord objects in writing within 14 days may not proceed with the application. Section 5A(4) further requires the Commission to write to the crofter who is alleged to be in breach of the statutory conditions and give that crofter a reasonable time to remedy matters before making the application to the Land Court.

Section 5A(5) specifies what the Land Court may do if it is satisfied that the breach of statutory conditions complained about has occurred. The Land Court can order remedy of the breach by a specific time and payment of compensation to the landlord as it thinks fit. Section 5A(6) provides that if a crofter fails to comply with such an order by the Land Court the croft tenancy can be terminated and the croft declared vacant.

New section 5B provides in subsection (1) that irritancy of the tenancy occurs if the crofter misuses or neglects the croft and in subsection (2) goes on to define misuse and neglect. Irritancy is the right of a landlord to terminate a lease (in this case a croft tenancy) early as a result of the breach by the crofter of the terms of the tenancy and the crofter having failed to remedy that breach.

12 **Complaint as respects breach of the statutory conditions**

After section 5 of the 1993 Act, there is inserted—

“5A Complaint as respects breach of the statutory conditions

- (1) Without prejudice to any right which the landlord has to initiate proceedings in relation to a breach of the statutory conditions as respects a croft, the landlord or any member of the crofting community in the locality of the croft may complain to the Commission that such a breach has occurred.
- (2) Provided that no such proceedings as are mentioned in subsection (1) above have been initiated, the Commission may make an application to the Land Court in relation to the breach; but this subsection is subject to subsections (3) and (4) below.
- (3) Except where the complaint was by the landlord, the Commission shall give him written notice of their intention to make the application; and if within 14 days after receipt of that notice he gives them written intimation that he objects, they shall not proceed with the application.
- (4) Before making the application, the Commission shall give written notice to the crofter of the breach complained of and give him the opportunity to remedy it within such reasonable period as they shall specify in the notice.
- (5) Where, on an application under subsection (2) above, the Land Court is satisfied that the breach complained of has occurred, it may—
 - (a) order that the breach be remedied and specify a time within which that must occur; and
 - (b) make such order regarding the payment of compensation by the crofter to the landlord as it thinks fit.
- (6) Where an order under subsection (5)(a) above is not complied with, the Commission may apply to the Land Court for an order terminating the tenancy and declaring the croft to be vacant.

5B Irritancy

- (1) There is irritancy of the tenancy of a croft if the crofter misuses or neglects the croft.
- (2) For the purposes of subsection (1) above, a crofter—

“misuses” a croft where he wilfully and knowingly uses it otherwise than for the purpose of its being cultivated or put to such other purposeful use as is duly consented to under section 5(4) of this Act;

“neglects” a croft where he does not keep it in a condition suitable for agricultural purposes or as the case may be for that other use.”

Section 13: Exchange of crofts or parts of crofts

Section 13 closes a loophole in the current legislation, whereby crofters, with the agreement of their landlord, may exchange croft land without the approval of the Commission. While on the face of it this existing practice allows ease of arrangements and is deregulatory, there has been concern expressed about the longer term effects of such changes. The new section 4A inserted into the 1993 Act by section 13 requires that an exchange of a croft or parts of a croft requires the consent of the landlord, the owner of any common grazing in which any of the crofts involved in the exchange have a share and the Commission. The Commission cannot consent unless the other consents required have already been given. The provisions in new section 58A (inserted by section 5 of the Bill) apply as regards the consent of the Commission with the additional criterion for intervention being that the proposed exchange would be unfair to any of the crofters involved.

Section 14: Division of croft

Section 14 provides a complete replacement for the existing section 9 of the 1993 Act. The principal change is that the landlord's consent to division of the croft is no longer required. In addition the new procedure for obtaining the Commission's consent in new section 58A applies so that the Commission are only required to make a decision where there is an objection to the application or the Commission's criteria for intervention apply. The landlord has a right to object to the division of the croft by virtue of the provisions of new section 58A(4) (section 58A is inserted by section 5 of the Bill). New section 9(3) specifies that the division of a croft has no legal effect until details of the division are recorded in the Register of Crofts. The landlord's financial interests are secured by new section 9(4) which provides that a rent for a new croft created by division of an existing croft is to be agreed between the crofter and the landlord. In the event that they cannot reach agreement section 9(5) provides that either party can apply to the Land Court to have the rents determined by the Land Court with the fees payable in connection with the application being paid by the crofter. It should be noted that the term "subdivision" is replaced by the term "division".

13 Exchange of crofts or parts of crofts

After section 4 of the 1993 Act, there is inserted—

“Exchange of crofts

4A Exchange of crofts or parts of crofts

- (1) A crofter may not exchange his croft (or any part of his croft) for another croft (or part of another croft) unless he obtains the consent of—
 - (a) the landlord of his croft;
 - (b) the owner of any common grazing in which he shares; and
 - (c) the Commission.
- (2) The consent of the Commission shall not be given unless they are satisfied that the consent mentioned in paragraphs (a) and (b) of subsection (1) above has been obtained.
- (3) In the case of an application made by virtue of subsection (1) above, the special condition which applies for the purposes of section 58A(6)(b)(ii) of this Act is that there are reasonable grounds for concern that the proposed exchange would be unfair to any of the crofters who are parties to the proposed exchange.”.

14 Division of croft

For section 9 of the 1993 Act (sub-division of croft), there is substituted—

“9 Division of croft

- (1) A crofter shall not divide his croft unless he obtains the consent of the Commission.
- (2) In the case of an application to divide a croft, the following special conditions apply for the purposes of section 58A(6)(b)(ii) of this Act—
 - (a) that the application is for the creation of more than two new crofts; or
 - (b) that the original croft is one created as a consequence of an earlier division (or sub-division).
- (3) Any division of a croft to which the Commission have given their consent under this section shall take effect when such details of that division as the Commission may require by virtue of sections 41 and 41A of this Act are entered in the Register of Crofts.
- (4) After division, the rent payable for the new crofts shall be that agreed between the landlord and the tenant.
- (5) In the event that such agreement cannot be reached, the Land Court, on the application of the landlord or the tenant, shall have the power to determine the rent in accordance with subsections (3) and (4) of section 6 of this Act, the fees payable in connection with such an application being borne by the tenant.

Section 15: Subletting

Section 15 modifies the provisions of sections 27 and 29 of the 1993 Act and repeals section 28 of that Act. The main changes to section 27 are to alter subsection (1) to provide that the maximum length of a sublet shall be for a period not exceeding 10 years and to replace subsections (3) and (4) with a new subsection (3) which provides the special conditions which will apply when the consent of the Commission is required in terms of new section 58A (inserted by sections of the Bill).

Section 15(2) repeals section 28 of the 1993 Act, a provision that, had it ever been commenced, would have given the Commission power to impose a sub-tenant on a crofter.

Section 15(3) amends section 29 by inserting new subsections (2A) and (3A). New subsection (2A) provides that it would be a condition of any sublease that the croft tenant must give the subtenant not less than 6 months notice of an intention by the tenant to assign the croft to a third party and thereby terminate the sublease. New subsection (3A) makes specific provision in relation to the continuation in occupation of the sub tenant on the death of the crofter.

- (6) In this section—
 - (a) “division” means the division of a croft into two or more new crofts (“divide” being construed accordingly);
 - (b) “original croft” means the croft which is the subject of an application for division; and
 - (c) “new crofts” mean each of the crofts created by the division of the original croft.”.

15 Subletting

- (1) In section 27 of the 1993 Act (provisions as to right to sublet)—
 - (a) in subsection (1), after the words “his croft” there is inserted “, for a period not exceeding 10 years,”; and
 - (b) for subsections (3) and (4) there is substituted—
 - “(3) In the case of any application for such consent, the following special conditions apply for the purposes of section 58A(6)(b)(ii) of this Act—
 - (a) that there are reasonable grounds for concern as regards the use which the proposed subtenant intends to make of the croft; and
 - (b) that the proposed subtenant will not reside on, or within 16 kilometres of, the croft.”
- (2) Section 28 of that Act (special provisions regarding subletting of crofts not adequately used) is repealed.
- (3) In section 29 of that Act (miscellaneous provisions regarding subleases of crofts)—
 - (a) after subsection (2) there is inserted—
 - “(2A) The conditions of let must specify that the crofter shall give the subtenant not less than 6 months written notice of any intention to assign the croft and that the sublease shall come to an end on such assignment.”; and
 - (b) after subsection (3) there is inserted—
 - “(3A) Where the tenancy of a croft is terminated by virtue of the death of the crofter, the Commission shall, as part of their consideration in determining whether to make an order under the proviso to subsection (3) above and if so what period of occupation to permit—
 - (a) consult the deceased crofter’s executor; and
 - (b) have regard in particular to such hardship as might, according to what they decide, be occasioned—
 - (i) the former subtenant;
 - (ii) an assignee or transferee of the interest of tenant.”.

Section 16: Assignment

Section 16 makes significant changes to the provisions of section 8 of the 1993 Act affecting both family and non-family assignment. The replacement of much of the existing wording of subsection 8(1) removes the requirement that a family assignment must have the landlord's consent. Sections 8(2) to 8(4) are replaced. The Bill also provides that new section 58A applies (inserted by section 5 of the Bill) to the process of considering an application. The effect of this is that the landlord along with the other persons specified at section 58A(4) have a right to object to an assignment proposal. So the anomaly requiring a landlord's permission for a family assignment, but not a non-family assignment, to succeed without Commission approval is replaced by the right (shared with others) to object in both cases, requiring the Commission to consider and make a decision.

In the case of an application to assign to a member of the crofter's family (see section 36 of the draft Bill) the Commission's power to intervene where there is no objection by a person entitled to object is as provided in new section 58A(9). However in the case of an assignment to a person who is not a member of the crofters family the new subsection 8(2) inserted by section 16(b) provides a list of additional special conditions which trigger a decision by the Commission to consider an application.

Section 16(c) is a technical amendment to section 8(5) consequential on the amendment to section 8(1).

Section 16(d) amends subsection 8(6) so as to allow a transfer of a croft tenancy to take place on dates other than Martinmas or Whitsunday.

Section 17: Bequest of tenancy of croft

This section amends the provisions of section 10 of the 1993 Act.

Section 17(2) amends section 10(1) to make it clear that a crofter may only leave the tenancy of his croft to a "natural person" i.e. the tenancy must be left to an individual and not to a company or institution.

16 Assignment

In section 8 of the 1993 Act (assignment of croft)—

- (a) in subsection (1), for paragraphs (a) and (b) there is substituted “unless he obtains the consent of the Commission”;
- (b) for subsections (2) to (4) there is substituted—
 - “(2) In the case of an application made by virtue of subsection (1) above in respect of an assignment to a person other than a member of the crofter’s family, the following special conditions apply for the purposes of section 58A(6)(b)(ii) of this Act—
 - (a) that the proposed assignee lives within 16 kilometres of the croft;
 - (b) that he already owns or is tenant of a croft;
 - (c) that he lacks the knowledge, abilities and experience to cultivate the croft or as the case may be to put it to such other purposeful use as he intends;
 - (d) that he is the grazings clerk or a member of the grazings committee;
 - (e) where the landlord is not a natural person, that the proposed assignee is a member or employee, or is a member of the family of a member or employee, of the body which constitutes the landlord;
 - (f) that there are reasonable grounds for concern over the use to which the proposed assignee intends to put the croft.”;
- (c) in subsection (5), for the words from “in writing” to “above” there is substituted “of the Commission”; and
- (d) in subsection (6), for the words from “at the term” to “may be,” there is substituted “on such date as the Commission shall specify in the consent (being a date not less than two months after that on which the consent was intimated to the crofter) unless before that date”.

17 Bequest of tenancy of croft

- (1) Section 10 of the 1993 Act (bequest of croft) is amended as follows.
- (2) For subsection (1), there is substituted—
 - “(1) A crofter may, by will or other testamentary writing, bequeath the tenancy of his croft to any one natural person.”.

Section 17(3) amends section 10(2). Section 17(3)(a) introduces a requirement that the legatee must give notice of the bequest to the Commission in addition to the current requirement that notice be given to the landlord. Section 17(3)(b) and (c) extend by 2 months the periods available to the legatee to give notice of a bequest. Section 17(3)(e) repeals the latter half of section 10(2) which is replaced by the new sections inserted by section 17(4).

Section 17(4) creates 4 new subsections to be inserted in section 10. New section 10(2A) allows the executor to give notice of the bequest of tenancy in addition to the current provision in section 10(2) requiring the legatee to do so. New section 10(2B) provides that the legatee will (provided there is no objection from the landlord in the case of a non family legatee) take control of the tenancy on the date on which the Commission indicate that the information that they require under the provisions of new section 10(2C) has been provided. It also provides that when the legatee takes over the tenancy it will be as if the transfer took place on the date of the death of the previous tenant.

New section 10(2C) provides that on receipt of notice of a bequest from a legatee or executor the Commission must notify the legatee of the information required by the Commission to update the Register of Crofts. In the case of a legatee who is not a member of the deceased crofter's family they will only do so if there has not been an objection from the landlord and in such cases must also indicate in the notification to the legatee that there has been no objection.

New section 10(2D) requires the Commission to notify the legatee once the information set out in the notification given under section 10(2C) has been provided.

- (3) In subsection (2)—
- (a) after the word “landlord”, where it first occurs, there is inserted “and send a copy of the notice to the Commission, both”;
 - (b) for the word “2” there is substituted “4”;
 - (c) for the word “4” there is substituted “6”;
 - (d) after the words “the provisions of this subsection”, there is inserted “or subsection (2A) below”; and
 - (e) the words from “The giving of such notice” to the end are repealed.
- (4) After subsection (2) there is inserted—
- “(2A) Notice under subsection (2) above of the bequest may be given by an executor of the deceased crofter authorised for that purpose by the legatee.
- (2B) The giving of notice to the landlord in accordance with the provisions of subsection (2) or (2A) above shall import acceptance of the bequest; and the legatee if—
- (a) he is a member of the deceased crofter’s family; or
 - (b) he is a person other than a member of the deceased crofter’s family and the landlord does not intimate objection to the legatee in accordance with subsection (3) below,
- shall come into the place of the deceased crofter (as from the date of death of the deceased crofter) on the relevant date mentioned in subsection (2D) below.
- (2C) Where notice is given in accordance with the provisions of subsection (2) or (2A) above and—
- (a) the legatee is a member of the deceased crofter’s family, the Commission shall notify the legatee of the information they require for the purpose of updating the Register of Crofts in relation to the tenancy; or
 - (b) the legatee is a person other than a member of the deceased crofter’s family and the Commission receive no intimation of objection to the legatee in accordance with subsection (3) below, they shall notify the legatee—
- (i) to that effect; and
 - (ii) of the information referred to in paragraph (a) above.
- (2D) The Commission shall notify the legatee when they are satisfied that he has provided the information required by them in their notification to him under subsection (2C) above; and the “relevant date” referred to in subsection (2B) above is the date on which the Commission notify the legatee under this subsection.”.

Section 17(5) replaces section 10(3) with a new but similar provision setting out the detail of how a landlord should exercise the right to object to a bequest to a person other than a member of the deceased crofter's family.

Section 17(6) replaces section 10(4)(b) with a new provision which retains the existing requirement to notify and adds a provision to the effect that the legatee should be notified of the need to provide information to be entered in the Register of Crofts.

Section 17(7) inserts seven new subsections into section 10. Section 10(4A) provides that, when the legatee has provided the information that new section 10(4)(b) requires the legatee to supply, the Commission must notify the legatee that this has been done. On receipt of that notice the legatee is empowered to take control of the tenancy except where there has been an appeal under the provisions of section 10(4B). New section 10(4B) sets out the arrangements for appealing a decision made by the Commission in accordance with the provision of section 10(4). New section 10(4C) indicates what happens where the Land Court finds on appeal that a bequest should be upheld.

(5) For subsection (3), there is substituted—

“(3) Where the legatee is a person other than a member of the deceased crofter’s family, the landlord may, within one month (or such longer period as may be determined by the Commission on an application made to them by the landlord) after the date of the notice given to him in accordance with subsection (2) or (2A) above, intimate to—

- (a) the legatee; and
- (b) the Commission,

that he objects to the legatee becoming tenant of the croft; and any such intimation shall state the grounds of objection.”.

(6) In subsection (4), for paragraph (b) there is substituted—

“(b) not so satisfied, they shall—

- (i) notify the landlord and the legatee to that effect; and
- (ii) notify the legatee of the information they require for the purpose of updating the Register of Crofts in relation to the tenancy.”.

(7) After that subsection, there is inserted—

“(4A) In a case where subsection (4)(b) above applies, the Commission shall notify the legatee when they are satisfied that he has provided the information required by them in their notification to him under that sub-paragraph (ii) of that subsection; and, if no appeal is made under subsection (4B) below against the Commission’s decision under subsection (4)(b) above, the legatee shall come into the place of the deceased crofter (as from the date of the deceased crofter’s death) on the date on which the Commission notify the legatee under this subsection.

(4B) The legatee or, as the case may be, the landlord may, within 42 days of the giving of notification of the Commission’s decision under paragraph (a) or (b) of subsection 4 above in relation to the objection, appeal to the Land Court against that decision; and in an appeal under this subsection, the Court may confirm the decision or direct the Commission to come to a different decision.

(4C) Where, on an appeal under subsection (4B) above, the Land Court directs the Commission to decide that a bequest under subsection (1) above be upheld, the legatee shall come into the place of the deceased crofter (as from the date of the deceased crofter’s death) on the date the Court directs under this subsection.

New section 10(4D) introduces a new provision to the effect that (a) a legatee accepting the bequest of a tenancy assumes responsibility for debts incurred by the deceased as former tenant of the croft and (b) creates arrangements whereby the executor can recover reasonable expenses relating to the management of the tenancy from the legatee including arrangements for the settlement of any disputes in the Land Court.

New section 10(4E) makes it clear that a croft tenancy is an asset of the deceased crofter's estate and so liable to be set against expenses and debts of the estate. This would require the legatee to contribute to such expenses and debts if the legatee chooses to retain the tenancy.

New section 10(4F) provides that where it is necessary to determine the value of the croft tenancy for the purposes of section 10(4E), and the executor and legatee fail to agree, the market value of the tenancy will be determined the Land Court. New section 10(4G) defines the market value for this purpose.

Section 18: Prior rights, on intestacy, in relation to tenancy of croft

The whole of section 18 consists of amendments to section 8 of the Succession (Scotland) Act 1964 (“the 1964 Act”). The effect of these amendments is to extend the prior rights of a spouse or civil partner of a crofter to cover the whole of the croft rather than the croft house alone and convey the same rights to a cohabitant where there is no spouse or civil partner (a civil partner is defined in section 1 of the Civil Partnership Act 2004 as a relationship between two people of the same sex which is formed when they register as civil partners of each other in accordance with provisions of that Act).

The effect of these changes is to afford a spouse or civil partner or cohabitant of a deceased crofter the same degree of protection in retaining the croft tenancy as the 1964 Act allows the spouse or civil partner of any other individual in retaining a dwelling-house owned by that person. This essentially means that where there is a house on the croft and the value of the relevant interest in that house is below the statutory threshold (currently £130,000), the spouse or civil partner or cohabitant of the deceased crofter is entitled to the croft tenancy (including the house) up to that amount. Where the value is above that threshold the entitlement is to the sum specified by order under section 8(1)(b) of the 1964 Act.

- (4D) A legatee who comes into the place of a deceased crofter in accordance with subsection (2B), (4A) or, as the case may be, (4C) above, in doing so—
- (a) becomes liable for such debts of the deceased crofter’s estate as are attributable to the tenancy; and
 - (b) shall, if requested to do so by the executor, pay the reasonable expenses necessarily and wholly incurred by the executor in relation to the administration and management of the tenancy during the period beginning with the date of the deceased crofter’s death and ending immediately before the date when the legatee so comes into the place of the deceased crofter; and such expenses—
 - (i) shall, in the event a dispute as to amount, be determined by the Land Court on the application of the executor or the legatee; and
 - (ii) shall not fall to be met from the deceased crofter’s estate.
- (4E) Notwithstanding that a legatee comes into the place of the deceased crofter as mentioned in subsection (4D) above, the tenancy (and accordingly its market value as at the date of the deceased crofter’s death) is an asset of the deceased crofter’s estate, available along with the other assets of the estate to meet the other expenses of administration, and debts, of the estate; and any such legatee is liable to contribute to such expenses and debts accordingly.
- (4F) For the purposes of subsection (4E) above, the market value of the tenancy, failing agreement between the executor and the legatee, shall be as determined by the Land Court under subsection (4G) below on the application of the executor or the legatee.
- (4G) The market value of the tenancy as determined by the Land Court shall be the amount which a willing assignee, on the open market, might be expected to pay.”.

18 Prior rights, on intestacy, in relation to tenancy of croft

- (1) Section 8 of the Succession (Scotland) Act 1964 (c.41) (prior rights, on intestacy, in dwelling house and furniture) is amended as follows.
- (2) In subsection (1)—
 - (a) for the words “dwelling house to which this section applies,” there is substituted “dwelling house mentioned in subsection (4)(a) of this section,”;
 - (b) after the words “shall be entitled” there is inserted “, subject to subsection (2B) of this section,”; and
 - (c) the proviso is repealed.

Section 18(3) provides new sections 8(2A) and 8(2B) in the 1964 Act. New subsection (2A) qualifies the existing provision in subsection (2) of that Act so as to provide that a croft tenancy is treated as being subject to prior rights in the same way as a house owned or leased under other forms of tenure. (Prior rights are the statutory rights of a spouse on intestacy to claim the house (with furniture and plenishings up to a certain value) and a fixed sum of money depending on whether or not the deceased is also survived by issue). New subsection (2B) sets out what happens when there is more than one property over which a spouse, civil partner or co-habitant could exercise a prior right.

Section 18(4) modifies section 8(4) of the 1964 Act to distinguish between properties to which prior rights apply which are crofts and those that are not.

(3) After subsection (2), there is inserted—

“(2A) Where the tenant of a croft dies intestate leaving a spouse or civil partner or, where he dies leaving no spouse or civil partner, leaving a cohabitant, and the intestate estate includes a relevant interest in a dwelling house mentioned in subsection (4)(b) of this section, the surviving spouse, civil partner or, as the case may be, cohabitant shall be entitled, subject to subsection (2B) of this section, to receive out of the intestate estate—

- (a) where the value of the relevant interest does not exceed the amount for the time being fixed by order under subsection (1)(a) of this section, the tenancy of the croft;
- (b) in any other case, the sum for the time being fixed by order under subsection (1)(b) of this section.

(2B) If the intestate estate comprises —

- (a) a relevant interest in 2 or more dwelling houses mentioned in subsection (4)(a) of this section, subsection (1) of this section shall have effect only in relation to such one of them as the surviving spouse or civil partner may elect for the purposes of that subsection within 6 months after the date of death of the intestate;
- (b) a relevant interest in 2 or more dwelling houses mentioned in subsection (4)(b) of this section, subsection (2A) of this section shall have effect only in relation to such one of them as the surviving spouse, civil partner or cohabitant may elect for the purposes of that subsection within 6 months after that date; and
- (c) a relevant interest in both—
 - (i) one or more dwelling houses mentioned in subsection (4)(a) of this section; and
 - (ii) one or more dwelling houses mentioned in subsection (4)(b) of this section,

the surviving spouse or civil partner shall not be entitled to receive both the entitlement under subsection (1) of this section and that under subsection (2A) of this section and must elect within 6 months after that date whether to take the entitlement under the said subsection (1) or under the said subsection (2A).”.

(4) For subsection (4), there is substituted—

“(4) The dwelling house is—

- (a) in a case mentioned in subsection (1) of this section, any dwelling house in which the surviving spouse or civil partner of the intestate was ordinarily resident at the date of death of the intestate and which did not, at that date, form part of a croft of which the intestate was tenant;

Section 18(5) inserts a definition of “co-habitant” into section 8(6) of the 1964 Act consistent with that which is inserted into section 61 of the 1993 Act by section 36 of this draft Bill.

Section 19: Transfer of tenancy of croft by executor: amendment of section 16 of the Succession (Scotland) Act 1964

This section modifies the provisions of section 16 of the 1964 Act relating to the transfer of tenancy by an executor to distinguish between transfer of a croft tenancy which will require the consent of the Commission and transfers of the tenancy of other leases which require the consent of the landlord. This is achieved mainly through section 19(3) which inserts new section (2A) into section 16 of the 1964 Act. The amendment to section 16(9) of the 1964 Act effected by section 19(4) clarifies the definition of croft for the purposes of the 1964 Act.

- (b) in a case mentioned in subsection (2A) of this section, any dwelling house in which the surviving spouse, civil partner or cohabitant was ordinarily resident at the date of death of the intestate and which, at that date, formed part of a croft of which the intestate was tenant.”.
- (5) In subsection (6), before paragraph (a) there is inserted—
 - “(za)“cohabitant” means a person—
 - (i) who was living with the intestate as if married to him; or
 - (ii) who was living with the intestate as if in civil partnership with him, and had been so living for at least 2 years.”.

19 Transfer of tenancy of croft by executor: amendment of section 16 of the Succession (Scotland) Act 1964

- (1) Section 16 of the Succession (Scotland) Act 1964 (powers of executor to assign lease which prohibits assignation) is amended as follows.
- (2) In subsection (2), for the words from “shall be entitled” to the end, there is substituted “shall be entitled, subject to subsection (2A) of this section, to transfer the interest.”.
- (3) After that subsection, there is inserted—
 - “(2A) Transfer by an executor pursuant to subsection (2) of this section—
 - (a) of an interest under an agricultural lease which is a lease of a croft within the meaning of section 3(1) of the Crofters (Scotland) Act 1993 (c.44) shall require the consent of the Crofters Commission; and
 - (b) of an interest under any other lease (including any agricultural lease which does not fall within paragraph (a) of this subsection) and which is not a transfer to one of the persons entitled to succeed to the deceased’s intestate estate or to claim legal rights or the prior rights of a surviving spouse or civil partner out of the estate, in satisfaction of that person’s entitlement or claim, shall require the consent of the landlord.”.
- (4) In subsection (9), in the definition of “agricultural lease”, after the words “1955” there is inserted “; and “references to a “croft” include a reference to a part of a croft, being a part consisting of any right of pasture or grazing land deemed by virtue of section 3(4) of the Crofters (Scotland) Act 1993 to form part of a croft”.

Section 20: Transfer of tenancy of croft by executor: special provision relating to the 1993 Act

This section inserts a new section 16A into the Succession (Scotland) Act 1964. The overall effect is to empower executors to transfer croft tenancies as they think fit subject to the same requirements as apply where a crofter assigns the tenancy.

New section 16A(1) provides that the provisions of section 58A of the 1993 Act (inserted by section 5 of the Bill) apply to a transfer covered by new section 16(2A). New section 16A(2) sets down the criteria for intervention by the Commission which will apply where there is an application to assign the tenancy of the deceased crofter to a person who is not a member of the deceased crofter's family. New section 16A(3) provides that if the executor does not seek the consent of the Commission before transferring the tenancy the transfer will be null and void and the Commission can declare the croft vacant. New section 16A(4) indicates what happens to give effect to a transfer if the Commission consent to it.

20 Transfer of tenancy of croft by executor: special provision relating to the 1993 Act

After section 16 of the Succession (Scotland) Act 1964, there is inserted—

“16A Leases of crofts: special provision relating to the Crofters (Scotland) Act 1993

- (1) The requirement in section 16(2A)(a) of this Act to obtain the consent of the Crofters Commission shall be treated as if it were a requirement under the Crofters (Scotland) Act 1993 (c.44) and accordingly section 58A of that Act shall apply for the purposes of the requirement as it applies for the purposes of a requirement under that Act.
- (2) In the case of an application for the consent of the Crofter’s Commission made by virtue of section 16(2A)(a) of this Act in respect of a transfer to a person other than a member of the crofter’s family, the following special conditions apply for the purposes of section 58A(6)(b)(ii) of the Crofters (Scotland) Act 1993—
 - (a) that the proposed transferee lives within 16 kilometres of the croft;
 - (b) that he already owns or is tenant of a croft;
 - (c) that he lacks the knowledge, abilities and experience to cultivate the croft or as the case may be to put it to such other purposeful use as he intends;
 - (d) that he is the grazings clerk or a member of the grazings committee;
 - (e) where the landlord is not a natural person, that the proposed transferee is a member or employee, or is a member of the family of a member or employee, of the body which constitutes the landlord;
 - (f) that there are reasonable grounds for concern over the use to which the proposed transferee intends to put the croft.
- (3) Where the consent of the Crofter’s Commission to a transfer is required by section 16(2A)(a) of this Act, and the executor transfers the interest without the consent of the Commission—
 - (a) the transfer and any deed purporting so to transfer the interest shall be null and void; and
 - (b) the Commission may declare the croft to be vacant.

New section 16A(5) provides for an appeal against a Commission decision to consent to or refuse consent to the transfer. It indicates the grounds on which an appeal can be made. New section 16A(6) confirms who may appeal. New section 16A(7) requires the appeal to be made within 42 days after the Commission decision. New section 16A(8) applies new sections 52A(4) and (5) of the 1993 Act to appeals under subsection 16A of the 1964 Act. These sections require the appellant to give notice of the appeal to the Commission, require the Commission to provide a written statement setting out the circumstances surrounding the application, the extent that these are agreed with the applicant together with the reasons for their decision and require the Land Court to send a copy of that statement to the applicant. New section 16A(9) provides that the Land Court may uphold the Commission's decision or direct that they should come to a different decision.

Section 21: Amendment to section 11 of the 1993 Act

Section 21 makes a number of amendments to section 11 of the 1993 Act to modify the arrangements that currently apply where the executor in an intestacy fails to find a new tenant. There are a number of changes but the most significant is that the Commission no longer have a role in identifying a tenant from amongst those who might be entitled to inherit the intestate estate of the deceased crofter. Instead, simpler arrangements are put in place, including a declaration by the Commission that the tenancy has fallen vacant. If the tenancy is declared vacant the landlord is then required to re-let in accordance with the provisions of section 23 of the 1993 Act.

Section 21(2) amends section 11(2) of the 1993 Act so as to increase the time limit available to an executor to notify the landlord of the particulars of a proposed new tenant to 12 months from the relevant date. Thus giving the executor more time to find a suitable tenant.

Section 21(3) repeals section 11(3)(a) of the 1993 Act. This provision is no longer necessary because the change made to section 10 of the 1993 Act by section 17(3) of the Bill means that the Commission are informed of a bequest at the same time as the landlord. The change made by section 11(3)(b)(i) is consequential upon the change to 11(3)(a). The change made by section 11(3)(b)(ii) has the effect of giving the executor up to 2 months to notify the Commission of the death of the crofter before the 12 month period allowed for the transfer of the tenancy starts. A failure to notify however means that the 12 month period will start at the date of death of the crofter. So in effect the Bill creates a time penalty for a failure to notify the Commission. The change made by section 11(3)(c) is a technical change.

- (4) A transfer to which the Crofter's Commission have given their consent under section 16(2A)(a) of this Act shall take effect on such date as the Commission shall specify in the consent (being a date not less than two months after that on which the consent was intimated to the executor) unless before that date the executor and the transferee jointly give to the Commission notice in writing that they do not intend to proceed with the transfer.
- (5) An appeal shall lie on any question of fact or law to the Land Court against a decision of the Crofters Commission on an application made to them under section 16(2A)(a) of this Act.
- (6) The appellant may be the applicant or any person with an interest in the application.
- (7) An appeal under subsection (5) of this section must be brought within 42 days after the Commission dispose of the application.
- (8) Section 52A(4) and (5) of the Crofters (Scotland) Act 1993 shall apply to an appeal by an executor under subsection (5) of this section as it applies to an appeal under that section.
- (9) In an appeal under subsection (5) of this section, the Land Court may confirm the decision or direct the Commission to come to a different decision. ”.

21 Amendment of section 11 of the 1993 Act

- (1) Section 11 of the 1993 Act (intestacy) is amended as follows.
- (2) In subsection (2), for the word “3” there is substituted “12”.
- (3) In subsection (3)—
 - (a) paragraph (a) is repealed;
 - (b) in paragraph (b)—
 - (i) the word “otherwise” is repealed; and
 - (ii) after the word “tenancy,” there is inserted “the date (no later than 2 months after the date of death of the deceased crofter) on which the Commission receive notification of the death or, where no such notification is received,”; and
 - (c) in paragraph (d), for the words “on which the Commission notified the landlord and the legatee” there is substituted “of notification by the Commission”.

Section 21(4) deletes subsections (4) to (9) of section 11 of the 1993 Act (measures that give the Commission power to get involved in finding a member of the deceased crofter's family who is suitable to be the new croft tenant and nominating that person as the tenant). In place of these provisions it puts in place new subsections (4) – (8) setting out a simpler process by which if a suitable tenant is not found by the executor the Commission will eventually declare the croft vacant and thus available for re-let by the landlord.

New subsection 11(4) requires the Commission to notify the landlord, the executor and, if there is no executor, such persons as the Commission know of and believe might have rights in the intestate estate that the 12 months from the relevant date has expired and the Commission propose to terminate the tenancy and declare the croft vacant. It is worth noting that this provision does not require the Commission to take steps to try and identify persons who might be entitled to claim rights in the intestate estate. The Commission are only be required to notify the individuals they were aware of at that time. That notice would invite those to whom it was sent to make representations on the proposal within a month of the date of the notice.

New section 11(5) allows the Commission, after considering any representations, to proceed to terminate the tenancy, if they consider it appropriate to do so and provided that the tenancy had not been terminated already, the executor was not planning to transfer the tenancy or there was not someone entitled to exercise prior rights in relation to the tenancy.

New section 11(6) allows the Commission to issue a further termination notice under the provisions of new subsection 11(4) if they conclude the tenancy is not or cannot be transferred. New section 11(7) allows the Commission to terminate the tenancy following that further notice if they consider it appropriate to do so.

New section 11(8) requires the Commission on deciding to terminate a tenancy to give notice to the same people as received notice under new section 11(4). The notice given to the landlord requires the landlord to submit re-letting proposals. Section 11(8) also provides that when that notice is given the rights any person may have in relation to the tenancy are terminated and the landlord is liable to pay the executor the value of the permanent improvements on the croft.

(4) For subsections (4) to (9), there is substituted—

“(4) If at the expiry of the period of 12 months referred to in subsection (2) above, it appears to the Commission (whether from notification under that subsection or otherwise) that the executor has not furnished to the landlord particulars of any transferee in accordance with subsection (1) above, they shall give notice in such manner as they think proper, whether by advertisement or otherwise—

- (a) to the landlord;
- (b) if an executor is confirmed in respect of the intestate estate of the deceased crofter, to the executor; and
- (c) if no executor is so confirmed, to each person of whom the Commission are aware and who the Commission consider may claim to be entitled to claim prior or legal rights out of, or to succeed to, the intestate estate,

that they propose to terminate the tenancy and declare the croft vacant and inviting the recipients of the notice to make representations as respects the proposal to the Commission before the expiry of the period of one month after the date of the notice.

(5) If, having considered representations (if any) made to them in accordance with subsection (4) above, the Commission are satisfied that—

- (a) the landlord or the executor has terminated the tenancy in accordance with section 16(3)(b) of the Succession (Scotland) Act 1964;
- (b) the executor is proposing to transfer the tenancy; or
- (c) a person is entitled to a transfer of the tenancy in or towards the satisfaction of his claim to prior rights or his entitlement to succeed to the deceased’s intestate estate,

they are not to implement their proposal; but if not so satisfied they may implement their proposal if they consider it appropriate to do so.

(6) If, by virtue of subsection (5) above, the Commission are not entitled to implement their proposal, but it appears to them subsequently (by means of representations made to them or otherwise) that the tenancy is not being transferred or is unable to be transferred, the Commission may give notice again as mentioned in subsection (4) above.

(7) If, having considered representations (if any) made to them in accordance with subsection (4) above as respects a proposal contained in a notice given by virtue of subsection (6) above, the Commission are satisfied that it is appropriate to implement their proposal they may do so.

Section 21(5) amends section 11(10) of the 1993 Act to leave only a definition of the value of improvements for the purposes of new section 11(8)(c). The effect of the amendment is to end the requirement that the landlord is liable to repay from the value of the improvements any sums due by the deceased crofter to Scottish Ministers.

New section 21(6) is a technical amendment necessary as a consequence of other changes to section 11.

- (8) Where the Commission in pursuance of this section declare the croft vacant—
- (a) they shall give notice to that effect—
 - (i) to the landlord;
 - (ii) if an executor is confirmed in respect of the intestate estate of the deceased crofter, to the executor; and
 - (iii) if no executor is so confirmed, to each person of whom the Commission is aware and who the Commission consider may claim to be entitled to claim prior or legal rights out of, or to succeed to, the intestate estate,and any such notice to the landlord shall require him to submit to them such proposals as are mentioned in section 23(5) of this Act;
 - (b) any right of any person in, or in relation to, the tenancy shall be extinguished; and
 - (c) the landlord shall be liable to pay to the executor of the deceased crofter the value of the permanent improvements on the croft in so far as those improvements are as described in paragraphs (a) to (c) of section 30 of this Act.”.

- (5) In subsection (10), for the words from the beginning to “In this subsection”, there is substituted “In subsection (8)(c) above,”.
- (6) In subsection (11)(a), for the words “subsection (8) above” there is substituted “this section”.

Section 22: Determination of the Land Court as to croft boundaries

Section 22 introduces a new section 53A into the 1993 Act. The purpose of this section is to reduce the future incidence and cost of disputes over croft boundaries. Section 53(1)(c) of the 1993 Act provides that the Land Court has power to settle any question relating to the boundaries of crofts. However, croft boundaries are not well documented and therefore it is often difficult to determine what these boundaries are. New section 53A provides that where there is no documentary evidence to the contrary and the current boundaries have been accepted without challenge for a period of twenty years or more, the Land Court will endorse those current boundaries when asked to determine where croft boundaries lie.

New section 53A(1) states the presumption in favour of the boundaries on the ground when the application is made. New section 53A(2) sets out the conditions that must be met for the presumption to be applied. New section 53A(3) states if any one of these conditions does not apply there must be a hearing to determine the application. New section 53A(4) makes it clear that if the court makes a declaration as to the boundaries a further application to the court on a question relating to these boundaries will be incompetent. It also requires the court to send a copy of its declaration as to these boundaries to the Keeper of the Registers of Scotland. New section 53A(5) provides definitions of the terms used in section 53A. New section 53A(6) provides that where a declaration has been made in respect of part only of a boundary it is only that part which is excluded from a further application to the Land Court in terms of section 53A(4)(a).

22 Determination of the Land Court as to croft boundaries

After section 53 of the 1993 Act, there is inserted –

“53A Extent of boundaries

- (1) Where an application is made to the Land Court to determine a question under section 53(1)(c) of this Act (in this section referred to as “the application”), and the conditions in subsection (2) below are met, the Land Court shall declare the boundaries of—
 - (a) a croft; or
 - (b) any pasture or grazing land a right in which forms part of a croft, to be those in existence at the time the application is made.
- (2) The conditions are that—
 - (a) the boundaries of the croft to which the application relates are those accepted as existing for the twenty year period (such boundaries being referred to in this section as the “agreed boundaries”);
 - (b) a plan delineating the agreed boundaries has been submitted to the Land Court;
 - (c) no successful challenge has been made to the agreed boundaries in the twenty year period;
 - (d) no challenge to the agreed boundaries is extant in respect of which the Land Court’s determination might be made before the expiry of the twenty year period; and
 - (e) no documentary evidence submitted to the Land Court in connection with the application contradicts or is inconsistent with the agreed boundaries.
- (3) If any of the conditions in subsection (2) above is not satisfied, the Land Court shall conduct a hearing to determine the application.
- (4) Where a declaration is made under subsection (1) above relating to the boundaries of a croft or of any pasture or grazing land a right in which forms part of a croft—
 - (a) a further application to the Land Court shall be incompetent insofar as it concerns a question under section 53(1)(c) of this Act which relates to the boundaries of that croft or land; and
 - (b) the Land Court shall send a copy of the declaration to the Keeper of the Registers of Scotland.

- (5) In this section—
- (a) “accepted” means—
 - (i) agreed, expressly or impliedly, by both landlord and crofter; or
 - (ii) known to, and acquiesced in by, both landlord and crofter;
 - (b) “boundaries” includes part of a boundary and “agreed boundaries” shall be construed accordingly;
 - (c) references to “challenge” are references to the making of a claim in an application to the Land Court under section 53(1)(c) of this Act;
 - (d) “crofter” includes any predecessors in the tenancy;
 - (e) “landlord” includes any person who, in the past, was entitled to receive the rents and profits, or take possession, of the croft; and
 - (f) the “twenty year period” is the continuous period of twenty years beginning with the date on which—
 - (i) the land bounded by the agreed boundaries was first so bounded; or
 - (ii) the landlord, crofter or, as the case may be, other party challenging the agreed boundaries (including any predecessor in title of such other party) was aware or ought to have been aware of the land being so bounded.”.
- (6) Where a declaration made under subsection (1) relates only to part of the boundaries of a croft or any pasture or grazing land a right in which forms part of a croft, the reference in subsection (4)(a) to the boundaries of a croft or land shall be read as a reference to that part.”.

Section 23: Reorganisation schemes

Section 23 amends sections 38 and 39 of the 1993 Act, inserts a new section 38A and repeals Schedule 4. These measures together change the approach to reorganisation of crofting townships by reducing timescales and allowing for more extensive consultation. The control exerted by Scottish Ministers under the current legislation is largely replaced by detailed provisions aimed at ensuring that interested parties are made aware of the scheme proposals and final version, coupled with a right of appeal to the Land Court. Scottish Ministers have only a limited role in the process and that is where it might involve acquisition of land which is not in crofting tenure.

Section 23(2)(a) amends subsection 38(1) so that it is clear that the initial scheme prepared by the Commission is a provisional proposal. Section 23(2)(b) inserts new section 38(1A) which requires the Commission to notify the persons identified in new section 38(10) of the intention to prepare a provisional draft reorganisation scheme. These persons are:

- each crofter who is a tenant of a croft in the township,
- the landlord of each croft, each relevant grazings committee,
- each relevant grazings committee,
- the owner of each grazing,
- each shareholder in a grazing and
- the occupiers of all contiguous land.

Section 23(2)(c) replaces section 38(3) with a new version. The main change is the addition of section 38(3)(a) which is a new provision to allow the Commission to include land which is not croft land in the scheme but only if Scottish Ministers have consented to the inclusion of that land.

23 Reorganisation schemes

- (1) The 1993 Act is amended as follows.
- (2) In section 38 (reorganisation schemes)—
 - (a) in subsection (1), after the words “prepare a” there is inserted “provisional”;
 - (b) after subsection (1) there is inserted—

“(1A) Before proceeding to prepare a provisional draft reorganisation scheme the Commission must give intimation in writing to each of the persons mentioned in subsection (10) below that the Commission are satisfied as is mentioned in subsection (1) above and that they intend so to proceed.”;
 - (c) for subsection (3) there is substituted—

“(3) A reorganisation scheme may, if the Commission—

 - (a) obtain the prior written consent of the Scottish Ministers, make provision with respect to the inclusion of any land in the vicinity of the township, being land to which this Act does not apply, which in the opinion of the Commission ought to be used for the enlargement of crofts in the township or of a common grazing used exclusively or shared in by the township;
 - (b) think fit, make provision with respect to all or any of the following matters—
 - (i) the admission into the township of new crofters and the allocation to them of shares in the common grazing;
 - (ii) the apportionment for the exclusive use of the township of a part of any common grazing in which it shares;
 - (iii) the inclusion in any croft formed under the scheme of a part of the common grazing or of any land held in runrig;
 - (iv) any other matter incidental to or consequential on the provisions of the scheme.”;
 - (d) in subsection (4)—
 - (i) after the words “reorganisation scheme”, there is inserted “, or provisional draft or draft of such a scheme,”; and
 - (ii) after the words “the scheme” there is inserted “ or, as the case may be, of the provisional draft or draft,”; and

Subsection 23(2)(e) replaces sections 38(5)–(7) with new sections 38(5)–(11). This changes the process for preparing reorganisation schemes and removes the requirement that the scheme must be confirmed by Scottish Ministers. The main change introduced by new section 38(5) is to require the Commission to send a copy of the scheme to and serve notice on the range of people identified in new subsection 38(10) (the current provision only requires that these documents are sent to the tenant of each croft). Some of the content of the notice is different and allows those to whom these documents are sent two months in which to comment (currently four months) and they would not be asked at this stage to indicate specifically whether or not they were in favour of the scheme as had previously been the case. However the notice does still, as at present, indicate a local venue where and times when maps and plans of the reorganisation can be seen.

Where the Commission have received comments on the provisional draft and is still satisfied that there ought to be a reorganisation new section 38(6) requires them to prepare a draft plan which takes account of the comments. The Commission on completion of that draft are required to issue copies and give notice as provided in new subsection 38(5) except the period for responding is one month and that on this occasion the persons to whom the notice is sent are asked to indicate whether or not they are in favour of the draft scheme.

New section 38(7) provides that a failure to respond to the notice given under new section 38(6) is deemed to be an intimation that the person who failed to respond is in favour of the scheme. This provision more or less replicates the last paragraph of the current section 38(5).

New section 38(8) authorises the Commission to finalise a reorganisation scheme provided the majority of the crofters previously given notice of the draft scheme have intimated that they are in favour of the scheme. It also provides that the finalised scheme must be copied to all the persons previously given notice of the draft scheme and they are again given notice of where and when maps and plans can be inspected. In addition the notice advises of the new right to appeal the decision to reorganise the township which section 23(3) of the draft Bill provides (see below).

(e) for subsections (5) to (7), there is substituted—

- “(5) Where, in relation to any township, the Commission prepare a provisional draft reorganisation scheme under subsection (1) above, they shall serve on each of the persons mentioned in subsection (10) below a copy of the provisional draft together with a notice—
- (a) naming a place within the locality in which the township is situated where a copy of the maps and plans prepared by the Commission under subsection (4) above in relation to the provisional draft scheme may be inspected at all reasonable hours;
 - (b) inviting the person on whom the provisional draft and notice are served, within two months of the date of such service, to make in writing to the Commission such comments as they may wish to make on the provisional draft, maps or plans.
- (6) Where, having taken into account comments (if any) made to them by virtue of subsection (5) above, the Commission are still satisfied as mentioned in subsection (1) above, they shall—
- (a) prepare a draft reorganisation scheme in relation to the township taking into account such comments;
 - (b) serve on each of the persons mentioned in subsection (10) below a copy of the draft scheme together with a notice—
 - (i) naming a place within the locality in which the township is situated where a copy of any maps and plans prepared by the Commission under subsection (4) above in relation to the draft scheme may be inspected at all reasonable hours; and
 - (ii) requesting that the person on whom the draft and notice are served, within one month from the date of such service, intimates to the Commission in writing whether or not that person is in favour of the draft scheme.
- (7) Where any person on whom a notice has been served under subsection (6) above fails to comply with the request contained in the notice, that person shall for the purposes of this section be deemed to have intimated to the Commission, in compliance with the request, that the person is in favour of the draft scheme.
- (8) If, within the period of one month mentioned in subsection (6)(b)(ii) above, a majority of the crofters on whom a copy of a draft reorganisation scheme and a notice have been served under that subsection have intimated to the Commission, in compliance with the request contained in the notice, that they are in favour of the draft scheme, the Commission shall, where they remain satisfied as mentioned in subsection (1) above—
- (a) prepare a reorganisation scheme in relation to the township;
 - (b) serve on each of the persons mentioned in subsection (10) below a copy of the scheme together with a notice—

New subsection 38(9) provides that if the Commission proceed with the preparation of a reorganisation scheme in accordance with new section 38(8)(a) that means that the Commission have decided to reorganise the township and therefore a decision which can be appealed has been made.

Subsection 23(3) inserts a new section 38A into the 1993 Act. New section 38A(1) specifies that any tenant of a croft in the township, the landlord of any such croft and the owner of any associated common grazing is able to appeal a Commission decision to reorganise a township or the reorganisation scheme. It further specifies that the appeal is to the Land Court and must be lodged within 42 days of the date a copy of the reorganisation scheme was issued to the appellant under the provisions of new section 38(8).

- (i) naming a place within the locality in which the township is situated where a copy of any maps and plans prepared by the Commission under subsection (4) above in relation to the scheme may be inspected at all reasonable hours;
 - (ii) advising of the right of appeal to the Land Court under section 38A of this Act against the Commission’s decision to reorganise the township or the scheme and the time limit within which an appeal may be made.
- (9) For the purposes of section 38A of this Act, the Commission’s proceeding, under subsection (8)(a) above, to prepare a reorganisation scheme shall be taken to comprise their decision to reorganise the township.
- (10) The persons referred to in subsections (1A), (5), (6)(b) and (8)(b) above and section 38A(2)(b) of this Act are—
 - (a) each crofter who is the tenant of a croft situated in the township;
 - (b) the landlord of each such croft;
 - (c) each grazings committee appointed under section 47 of this Act in respect of any common grazing shared in by each such crofter;
 - (d) each person occupying land which is contiguous to a croft situated in the township;
 - (e) the owner of, and each person who holds shares in, a common grazing associated with the township.
- (11) The requirements of subsections (1A) and (6)(b)(ii) above that intimation be in writing and in subsection (5)(b) above that comments be made in writing are to be taken to be satisfied by the giving of intimation or, as the case may be, the making of comments in a form other than writing which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape).”
- (3) After that section, there is inserted—

“38A Appeal to Land Court: special provision as respects reorganisation schemes

- (1) Any crofter who is the tenant of a croft situated in the township in relation to which a reorganisation scheme is made or the landlord of any such croft or the owner of any common grazing associated with the township may, within 42 days after the Commission serve a copy of the reorganisation scheme on him under section 38(8)(b), appeal to the Land Court against—
 - (a) the Commission’s decision to reorganise the township; or
 - (b) the scheme.

New section 38A(2) sets out what the Land Court may determine in an appeal. It also provides that if the Court requires the Commission to modify the scheme the Commission must send a copy of the modified scheme to all those who previously had an opportunity to comment on the scheme.

Section 23(4) amends section 39 of the 1993 Act. Section 23(4)(a) replaces section 39(1) with a new version, the effect of which is that instead of the Commission, as at present, having a duty to proceed with a reorganisation when the scheme is approved by Scottish Ministers the Commission will instead be constrained not to start to implement the scheme until the period allowed for lodging an appeal has ended, every appeal has been decided and any modification required as a consequence of a successful appeal effected. Section 23(4)(a) also inserts a new section 39(1A). This requires the Commission to give effect to the reorganisation in accordance with the scheme previously prepared (or modified where required to do so by the Land Court on appeal).

Sections 23(4)(b)&(c) make amendments to sections 39(3)&(4) to take account of the fact that the Commission will no longer require to have the scheme confirmed Scottish Ministers.

- (2) In an appeal under this section, the Court may—
 - (a) confirm the decision and the scheme;
 - (b) confirm the decision and require the Commission to—
 - (i) make such modifications to the scheme as the Court directs by the date specified by it; and
 - (ii) serve a copy of the modified scheme on each of the persons mentioned in section 38(10) of this Act; or
 - (c) revoke the Commission’s decision.”.
- (4) In section 39 (putting schemes into effect)—
 - (a) for subsection (1), there is substituted—
 - “(1) The Commission shall not take any steps in discharge of their duties or powers under this section in relation to a reorganisation scheme until (whichever first occurs)—
 - (a) the period of 42 days mentioned in section 38A(1) of this Act has elapsed without any appeal to the Land Court under that section being made; or
 - (b) every such appeal timeously made is—
 - (i) decided and, where by virtue of subsection (2)(b)(i) of section 38A of this Act the Land Court has required modifications to be made to the scheme, those modifications have been made and the Commission have complied with subsection (2)(b)(ii) of that section; or
 - (ii) abandoned.
 - (1A) The Commission—
 - (a) shall put into effect a reorganisation scheme—
 - (i) prepared by them under section 38(8)(a); or
 - (ii) where by virtue of subsection (2)(b)(i) of section 38A of this Act the Land Court has required modifications to be made to the scheme, of which they have served a copy by virtue of subsection (2)(b)(ii) of that section; and
 - (b) may do all such things as are required for that purpose.”;
 - (b) in subsection (3), for the words “shall, on a reorganisation scheme being confirmed by the Secretary of State,” there is substituted “may”;
 - (c) in subsection (7), the words “, on the scheme being confirmed by the Secretary of State,” are repealed;

Section 23(4)(d) amends section 39(8) so that the role of Scottish Ministers in serving notice on occupiers and owners is taken on by the Commission. It also provides for copies of these notices to be sent to Scottish Ministers.

Section 23(4)(e) amends section 39(10) to reflect the repeal of Schedule 4 and section 23(5) repeals Schedule 4.

Section 24: Resumption and reversion

Section 24 makes a number of changes to the handling of resumption of land from crofting tenure including the extension of the definition of “reasonable purpose” to include the generation of energy. It also provides that the Commission can be a party to all resumption hearings before the Land Court. Consequently, the Commission can choose whether to give evidence to a resumption hearing. It empowers the Land Court to allow resumption for a specified period, rather than the permanent arrangement required by the existing legislation. It also empowers the Land Court to determine that payments to crofters as a share in the value of resumed land may be made by instalments rather than in a lump sum. This removes a potential obstacle to the development of land where income is deferred or spread over a lengthy period. Finally, it empowers the Land Court to restore resumed land to crofting tenure in certain circumstances.

Section 24(1)(a) amends section 20(1) of the 1993 Act to extend the matters which the Land Court must take into account when considering a resumption application to include the interests of the crofting community. Section 24(1)(b) inserts new subsections (1A) – 1(F) into section 20. The effect of new section 20(1A) is that the landlord must convene the Commission as a third party to a resumption application. This means that applications which are unopposed by crofters can nevertheless be challenged where there is concern about the impact of or need for resumption. New section 20(1B) allows the Land Court to specify that land is to be resumed for a specified period rather than permanently. New section 20(1C) allows the Land Court to extend that period on request and new section 20(1D) specifies circumstances where the Land Court is bound to extend the period of resumption in line with an extension of a relevant planning consent. New section 20(1F) allows the landlord to apply to the Land Court to turn a resumption for a specified period into a permanent resumption and provides for any necessary further compensation payment or further payment of a share in the value of the land to be made to the crofter.

- (d) in subsection (8)—
 - (i) for the words “Secretary of State shall, on confirming the scheme,” there is substituted “Commission shall”; and
 - (ii) at the end of paragraph (b), there is inserted “, and shall send a copy of each notice served by them under this subsection to the Scottish Ministers” ;
 - (e) in subsection (10)(b), for the words “of the confirmation of the scheme is served on him under paragraph 7 of Schedule 4 to this Act” there is substituted “is served on him under subsection (6) above”.
- (5) Schedule 4 (confirmation of schemes by Scottish Ministers etc.) is repealed.

PART 3

TERMINATION OF TENANCY, DECROFTING, ETC.

24 Resumption and reversion

- (1) In section 20 of the 1993 Act (resumption of croft or part of croft by landlord)—
 - (a) in subsection (1), after the word “interest” there is inserted “or the interests of the crofting community in the locality of the croft”;
 - (b) after that subsection there is inserted—
 - “(1A) A landlord making application under subsection (1) above must, by service of notice on the Commission, convene them as a third party to the application.
 - (1B) Without prejudice to the generality of subsection (1) above, resumption may be authorised under that subsection for a specified period of time (such resumption being in this Act referred to as “temporary resumption” and resumption other than for a specified period of time as “ordinary resumption”) and the land shall revert to being a croft (or to being part of a croft)—
 - (a) on the date on which the period (or as the case may be the period as extended under subsection (1D) below) elapses; or
 - (b) on such earlier date as the Land Court may specify in an order under section 21A(1) of this Act.
 - (1C) Subject to subsection (1D) below, the Land Court may, on the application of the landlord, extend the period specified under subsection (1B) above.

Section 24(2) amends section 21 of the 1993 Act by adding new subsections(1A) to (1C) to provide that the Land Court may direct that sums payable to a crofter in connection with a resumption can be paid by instalments. It also provides for any such direction to be recorded in the Register of Crofts and so made binding on the successors to the landlord.

- (1D) Where a planning permission granted for a limited period subsists for a change of the use of the land, being a change for which resumption was authorised, the Land Court must, on such application, extend the period so specified; but not to a date later than the end of the period specified in the condition under subsection (1)(b) of section 41 of the Town and Country (Scotland) Act 1967 (c.8) to which the permission is subject.
- (1E) In subsection (1D) above, “planning permission granted for a limited period” shall be construed in accordance with subsection (3) of that section.
- (1F) The Land Court may, on the application of the landlord made before the expiry of the specified period of time referred to in subsection (1B) above, determine that a resumption authorised as a temporary resumption is to be taken to be an ordinary resumption; and where such a determination is made—
- (a) subsections (1B) to (1D) above and the exception to subsection (2)(b) of section 21A of this Act shall cease to be applicable as respects the resumption; and
 - (b) the Land Court may determine (either or both)—
 - (i) that the landlord shall make further compensation under subsection (1) above;
 - (ii) that the crofter shall, under section 21(1) of this Act, be entitled to a further share in the value of the land.”.
 - (c) in subsection (3)(a), after sub-paragraph (viii) (but before the word “or” which immediately follows that sub-paragraph), there is inserted—

“(viiiA)the generation of energy;”.
- (2) In section 21 of the 1993 Act (crofter’s right to share in value of land resumed by landlord)—
- (a) after subsection (1) there is inserted—

“(1A) If it thinks fit the Land Court may, having regard to how the purpose for which resumption is authorised is to be carried out, determine that a sum awarded under this section shall be payable in instalments of such amounts and on such dates as it shall specify in the determination.
 - (1B) On making a determination under subsection (1A), the Land Court shall intimate to the Commission that it has done so and provide them with a copy of the determination; and the Commission shall enter that copy in the Register of Crofts.
 - (1C) When so entered the determination shall bind any successor to the landlord as it binds the landlord.”; and
 - (b) in subsection (6), after the word “payable” there is inserted “, or in the case of payment by instalments as from the date when the unpaid balance of such sum is payable,”.

Section 24(3) inserts a new section 21A into the 1993 Act. That new section would allow a landlord of a croft, the person who was the tenant of the land when it was resumed or if the land had been part of a common grazing the owner or the grazings committee to apply to the Land Court to have the land restored to crofting tenure. The court is empowered to agree to the land being returned to crofting tenure provided the self explanatory conditions specified in new subsection 21A(2) are met. If the court were to determine that the land should be restored to crofting tenure new subsection 21A(4) empowers the court to specify that crofters should return all or part of the compensation or share of value paid on resumption. Where the land is to be restored as a common grazing new subsection 21A(5) empowers the court to specify how the question of shares in the grazing is to be dealt with.

(3) After section 21 of the 1993 Act, there is inserted—

“21A Reversion of resumed land

- (1) The Land Court may, on the application of any relevant person and on being satisfied that the conditions specified in subsection (2) below are met, make an order that land, the resumption of which was authorised under section 20(1) of this Act, shall revert to being a croft (or to being part of a croft).
- (2) The conditions are—
 - (a) no standard security over the land subsists;
 - (b) except in the case of a temporary resumption, not less than 5 nor more than 20 years have elapsed since the resumption was so authorised;
 - (c) the purpose for which the landlord desired to resume the croft has not been carried out;
 - (d) no planning permission relating to a change of the use of the land subsists;
 - (e) the land remains suitable for use by crofters for cultivation; and
 - (f) the land is owned by the person who was so authorised.
- (3) For the purposes of subsection (2)(e) above, “cultivate” has the same meaning as in Schedule 2 to this Act.
- (4) Where land reverts by virtue of subsection (1) above, the Land Court may make such order (if any) as it thinks fit as to the repayment, in whole or in part, of any sum awarded as compensation under section 20(1), or any share in value paid by virtue of section 21(1), of this Act.
- (5) Where land which reverts by virtue of subsection (1) above or under section 20(1B) of this Act comprises a common grazing, the Land Court may make such order as it thinks fit as to shares in the common grazing.
- (6) “Relevant person” in subsection (1) above means the Commission, the landlord, the person who surrendered the land or, where the land comprises a common grazing, the owner or the grazings committee.”.

Section 25: Decrofting

Section 25(a) amends section 24 of the 1993 Act so that the Commission are no longer bound in certain circumstances to decroft a croft which has become vacant through Commission action. At present if such a croft remains vacant for 6 months the landlord can within the next 3 months give notice to the Commission requiring the Commission to decroft it. The new provision allows the Commission to apply to the Land Court for an extension of the period in which the croft may remain vacant thus allowing more time to find a suitable new tenant. If the Land Court grants an extension the Commission will become liable to make a payment to the landlord equivalent to the rent which would be due for the period of the extension.

Section 25(b) amends section 25 of the 1993 Act to effect a number of changes. Section 25(1)(a) is amended so that the Commission must in addition have regard to the interests of the local crofting community in determining that a croft shall cease to be a croft. A new section 25(1)(c) is inserted to provide that the special arrangements for decrofting the site of a house would also apply to a croft which had been feued in accordance with the provisions of sections 17 or 18 of the 1955 Act (these were feus of house sites with existing houses to persons who had given up their croft for re-letting. Because there was no provision for decrofting these sites in the 1955 Act they have never been decrofted and thus are still in crofting tenure although no longer associated with other croft land).

Section 25(3) of the 1993 Act is amended to allow the Commission to impose timescales for any new use and new subsections (3A) and (3B) extend the powers of the Commission to enable them to set such time scales for meeting conditions imposed in a crofting direction, to set a time limit within which the land being decrofted is used for the purpose for which it has been decrofted and to modify the conditions that apply to a decrofting direction. However, the power to set new conditions is constrained by the circumstances specified in new subsection (3C).

25 Decrofting

In the 1993 Act—

- (a) in section 24 (decrofting in case of resumption or vacancy of croft)—
 - (i) in subsection (2), after the words “do so” there are inserted the following paragraphs –
 - “(a) forthwith or on the refusal of an application made under paragraph (b) below; or
 - (b) at the end of such further period as the Land Court, on the application of the Commission, may allow;” and
 - (ii) after that subsection there is inserted—
 - “(2A) Where a further period is allowed by virtue of subsection (2)(b) above, the Commission shall be liable to the landlord for an amount equal to the rent which would have been payable for the croft in respect of that period.”; and
- (b) in section 25 (provisions supplementary to section 24(3))—
 - (i) in subsection (1)(a), after the word “interest” there is inserted “or to the interests of the crofting community in the locality of the croft”;
 - (ii) in subsection (1), after paragraph (b) there is added “or
 - “(c) the application is made in respect of a croft the conveyance in feu of which was granted under section 17 or 18 of the 1955 Act”;
 - (iii) in subsection (2), for the words “(1)(b)” there is substituted “(1)(b) or (c)”;
 - (iv) in subsection (3), after the word “conditions” there is inserted “(which may include provision as to timescales)”;
 - (v) after subsection (3) there is inserted—
 - “(3A) Conditions imposed by virtue of subsection (3) above may include a condition that the use be initiated by a time specified in the condition.
 - (3B) The Commission may from time to time modify any conditions so imposed.
 - (3C) No such further direction as is mentioned in subsection (3) above shall be made if—
 - (a) more than 20 years have elapsed since the direction under section 24(3) of this Act;
 - (b) the land, or any part of it, has, since the direction under that section, been conveyed to a person other than the former crofter or a member of the former crofters’ family; or
 - (c) a debt is for the time being secured by way of a standard security over, or over any real right in, the land or any part of it.”;

New sections 25(4A) and (4B) make two changes to the decrofting procedure. Firstly, they require a crofter who is applying for a decrofting direction whilst still the croft tenant to inform the landlord of the application and, secondly, they require that the application should be handled under the provisions of section 58A (inserted by section 5 of the Bill) if implementation of the application would impede access to another part of the croft or other croft land. The effect of this is that where the Commission are not satisfied that the extent of the garden ground is appropriate or access would be impeded, the landlord and any member of the crofting community could object to the proposal. An objection requires the Commission to consider the application and the Commission can also decide to consider the application if any of the criteria set out in new section 58A(9) or in new subsection 25(4C) apply.

Section 25(b) also replaces sections 25(7) and (8) with new subsections (7), (7A) and (8). The main effects are firstly, to require the Commission to notify the landlord, applicant and the public of any decrofting direction they make setting out details of the decision and secondly, to extend the right to appeal that decision in the Land Court to the landlord and other members of the crofting community with the time allowed for making that appeal extended to 6 weeks.

(vi) after subsection (4) there is inserted—

“(4A) Written notice of an application under subsection (4) above made in respect of a part of a croft consisting only of the site of the dwelling-house on or pertaining to the croft shall be given to the landlord by the applicant; and the Commission shall not give a direction by virtue of that subsection on an application so made unless they are satisfied (in addition to what is required by subsection (1)(b) above) that implementation of the proposal would not prevent or impede access to another part of the croft or to other croft land.

(4B) Section 58A of this Act does not apply in the case of an application made under—

(a) section 24(3) of this Act; or

(b) subsection (4) above,

other than as mentioned in subsection (4A) above.

(4C) In the case of an application made as mentioned in subsection (4A) above, the following special conditions apply for the purposes of section 58A(6)(b)(ii)—

(a) that the application appears to relate to ground which is not part of the croft;

(b) that the extent of garden ground included in the part of the croft to which the application relates is excessive; and

(c) that implementation of the proposal would prevent or impede access to another part of the croft or to other croft land.”; and

(vii) For subsections (7) and (8) there is substituted—

“(7) The Commission shall give both—

(a) notice in writing to the applicant; and

(b) public notification,

of their direction on an application made to them under the said section 24(3) or subsection (4) above, specifying the nature of and the reasons for the direction and, as the case may be, for any conditions imposed in the direction.

(7A) The Commission shall—

(a) give written notification to the owner of land—

(i) to which a further direction under subsection (3) above relates of the making of that direction; and

(ii) of the modification, under subsection (3B) above, of a condition which relates to that land; and

(b) give public notification of those matters.

Section 26: Re-letting

Section 26 amends section 23 of the 1993 Act. By replacing section 23(3) it removes the right of the landlord to seek the consent of Scottish Ministers to a re-let when the Commission have not consented to the re-let. It also inserts a new section 23(3A) which requires the landlord to provide certain information in the application for approval of a re-let. The procedure set out in new section 58A (inserted by section 5 of the Bill) will apply to the process of obtaining Commission approval and new section 23(3B) sets out the additional criteria which will apply to consideration of a re-let case. Section 26(b) makes changes consequential to the removal of the right to seek the consent of Scottish Ministers by amending section 23(5). The new section 23(5B) also requires the Commission to seek by public notification prospective tenants for the croft where the landlord has failed to find a suitable tenant.

- (8) As regards—
- (a) a direction (including a condition in a direction) by the Commission on an application—
 - (i) under section 24(3) above, the applicant or any member of the crofting community in the locality of the land;
 - (ii) under subsection (4) above, the applicant or the owner of the land, may within 42 days after the giving of public notification of the making of the direction;
 - (b) a notification under subsection (3) above, of a condition which relates to land, the owner, or any tenant of the land or any member of the crofting community in the locality of the land, may within 42 days after the giving of public notification of the modification; or
 - (c) a further direction under subsection (3) above, the owner, or any tenant, of the land, may within 42 days after the making of that direction,
- appeal to the Land Court who may hear or consider such evidence as it thinks fit in order to enable it to dispose of the appeal.”.

26 Re-letting

In section 23 of the 1993 Act (vacant crofts)—

- (a) for subsection (3) there is substituted—

“(3) The landlord of a croft shall not, without the approval of the Commission, let the croft or any part of it to any person; and any letting of the croft otherwise than with such approval shall be null and void.
- (3A) Subsection (3) above is subject to section 29A(5)(a) of this Act.
- (3B) In the case of an application made by virtue of subsection (3) above, the following special conditions apply for the purposes of section 58A(6)(b)(ii) of this Act—
 - (a) that the proposed tenant lives, or intends to live, within 16 kilometres of the croft;
 - (b) that he already owns or is tenant of a croft;
 - (c) that he lacks the knowledge, abilities and experience to cultivate the croft or as the case may be to put it to such other purposeful use as he intends;
 - (d) that he is the grazing clerk, a member of the grazings committee, the owner of the common grazings or a member of the landlord’s family;

Section 27: Short Term croft tenancies

Section 27 introduces the new concept of “short-term croft tenancy” which enables an owner-occupier of an untenanted croft to let the whole or any part of the croft for a period of up to ten years without the tenant becoming a crofter. It does this by inserting new section 29A, 29B & 29C into the 1993 Act.

Subsection (1) of section 29A defines who may let a croft on a short term tenancy. It does so in a way which ensures this option is only available to a person who has been the croft tenant and has bought the croft or the successor in title to such a person. Section 29A(3) is a provision which ensures that a short term croft tenancy cannot be construed to be a croft tenancy or a tenancy under the Agricultural Holdings (Scotland) Acts. New section 29A(4) means that where the owner is eligible to let the croft on a short term croft tenancy and lives on or within 16 kilometres of the croft he may let the croft on a short term croft tenancy without requiring the consent of the Commission to do so. New section 29A(5) and (6) specify certain information about a short term croft tenancy which must be given to the Commission. New section 29A(7) provides that there must be a gap of at least 28 days between the end of one short term tenancy and the start of another tenancy involving the same tenant. New sections 29A(8) limits the number of crofts that can be included in a short term tenancy and imposes a proximity requirement.

- (e) where the landlord is not a natural person, that the proposed tenant is a member or employee, or is a member of the family of a member or employee, of the body which constitutes the landlord; and
 - (f) that there are reasonable grounds for concern over the use to which the proposed tenant intends to put the croft.”;
- (b) in subsection (5)—
- (i) at the beginning there is inserted “Subject to subsection (5A) below,”; and
 - (ii) for the words from “the Commission refuse” to the end of the proviso there is substituted—
- “the Commission’s approval of them is not obtained, the Commission must proceed in accordance with subsections (5B) and (5C) below.
- (5A) Where the croft is declared vacant in pursuance of section 11(8) of this Act, if, within a period of four months from the giving of notice under that section, the proposals required by that notice to be submitted are not submitted or the Commission’s approval of them is not obtained, the Commission must proceed in accordance with subsections (5B) and (5C) below.
- (5B) The Commission shall, by public notification, invite applications for tenancy of the croft within such period as shall be specified in the notification.
- (5C) When that period has elapsed, the Commission shall determine—
- (a) to which of the applicants (if any) to let the croft; and
 - (b) in consultation with the landlord, on what terms and conditions.”.

27 Short-term croft tenancies

After section 29 of the 1993 Act, there is inserted—

“29A Short-term croft tenancies

- (1) An owner of an untenanted croft which he or a predecessor in title acquired—
 - (a) on an application under section 1 of the Crofting Reform (Scotland) Act 1976 or section 12 of this Act; or
 - (b) by agreement, where failure to agree would have allowed such application,
 may, under this section, let the croft (or any part of it) for a period not exceeding 10 years for the purpose of its being cultivated by the tenant.
- (2) A tenancy under subsection (1) above may be referred to as a “short-term croft tenancy”.

New section 29B provides that an end date for a short term croft tenancy must be specified in the lease, that such a tenancy may not be extended on a year to year basis and that a short term croft tenant cannot assign or sublet the tenancy.

- (3) The tenant (in this Act referred to as a “short-term tenant”) is not a crofter for the purposes of this Act and accordingly is not subject to the conditions set out in Schedule 2 to this Act; nor is the tenancy a 1991 Act tenancy (within the meaning of the Agricultural Holdings (Scotland) Act 2003) or a short limited duration tenancy or limited duration tenancy (within the meaning of that Act of 2003) or a tenancy to which section 3 of that Act of 2003 applies.
- (4) This section is without prejudice to section 23 of this Act except that subsection (3) of that section does not apply to a short-term croft tenancy if the owner resides on, or within 16 kilometres of, land comprised in the lease.
- (5) The owner must—
 - (a) in applying to the Commission for any approval required by section 23(3) of this Act, include in that application;
 - (b) where no approval is so required, forthwith on letting, give notice thereof to the Commission and include in that notice,

the following information—

 - (i) the name and address of the short-term tenant;
 - (ii) the name and address of the owner; and
 - (iii) the name, location, rent and extent of the land comprised in the lease.
- (6) There must be appended to the application or notice an Ordnance Map on which are delineated the boundaries of the land comprised in the lease, the scale being not less than 1:10,000.
- (7) After the termination of a short-term croft tenancy, the owner may not, until at least 28 days have passed after the date of termination, enter into a further such tenancy of land comprised in the lease with the person who was the short-term tenant.
- (8) In subsection (1) above, the expression “croft” may be construed as comprising more than one croft provided that they both or all are in close proximity one to another and are cultivated as a unit; but the expression shall not be construed as comprising more than four crofts.
- (9) For the purposes of subsection (1) above, “cultivate” has the same meaning as in Schedule 2 to this Act.

29B Further provision as respects short-term croft tenancies

- (1) The lease constituting a short-term croft tenancy must specify a date of termination.

New section 29C makes provision for termination of a short term croft tenancy other than at the actual termination date. It provides that it may be ended by agreement at any time and must (except in certain specified circumstances) end on the death of either the owner or the short term tenant. It also requires that, if the lease did not require the consent of the Commission because the owner lived on or within 16 kilometres of the croft, it should terminate if the owner ceases to do so. In addition it provides for termination of the lease six months after the sale of the croft unless notice of the intention to sell has been given in which case it will terminate at the end of the notice period or 6 months from the date of the notice or the date the conveyance of the land is registered whichever is the latest.

New section 29C(2) provides that when the owner dies the short term croft tenant may apply to the Commission for permission to remain on the land for a period of up to one year. New section 29C(3) requires the Commission to consider whether or not by agreeing or rejecting such an application there would be hardship for either the successor to the deceased crofter or the short term tenant.

- (2) A short-term croft tenancy is not capable of renewal or continuation by tacit relocation.
- (3) It shall not be competent for the short-term tenant to assign the lease or sublet the land comprised in the lease.

29C Termination of short-term croft tenancy other than at specified date of termination

- (1) A short-term croft tenancy—
 - (a) may before the date specified under section 29B(1), be terminated by agreement between the owner and the short-term tenant;
 - (b) subject to subsections (2) to (6) below, is terminated (irrespective of any agreement under paragraph (a) above) on the occurrence of any of the following—
 - (i) the death of the owner;
 - (ii) the death of the short-term tenant;
 - (iii) if such notice as is required by virtue of subsection (5) below has been duly given, the later of there being registered a conveyance in implement of a contract of sale of land comprised in the lease and the period of notice expiring;
 - (iv) if that notice is given but by reason only of being less than six months is not duly given, the later of there being registered such a conveyance and the expiry of the period of six months after the notice is given;
 - (v) if that notice is not given or, not being as described in sub-paragraph (iv) above, is not duly given, the expiry of the period of six months after there being registered such a conveyance;
 - (vi) in a case where the consent of the Commission was not required for the letting, on the owner ceasing to reside on, or within 16 kilometres of, land comprised in the lease.
- (2) Where a short-term croft tenancy comes to an end by virtue of sub-paragraph (i) of subsection (1)(b) above the Commission may, on an application in that behalf made to them, within one month (or such longer period not exceeding three months as they may in all the circumstances think reasonable) after the death, by the former short-term tenant make an order permitting him to remain in occupation of land comprised in the lease for such period, not exceeding one year after the death, as may be specified in the order.

New section 29C(4) ensures that the short term tenant cannot be evicted if an application has been made to the Commission until after the Commission reaches a decision on that application.

New section 29C(5) provides that a lease of a short term tenancy must include a condition requiring the owner to give the tenant 6 months notice of an intention to sell the croft.

New section 29C(10) provides that the terms of a short term croft tenancy may include provisions on irritancy. Irritancy is the right of the landlord to terminate a lease as a result of the breach by the tenant of the terms of the tenancy and the tenant having failed to remedy that breach as required.

- (3) Before making any order under subsection (2) above, the Commission shall consult the deceased's executor and shall take into account any potential hardship—
 - (a) their making it might cause the deceased's successor; or
 - (b) their not making it might cause the former short-term tenant.
- (4) No proceedings for the removal of the former short-term tenant from the land comprised in the lease shall be taken by the deceased's successor before the expiry of the period within which an application may be made under subsection (2) above or, if an application is so made, before the date of the determination by the Commission of that application.
- (5) The lease constituting a short-term croft tenancy must specify that the owner shall give the short-term tenant not less than six months written notice of any intention to sell land comprised in the lease.
- (6) Where a short-term croft tenancy would, but for this subsection, come to an end by virtue of sub-paragraph (vi) of subsection (1)(b) above, the owner (whether he has yet ceased to reside as mentioned in that sub-paragraph) may apply to the Commission for a determination that the lease should not be, or as the case may be has not been, affected by his change in residence.
- (7) If the short-term tenant is in breach of the tenancy agreement the owner may so inform him and in doing so must give him reasonable opportunity to remedy the breach.
- (8) Where notwithstanding that opportunity the short-term tenant remains in breach of the tenancy agreement, the owner may apply to the Land Court for an order requiring that the breach be remedied within a period specified in the order; and such order may require the short-term tenant to pay compensation to the owner for the breach.
- (9) If an order is made by virtue of subsection (8) above but is not complied with, the owner may apply to the Land Court for an order terminating the short-term croft tenancy.
- (10) The lease constituting a short-term croft tenancy may make provisions for irritancy.”.

Section 28: Compensation for improvements for purposes other than cultivation or grazing etc.

This provision reflects the introduction of the concept of using a croft for another purposeful use (defined at Schedule 2 paragraph 3(b) or use of common grazing land for other purposes defined in new section 50B). It alters the existing effect of section 30 of the 1993 Act which deals with compensation payable to the crofter by the landlord in respect of improvements to the croft. It means that a landlord will be required to compensate a crofter for things that the crofter does in order to use the croft for a non agricultural purpose only if the landlord has previously agreed to do so.

This reflects the fact that these things may be of no value to either the landlord or an incoming croft tenant. It also reflects the fact that the croft tenant could readily realise the value of such improvements by assignation or purchase and sale of the croft. New section 30(6A) specifies what would not be considered an improvement for the purposes of section 30 and new section 30(6B) qualifies that by indicating that the works mentioned in new section 30(6A) will be classed as improvements if the landlord has agreed in a writing that the croft can be used as proposed.

It is worth noting that in many instances the provisions of Schedule 3 of the 1993 Act would be likely to preclude any entitlement for compensation. However, this new provision would impart greater clarity and certainty for both parties.

Section 29: Use of Common grazings

This section introduces a number of changes connected with common grazings and their uses.

Section 29(1) makes changes to section 50 of the 1993 Act. It inserts six new subsections which deal with modification of matters relating to consent by the owner and use of woodlands.

New section 50(2A) restricts the right of the owner of common grazings land to refuse consent for crofter forestry purposes by specifying the grounds on which consent may be refused. The grounds on which consent can be refused are intended to cover the situations in which there would be a loss or harm to the interests of the owner or a crofter if the planned crofter forestry scheme proceeded. It also specifies that a refusal of consent must be in writing giving reasons for refusal. New section 50(2B) further provides that a failure to give or refuse consent within 6 weeks is to be treated as refusal of consent. In the event that consent is refused or granted with conditions the crofters have the right to appeal that refusal of consent in the Land Court. New section 50(2C) specifies what the Land Court may do if it determines that the refusal of consent was unjustified.

28 Compensation for improvements for purposes other than cultivation or grazing etc.

In section 30 of the 1993 Act (compensation to crofter for improvements), after subsection (6) there is inserted—

“(6A) Subject to subsection (6B) below, in this Act “improvement” does not include anything erected or carried out wholly for—

- (a) putting a croft to such other purposeful use as is mentioned in paragraph 3(b) of Schedule 2 to this Act; or
- (b) using part of a common grazing for a purpose other than is mentioned in paragraph (a) or (b) of section 50B(1) of this Act.

(6B) Subsection (6A) above does not apply if—

- (a) in any written consent given under section 5(6)(a) of this Act as respects the use in question, the landlord agrees that the subsection should not apply; or
- (b) before the Commission approve under section 50B(8) of this Act implementation of the proposal for the use in question, the owner gives written intimation to the proposer that, as respects that use, he so agrees.”.

PART 4

COMMON GRAZING

29 Use of Common Grazing

(1) In section 50 of the 1993 Act (use of common grazings for forestry purposes)—

(a) after subsection (2) there is inserted—

“(2A) An owner may refuse consent on (and only on) the grounds that implementation of the proposal would—

- (a) adversely affect the exercise of any rights which he has under or by virtue of Schedule 2 to this Act;
- (b) prevent an intended resumption by virtue of section 20(1) of this Act;
- (c) be detrimental to the sound management of the estate which comprises the land;
- (d) cause hardship to a crofter who shares in the common grazing;
- (e) cause the owner undue hardship; or
- (f) lessen significantly the amenity of (either or both)—
 - (i) the land;
 - (ii) its surrounding area,

and without prejudice to subsection (2B) below any refusal shall be in writing and shall specify the grounds of refusal.

New section 50(3C) makes clear that responsibility for the cost of fencing land enclosed for crofter forestry and for subsequent maintenance, repair and renewal of that fence rests with the grazings committee or where there is no grazings committee with the crofters sharing in the grazing.

- (2B) If, within six weeks after application under subsection (1)(b) above, there has neither been written consent nor written refusal, the owner shall be deemed to have refused the application.
- (2C) If, on an appeal under section 52A of this Act in relation to—
- (a) the refusal of an application under subsection (1)(b) above; or
 - (b) conditions to which, under subsection (2)(bb) above, consent is given,
- the Land Court is satisfied that the owner is not justified in refusing consent, it may determine that, provided approval under subsection (1)(a) above is obtained for the use in question, the consent is to be deemed given.”;
- (b) after subsection (3) there is inserted—
- “(3A) The Commission shall, on receipt of any application under subsection (1)(a) above, consult as regards the proposal the owner, the crofters who share in the common grazing and such other persons as appear to the Commission to have an interest.
- (3B) The reference in subsection (1) above to using as woodlands is to having the right to exclusive economic and recreational use, including (without prejudice to that generality)—
- (a) felling, removing, selling and replacing the trees in question;
 - (b) collecting trimmings, fallen timber, foliage, flowers, fruit, seeds and nuts for use or sale;
 - (c) grazing animals in the woodlands; and
 - (d) selling timber, timber products and other forestry products.
- (3C) Where the owner’s consent is, under subsection (2)(bb) above, subject to a condition that land be fenced, or otherwise enclosed, any expenditure incurred in complying with that condition (including expenditure incurred in that connection in maintenance, repair or renewal) shall be met—
- (a) in a case where the applicant is the grazings committee, by that committee, and
 - (b) in any other case, jointly and severally by the crofters sharing in the common grazing.”; and
- (c) in subsection (4), for the definition of “landlord’s consent”, there is substituted—
- ““owner’s consent” means the consent of the owner referred to in subsection (1)(b) above (or a deemed such consent);”.

Section 29(2) inserts new sections 50A and 50B into the 1993 Act. New section 50A provides scope for joint forestry ventures between the owner of the common grazing and crofters. It provides for the crofters and owner to make agreements which are binding on their successors and which can be amended at a later date only by agreement. It provides in section 50A(2) for the possibility of such agreements including existing trees. It also provides (new section 50A(3)) for a copy of such an agreement to be held by the Commission and in terms of section 50A(4) for such agreement to be amended by written agreement also lodged with the Commission. It also makes provision in new sections 50A(5) – (7) for the parties to resolve, in the Land Court, any disputes that arise as to value of the trees or the size of the entitlement to a share of the timber produced.

(2) After section 50 of the 1993 Act, there is inserted –

“50A Joint forestry ventures etc.

- (1) A crofter who holds a right in a common grazing, or a grazings committee, may, with the agreement of the Commission, enter into a written agreement with the owner of the common grazing that they shall engage in a joint forestry venture to use woodlands as part of the common grazing concerned; and subject to subsection (4) below that agreement shall bind the parties to it and their successors.
- (2) Subject to the terms of any agreement under subsection (1) above, where there are, on part of a common grazing which is to be used as woodlands by virtue of section 50 of this Act, trees other than such as are mentioned in paragraph 11(d) of Schedule 2 to this Act, the owner and the grazings committee may agree—
 - (a) that those trees are to be sold to the committee at current value; or
 - (b) that the owner is to be entitled to a share of the timber obtained from such use, being a share which is proportionate having regard to the numbers, respectively, of those trees and of the trees planted (or obtained from planned natural regeneration of the trees planted) in the course of such use.
- (3) Where an agreement is entered into under subsection (1) or (2) above, a copy of that agreement shall be lodged with the Commission.
- (4) The persons who for the time being are bound by the agreement in question may by written agreement lodged with the Commission under this subsection amend the agreement lodged under subsection (3) above (or as the case may be that agreement as last amended under this subsection).
- (5) Any person who is for the time being bound by an agreement under subsection (2) above may appeal to the Land Court against a valuation carried out by virtue of paragraph (a), or the assessment of a share entitlement carried out by virtue of paragraph (b), of that subsection.
- (6) In an appeal under subsection (5) above, the Land Court may reassess the value or entitlement in question.
- (7) The valuer whose valuation is appealed against may be a witness in the appeal proceedings.
- (8) In subsection (2)(b) above “planned natural regeneration” means regeneration which takes place in accordance with—
 - (a) an agreement entered into under or by virtue of this Act or any other enactment; or
 - (b) the conditions of—
 - (i) any grant for purposes which include such regeneration and which is paid out of the Scottish Consolidated Fund; or
 - (ii) such other grant of a public nature as may be prescribed.

New section 50B provides that common grazings may be used by crofters for purposes other than those such as grazing, forestry, peat-cutting, use of seaweed and use of heather and grass for roofing which are currently permitted. This would require agreement of those crofters with shares in a common grazing and approval of the Commission (the Commission decision would be subject to a right of appeal to the Land Court by a shareholder or the owner of the common grazing in terms of section 33).

Section 50B creates a process for making and considering a proposal to put a common grazing to another use. New section 50B(1) identifies who may propose an alternative use for a part of the common grazing. New section 50B(2) provides that the proposed new use cannot be one which is detrimental to the current use of other parts of the common grazing or to the owner's interests.

New section 50B(3) requires the grazings committee on receipt of a proposal to convene a meeting of the shareholders in the grazing to consider the proposal and new section 50B(4) sets out requirements which are to be incorporated into grazings regulations. These cover the method of convening such a meeting, consultation with the owner before the meeting, making the owner's views known to the meeting, conducting the vote, declaring the result of the vote and communicating the details of the decision of the meeting and the detailed results of the vote to the owner after the meeting.

50B Use of common grazing for other purposes

- (1) A crofter who holds a right in a common grazing may propose to the grazings committee that a part of the common grazing be used other than for—
 - (a) grazings or a purpose mentioned in section 52(9) of this Act; or
 - (b) woodlands.
- (2) The use proposed must not be such as would be detrimental to—
 - (a) the use being made, as at the time of application, of the other parts of the common grazing; or
 - (b) the interests of the owner.
- (3) On receipt of a proposal made under subsection (1) above the grazings committee shall, for the purpose of there being a discussion and vote on the proposal, summon a meeting of the crofters who share in the common grazing.
- (4) Regulations under section 49(2)(g) of this Act shall, in relation to any meeting so summoned, provide that—
 - (a) the time, place and purpose of the meeting (including the proposal in question) should be—
 - (i) set out in a notice sent by registered post to each of those crofters and to the owner; and
 - (ii) intimated by public notification, at least 28 days before the meeting; and
 - (b) the grazings committee shall, in sending such notice to the owner—
 - (i) invite him to give his views as to the proposal; and
 - (ii) afford him the opportunity to discuss it, at such reasonable time before the meeting as is convenient to him, with a member of the committee;
 - (c) at the meeting any views so given (or disclosed in discussion) shall be made known to the crofters attending;
 - (d) the vote on the proposal shall be by simple majority of those crofters attending on a show of hands, except that a crofter who is unable to attend but who has notified the committee of that circumstance may vote by proxy or by post (provided that any vote posted shall be valid only if received by the committee before the meeting);
 - (e) the result of the vote shall be declared at the meeting; and

New section 50B(5) provides that if there is a vote at the meeting in favour of the proposal the grazings committee must seek approval of the proposal from the Commission before they implement it.

New sections 50B(6) – (8) specify how the Commission should consider the matter and reach a decision. Furthermore if that decision is to approve a proposal new section 50B(8) provides how the Commission may deal with a proposal and if they approve the implementation of the proposal, how they may later review their decision.

New section 50B(9) requires the Commission to impose a condition requiring provision of a deer-proof barrier around the land affected by a proposal where the owner asks for it to be provided and the Commission consider that the implementation of the proposal would make the land more attractive to deer.

New section 50B(10) provides how the Commission will communicate their decision. It is important to note that the appeal provisions in new section 52A (see section 33 of the draft Bill) will apply to the decision by the Commission.

- (f) the owner shall be advised, by written notice given within two weeks after the meeting takes place, of its outcome (that is to say, of whether the proposal has been accepted or rejected, of the number of crofters present and of the numbers, including those voting by proxy or by post, who respectively voted for, voted against and abstained) and, if the vote is in favour of the proposal, of what subsection (5) of this section requires to be done.
- (5) If the vote is in favour of the proposal the committee shall, in such manner as the Commission may require, seek their approval for its implementation.
 - (6) On receipt of an application under subsection (5) above the Commission shall—
 - (a) consult, as regards the proposal, the owner and any other person who appears to the Commission to have an interest; and
 - (b) give public notification—
 - (i) that the proposal has been made;
 - (ii) that they are considering whether to approve it; and
 - (iii) inviting written comments within such period as shall be specified in the notification.
 - (7) The Commission or assessors appointed by them may, if the Commission think fit, hear evidence as regards the proposal.
 - (8) The Commission may approve or reject the implementation of the proposal; and if they give their approval they may, if they think fit, impose conditions as respects that implementation; and they may, if requested by the grazings committee or the owner to review that implementation, carry out such a review, vary or withdraw any such conditions, impose further conditions or revoke the approval.
 - (9) Where, in the opinion of the Commission, implementation of the proposal is likely to result in the land to which the proposal relates becoming more attractive to deer they must, if they give approval and the owner so requests, impose under subsection (8) above a condition that the land is to be enclosed by means of a deer-proof barrier (as defined by section 45(1) of the Deer (Scotland) Act 1996 (c.58)).
 - (10) Within two weeks after coming to a decision as respects implementation of the proposal, the Commission shall advise—
 - (a) the proposer;
 - (b) the grazings committee;
 - (c) the owner; and
 - (d) every person who submitted written comments by virtue of subsection (6), or gave evidence by virtue of subsection (7), above,

Section 30: New Common Grazings

This provision inserts a new section 51A into the 1993 Act to provide for the creation of a new common grazing by a land owner. New section 51A(1) empowers the Commission acting on an application from the owner of the land to record eligible land as a common grazing in the Register of Crofts. Such change cannot be recorded until any appeals against such change have been decided. New section 51A(2) – (4) details how the Commission should go about considering and determining an application.

New section 51A(5) defines what constitutes eligible land for the purposes of this section. New section 51A(5)(c) excepts land adjacent to a croft (because such land can be turned into common grazing land under existing provisions of the 1993 Act).

as to the decision and as to any conditions imposed under subsection (8) above; and where the decision is to approve implementation but subsequently they vary or withdraw conditions, impose further conditions or revoke the approval they shall, within two weeks after doing so, advise those same persons accordingly.”.

30 New Common Grazing

After section 51 of the 1993 Act, there is inserted –

“51A New Common Grazing

- (1) The Commission shall have power, on the application of the owner of any eligible land, to constitute the land as a common grazing by entering it as such, in accordance with section 41 of this Act, in the Register of Crofts; but no such entry shall be made until the period mentioned in section 52A(3) of this Act has elapsed without any appeal to the Land Court being made or until any such appeal timeously made is decided or abandoned.
- (2) The Commission shall, on receipt of any such application, give public notification of it; and such notification shall specify a period within which written comments as regards the application may be made.
- (3) After the period mentioned in subsection (2) above has elapsed the Commission—
 - (a) shall determine whether to exercise their power under subsection (1) above; and
 - (b) shall give public notification of that determination.
- (4) In so determining the Commission shall have regard to—
 - (a) such written comments, if any, as are timeously made by virtue of subsection (2) above;
 - (b) the public interest and the interests of the crofting community in the locality of the land; and
 - (c) whether social or economic benefits might be expected as a consequence of so constituting it.
- (5) Land is eligible land for the purposes of subsection (1) above only if it is—
 - (a) neither tenanted nor occupied by a cottar;
 - (b) situated in the crofting counties but not constituted as a croft; and
 - (c) not adjacent or contiguous to a croft.

New sections 51A(6) and (7) provides that where a new common grazing is created the parties must agree in writing how the land is to be used, that this agreement is binding on the parties and their successors, that it may only be amended by agreement and that a copy of the agreement will be held by the Commission. It should be noted that since the parties would remain bound by the agreement the procedure for enabling the use of parts of the common grazing for other purposes and for crofter forestry, insofar as they allow for an owner's refusal of consent to be overridden, will not be relevant to new grazing.

New section 51A(8) applies section 6 of the 1993 Act with the effect that the land will be treated as a croft for rent purposes.

Section 31: Contravention of, or failure to comply with, common grazings regulations

Section 31 amends the provisions of section 52 of the 1993 Act so as to provide a new means of enforcing common grazings regulations. The existing criminal offence will cease to apply as a result of the replacement of the existing section 52(1) with a new section 52(1).

A new procedure is put in place by means of new sections 52(1) – 52(1F). These provisions provide for the Commission to intervene at the request of the owner or grazings committee where grazings regulations are not being observed. If the Commission are asked to intervene new section 52(1A) requires them to give notice of the contravention to the person accused of not observing the regulations, the grazings committee and the owner. The Commission are thereafter required by new section 52(1B) to allow all these parties to make representations about the allegation and are also to hear evidence.

If the Commission determine there has been a contravention of or failure to comply with grazings regulations in terms of new section 52(1C) they can require the offender to comply with the regulations and make good any damage. Where an offender does not so comply, new section 52(1D) allows the Commission to either determine that all or part of that person's share in the common grazing is suspended or, if the person is required to make good damage to the grazing, to allow a further period for that to be done. New section 52(1E) provides that when a grazing share has been suspended and a requirement imposed by the Commission is still not complied with the Commission can determine that the share is terminated and apportion it to the other shareholders. New section 52(1F) clarifies what other rights are included within the meaning of the term grazing share.

- (6) The owner and the persons who are to share in the common grazing shall agree in writing what the uses of the common grazing are to be; and subject to subsection (7) below that agreement shall bind –
 - (a) the owner and those persons; and
 - (b) the successors of the owner and of those persons,
 and a copy of the agreement shall be lodged with the Commission.
- (7) The persons who for the time being are the owner and the persons sharing in the common grazing may by written agreement lodged with the Commission under this subsection amend the agreement lodged under subsection (6) above (or as the case may be that agreement as last amended under this subsection).
- (8) Section 6 of this Act applies in relation to land constituted as a common grazing under this section as it applies in relation to a croft.”.

31 Contravention of, or failure to comply with, common grazings regulations

In section 52 of the 1993 Act (miscellaneous provisions as to common grazings etc.), for subsection (1) there is substituted—

- “(1) Where it is averred by the grazings committee or the owner that a person has contravened, or failed to comply with, any common grazings regulations for the time being in force under section 49 of this Act, the committee or as the case may be the owner may apply to the Commission for a determination in the matter.
- (1A) On receipt of an application made under subsection (1) above the Commission—
 - (a) shall serve notice on the person of the averment; and
 - (b) shall send a copy of that notice to the grazings committee and to the owner.
- (1B) The person, the committee and the owner shall all be afforded the opportunity to make representations as regards the averment and the Commission or assessors appointed by them may, if the Commission think fit, hear evidence in the matter.
- (1C) If the Commission determine that the averred contravention or failure has occurred they may require the person to conform with the regulation in question and to make good, within such reasonable period as they shall specify, any damage which has directly resulted from the occurrence.

It is important to note that each determination by the Commission under sections 52(1C),(1D) and (1E) is subject to the appeal provisions in new section 52A – see section 33 of the draft Bill. This therefore affords the person accused of a breach to challenge the Commission’s actions in court at each stage.

Section 32: Schemes for development

Section 32 introduces a set of concepts designed to enable development of croft land for non-crofting use while retaining the role of the Land Court in ensuring that the interests of crofters are protected and maximising the scope for retaining land in crofting tenure. It does this by means of section 32(1) which inserts a new section 19A into the 1993 Act. New section 19A allows a landlord or owner to apply to the Land Court for consent to develop croft land and common grazing in accordance with a scheme which is to accompany the application. The scheme could include the ending of all or some of crofters’ rights on that land or make different arrangements for different parts of the land. This ending of rights would be binding upon both crofters and their successors in tenancy. The most useful example of the flexibility this approach allows would be where a development is built on one area of land (which might be fenced off with no access for grazing), while rights to burn heather or shoot ground game are ended on a neighbouring stretch in order to secure the future operation of the development.

New section 19A(1) provides that an application to make a scheme may be made by the landlord (or owner) or an agent for the landlord or owner. The application can include land adjacent to the croft land or common grazing if there is an effect on the rights and liabilities relative to the croft land or common grazing. The proposed scheme is to accompany the application.

New section 19A(2) provides the criteria such a scheme must meet in order to obtain the Land Court’s consent to it. Firstly, the development has to be for a reasonable purpose and as new section 19A(3)(a) indicates this means the same as it would mean in the context of resumption and decrofting. Secondly, the development must not be unfair and what is unfair is explained in new section 19A(3)(b). Thirdly, the scheme must provide for recompense, defined in new section 19A(3)(c), to each member of the crofting community (crofting community for this purpose is defined in section 37) and that new section also sets a minimum acceptable amount of compensation that is to be paid to each member of the community. Finally, the development must be one which would be likely to bring benefits to the community at least comparable with the benefit which could be achieved if the development had progressed by other means.

- (1D) Where a requirement imposed under subsection (1C) above is not complied with (but subsection (1E) below does not apply) the Commission may—
- (a) determine that all or part of the person’s share in the common grazing is suspended for such period as they shall specify; and
 - (b) may, if the non-compliance consists in a failure to make good damage within the period specified under subsection (1C) above, require it be made good within such further period as they may specify.
- (1E) Where, while the person’s share in the common grazing is suspended by virtue of subsection (1D) above, a requirement imposed under subsection (1C) or as the case may be (1D) above is not complied with, the Commission may—
- (a) determine that all or part of that share is terminated; and
 - (b) apportion the share or part to other persons sharing in the common grazing.
- (1F) Reference in this section to a share in the common grazing includes reference to any rights and privileges pertaining to that share. ”.

PART 5

SCHEMES FOR DEVELOPMENT

32 Schemes for development

- (1) After section 19 of the 1993 Act, there is inserted—

“19A Schemes for development

- (1) The landlord (or owner), or any person acting with the consent of the landlord (or owner), may by application to the Land Court seek its consent to—
- (a) croft land or common grazing; or
 - (b) land near to croft land or common grazing if rights and liabilities in relation to the croft land or common grazing would be affected, being developed in accordance with a scheme appended to the application.
- (2) Such consent is not to be given unless the Court is satisfied—
- (a) that the development is for a reasonable purpose;
 - (b) that to carry it out would not be unfair;
 - (c) that the scheme provides for there to be fair recompense to each member of the crofting community in the area affected by the development for the effects of the development (including, in relation to the croft land of each such member, compensation at least equivalent to the compensation which the member might be expected to have obtained had that croft land been resumed);

New sections 19A(4) and (5) make provision for the Land Court to specify the form in which the application must be made, the form and content of the scheme to accompany the application and to set the amount of court fees.

New section 19A(6) ensures that details of the application are made public by requiring the applicant to give public notification of it (public notification is defined in new section 55A inserted by section 35 of the Bill). New section 19A(7) specifies the time limit (28 days after public notification is given) for lodging objections to the application and the scheme and who may object. The right to object is widely drawn and specifically includes the Commission as well as any other interested party. The Land Court is required to hear the objections before reaching a decision on the scheme.

- (d) that, were the development carried out—
 - (i) that community would be likely to benefit financially; and
 - (ii) such benefit would be at least commensurate with any financial benefit which the members of that community might obtain on the development proceeding other than by virtue of this section.
- (3) For the purposes of subsection (2) above—
 - (a) the definition of “reasonable purpose” in subsection (3) of section 20 of this Act applies as it does for the purposes of subsection (1) of that section;
 - (b) it is unfair to carry out a development only where to do so would have significant adverse consequences for one or more of the members of the crofting community in the area affected by the development and either those consequences would be disproportionately greater than the adverse consequences for the other members of that community or there would be no adverse consequences for those other members; and
 - (c) whether recompense is fair is to be determined having regard both to the value of the development and to its effect on the member in question.
- (4) The application for consent shall—
 - (a) be made in such form; and
 - (b) be accompanied by such fee,as the Court shall specify; and the Court may make different provision for different categories of case.
- (5) Provision made under subsection (4)(a) above shall include provision as to the form and content of the appended scheme.
- (6) The person making the application shall forthwith give public notification of it.
- (7) Within 28 days after the public notification is given (including the day on which given)—
 - (a) the Commission; or
 - (b) any other interested party,may submit to the Court written objections as respects the application; and the Court shall hear the objectors (if any) before determining whether to give consent under this section.
- (8) The Court shall, whether or not there is a hearing under subsection (7) above, give reasons for any such determination.

New section 19A(9) requires the Land Court, if it consents to the scheme, to provide the Commission with a copy of the scheme and requires the Commission to enter the copy in the Register of Crofts. New section 19A(10) provides that once the copy is entered in the Register of Crofts the scheme will be binding on all the parties and their successors.

It is important to note that this section makes no provision for the amendment of the scheme by the Land Court or by the person applying for consent to the scheme once the application is made. The scheme in the application will therefore stand or fall on its merits. This implies that to obtain consent to the scheme there will need to be substantial discussion with and investigation of the circumstances of the community and each member of that community before an application is made. It would also not be necessary for the scheme to have the consent of the community. Although a community substantially opposed to an application would almost certainly argue that the criteria for consent are not met.

Section 32(2) makes a minor technical amendment to section 49 of the 1993 Act which is consequential on the provisions of new section 19A. The effect is to ensure that grazings regulations cannot ignore the terms a new scheme made under section 32.

Section 33: Appeal to the Land Court and jurisdiction of that court.

This section creates a new and wide ranging right of appeal to the Land Court against decisions and other actions taken by the Commission. Section 33(1) inserts new section 52A into the 1993 Act. New section 52A(1) sets out the detail of the new right of appeal – a right of appeal against any decision, determination or direction of the Commission or any imposition by them of a condition in response to an application made to them under the 1993 Act as amended by this Bill. For example this right of appeal would apply to a decision by the Commission to refuse consent for an assignation of a croft or a determination by the Commission that there had been a contravention of grazings regulations by a particular shareholder in a grazing. New section 52A(2) extends that right of appeal to any person with an interest in the application and that would include for example prospective tenants in the case of applications for assignation and re-let. New sections 52A(3) – (5) explain the appeal process including the time allowed for the appeal and new section 52A(4) also requires the Commission to provide the Land Court with a written statement setting out the circumstances which gave rise to the application, the decision they reached and the reasons for that decision.

- (9) On giving consent under this section the Court shall intimate to the Commission that it has done so and provide them with a copy of the scheme in accordance with which the development is to take place; and the Commission shall enter that copy in the Register of Crofts.
 - (10) When so entered the scheme shall, in so far as its terms so provide, be binding on the landlord (or owner), on any member of the crofting community in the area affected by the development and on the successors to those persons.”.
- (2) In section 49 of the 1993 Act (common grazings regulations), after subsection (8) there is added—
- “(9) Nothing contained in a scheme consented to under section 19A of this Act is, for the purposes of subsection (8) above, an agreement.”.

PART 6

GENERAL AND MISCELLANEOUS

General

33 Appeal to Land Court and jurisdiction of that court

- (1) Before section 53 of the 1993 Act there is inserted—
- “52A Appeal to Land Court: general**
- (1) An appeal shall lie on any question of fact or law to the Land Court against—
 - (a) any decision, determination or direction of, or
 - (b) the imposition of a condition by,
 the Commission on an application made to them under this Act.
 - (2) The appellant may be the applicant or any person with an interest in the application.
 - (3) The appeal must be brought within 42 days after the Commission dispose of the application.
 - (4) The appellant shall give notice in writing to the Commission that he has appealed; and the Commission shall, as soon as practicable after receiving such notice, provide the Land Court with a written statement as to the circumstances out of which the application arose (as found by them or agreed with the appellant) and as to why they disposed of the application as they did.
 - (5) The Land Court shall send the appellant a copy of that statement.

New section 52A(6) specifies how the Land Court may dispose of an appeal.

New section 52A(7) provides that the appeal arrangements will also apply to Commission approval of the re-letting of a croft and variation, withdrawal and revocation of approval of the use of common grazings for other purposes (all actions which are not covered by the wording of new section 52A(1)) because these cannot be described as a decision, determination or direction.

New section 52A(8) narrates the cases which are excluded from the appeals procedure under section 52A. In one case because a specific appeal provision is already in place within section 25(8) the 1993 Act and in the other two cases there are specific new appeal provisions created by sections 17 and 23 of this draft Bill.

New section 52A(9) provides that a decision by the Commission under the provisions of new section 58A (inserted by section 5 of this draft Bill) not to intervene or that an objection under that section is frivolous, vexatious or unreasonable cannot be the subject of an appeal. The decision under section 58A that can be appealed is a decision to grant or refuse an application.

Section 33(2) amends the provisions in section 53 of the 1993 Act dealing with the jurisdiction of the Land Court to determine questions of fact or law arising under the Act. The effect of the new proviso (ii) to section 53(1) is that the Land Court cannot decide in the first instance a matter for which there is a right of appeal under new section 52A. The Land Court may in such cases only deal with the appeal under that section. The effect of the new proviso (iii) is essentially the same as the current proviso (ii). It ensures that the Land Court cannot substitute its own decision for a decision by the Scottish Ministers or the Commission made under the provisions of the 1993 Act as amended by this Bill except on a question of law.

The effect of new proviso (iv) is that if a property has been recorded as a croft in the Register of Crofts for more than 20 years its status as a croft cannot be challenged in the Land Court.

Subsection 33(2)(b) is a purely technical amendment to section 53.

- (6) In an appeal under subsection (1) above the Court may confirm the decision, determination, direction or imposition or direct the Commission to come to a different decision, make a different determination or direction or impose a different (or no) condition.
 - (7) Subsections (1) to (6) above also apply, but with such modifications as are necessary, to—
 - (a) a granting of approval under section 23(3), or
 - (b) a variation, withdrawal or revocation under section 50B(8),of this Act.
 - (8) Subsections (1) to (6) above do not apply where an appeal lies under section 10(4B), 25(8) or 38A of this Act.
 - (9) In subsections (1) to (6) above, “decision” does not include a decision under section 58A of this Act as to whether or not to intervene or any determination by the Commission that an objection under subsection (4) of that section is frivolous, vexatious or unreasonable.”.
- (2) In section 53 of the 1993 Act (jurisdictional provisions)—
- (a) in the proviso to subsection (1), for paragraph (ii) (and the word “or” immediately preceding that paragraph) there is substituted—
 - “(ii) any question arising by virtue of an application to the Commission under this Act;
 - (iii) any other question (other than a question of law), if it is a question decided by the Scottish Ministers or the Commission in the discharge of any of their respective functions under this Act; or
 - (iv) on an application or reference made twenty years or more after a holding has been entered in the Register of Crofts, that the holding is not a croft.”;and
 - (b) in subsection (2), for the words “this Act” there is substituted “subsection (1) above”.

Section 34: Further amendments in relation to the Land Court

This section amends the provisions of Schedule 1 to the Scottish Land Court Act 1993. Subsection (2) redefines what constitutes a quorum of members of the Land Court. The effect of that would be to ensure that when the Chairman is sitting only one other member of the Land Court is required to constitute a quorum. Subsection (3) amends paragraph 6 of Schedule 1 with regard to appeals against orders or determinations which have been delegated from the full court and makes provision for former members of the Land Court to be used as members of the full court to hear appeals on decisions taken by a single member of the court (other than the Chairman). Subsection (4) makes provision for the Chairman of the Land Court to have a casting vote. Subsection (5) defines what is meant by nominated former members. Subsection (6) is a consequential provision.

Section 35: Public Notification

This section inserts new section 55A into the 1993 Act and describes what constitutes public notification for the purposes of the Act where such notification is required by the Act. (Public notification is required for example by new sections 58A(4) and 32(6)). It is given essentially by publication of an appropriate notice in one or more local newspapers. The contents of the notice will generally be specified by the Commission (new section 53A(2)). New section 55A(3) provides that in any case where notification is to be given to a specified person that notification should be in the same form as the public notification.

34 Further amendments in relation to the Land Court

- (1) Schedule 1 to the Scottish Land Court Act 1993 (c.45) (incorporation etc. of the Scottish Land Court) is amended as follows.
- (2) In paragraph 5 (quorum), for the words “three members of the Land Court shall be a quorum” there is substituted “a quorum of the Land Court shall be—
 - (a) three of its members if none of the three is the Chairman; or
 - (b) the Chairman and one other of its members”.
- (3) In paragraph 6 (delegation)—
 - (a) in sub-paragraph (2), for the words from “shall” to the end there is substituted “, other than a delegation to one member where that member is the Chairman, shall be subject to review upon appeal by three or more members, or nominated former members, of the Land Court sitting together; and one of the members so sitting shall be the Chairman.”; and
 - (b) sub-paragraph (3) is repealed.
- (4) After paragraph 6 there is inserted—

“6A On any question being determined by the Land Court, whether or not by virtue of paragraph 6 of this Schedule, the Chairman shall have a casting vote.”.
- (5) After paragraph 7 there is inserted—

“7A The reference in paragraph 6(2) of this Schedule to nominated former members is to such members as have vacated office, whether or not under paragraph 2 of this Schedule, and in relation to the particular review have been nominated under this paragraph by the principal clerk.”.
- (6) In paragraph 18 (payments to persons appointed etc.), for the words “or employed under paragraph 7” there is substituted “, employed or as the case may be nominated under paragraph 7, 7A”.

35 Public notification

After section 55 of the 1993 Act, there is inserted—

“55A Public notification

- (1) For the purposes of this Act, public notification shall be given by publishing or causing to be published a notice in appropriate form in one or more newspapers circulating in the district in which the croft or, as the case may be, common grazing to which the application relates (or in the case of public notification under section 50B(4)(a)(ii) the regulations relate) is situated.

Section 36: “members of a family”

This section amends section 61 of the 1993 Act to the extent that it amends the definition of persons who comprise members of a family for purposes of the 1993 Act. This reduces the breadth of “family” within the context of crofting legislation. The current definition defines family as extending to anyone who is, or would in any circumstances be, entitled to succeed to the crofter’s estate on intestacy by virtue of the provisions of the Succession (Scotland) Act 1964. This would include cousins and more distant blood relatives. The new definition also now includes a civil partner or co-habitant and defines the terms co-habitant, sibling and son or daughter. The definition of co-habitant for the purposes of this draft Bill is provided for illustrative purposes only. It is intended that the definition will be modified as required in due course to make it consistent with whatever term is contained in the Family Law (Scotland) Bill currently at Stage 1 of consideration by the Scottish Parliament.

- (2) A notice is in appropriate form if—
- (a) its form and content complies, or does so as far as is reasonably practicable, with that specified by the Commission for an application of that type (or as the case may be for regulations under section 49(2)(g) of this Act); and
 - (b) it specifies—
 - (i) the purpose of the application to which it relates (or in the case of regulations the matters which are required to be set out in it by virtue of section 50B(4)(a)(ii) of this Act);
 - (ii) a description of the croft land or, as the case may be, common grazing to which the application relates (or regulations relate); and
 - (iii) in the case of an application, the period during which, and manner in which, objections may be made.
- (3) Where, in accordance with the provisions of this Act, a person giving public notification is also required to serve notice on a landlord, tenant or occupier of croft land to which the application relates or, if applicable, on the owner of or a crofter sharing in the common grazing, such notice shall be in the form required by subsection (2) above.”.

36 “Members of a family”

In section 61 of the 1993 Act (interpretation)—

- (a) in subsection (2), for the words from “the wife” to the end, there is substituted “the individual in question’s—
 - (a) spouse or civil partner (or cohabitant provided that the individual has no spouse or civil partner and that the cohabitation has included cohabitation for at least two years in a dwelling-house on or pertaining to the croft);
 - (b) sibling;
 - (c) sibling’s spouse or civil partner;
 - (d) spouse’s or civil partner’s sibling;
 - (e) father;
 - (f) mother;
 - (g) son;
 - (h) daughter;
 - (i) son’s or daughter’s spouse or civil partner;
 - (j) grandchild;
 - (k) grandchild’s spouse or civil partner;

Section 37: “Crofting Community”

This section defines the expression “crofting community” for the purposes of the 1993 Act by adding this definition to the list of definitions in section 61(1) of the Act. It therefore defines which persons will be considered to be members of the crofting community and therefore are afforded a right to have a valid objection to certain proposals considered by the Commission.

Section 39: Minor and consequential amendments

This gives effect to Schedule 2

- (l) aunt;
- (m) uncle;
- (n) nephew; or
- (o) niece.”; and

(b) after that subsection there is added—

“(3) In subsection (2)(a) above, the reference to an individual’s cohabitant is to a person, whether or not of the same sex as the individual, who lives with the individual as if—

- (a) in a married relationship; or
- (b) in civil partnership.

(4) In subsection (2) above—

“sibling” includes a sibling by virtue only of adoption, marriage or civil partnership and a sibling of the half blood;

“son”, “daughter” or “grandchild” includes a person so related by virtue only of adoption, marriage or civil partnership; and

“son” or “daughter” includes a son, or as the case may be a daughter, of the individual’s cohabitant provided that such son or daughter resides with the individual and that such residence has included residence for at least one year in a dwelling-house on or pertaining to the croft.”.

37 “Crofting community”

In section 61(1) of the 1993 Act (interpretation), at the appropriate place there is inserted—

““crofting community” means all the persons who (either or both)—

- (a) occupy crofts within a township which consists of two or more crofts and is registered with the Crofters Commission;
- (b) hold shares in a common grazing associated with that township.”.

38 “The 1993 Act”

In this Act “the 1993 Act” means the Crofters (Scotland) Act 1993 (c.44).

Miscellaneous

39 Minor and consequential amendments

Schedule 2 to this Act, which contains minor amendments and amendments consequential on the provisions of this Act, has effect.

Section 40: Savings

This section ensures continuity of any process leading to a decision by the Commission which has started before the new provisions come into force. The effect is that any decision on such a process will be reached in accordance with the un-amended provisions of the 1993 Act.

Section 42: Repeals

This section gives effect to the repeals in Schedule 3.

40 Savings

- (1) Nothing in this Act affects an application made, or proceedings commenced, before this section comes into force.
- (2) Nothing in this Act affects any provision of the 1993 Act amended or repealed by this Act in that provision's operation in relation to an offence committed before the amendment is made or, as the case may be, the provision is repealed.

41 Transitional provisions etc.

- (1) The Scottish Ministers may, by order made by statutory instrument, make such incidental, supplemental, consequential, transitional transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, this Act.
- (2) Subject to subsection (4), a statutory instrument containing an order under subsection (1) is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (3) An order under subsection (1) may make different provision for different cases or for different classes of case.
- (4) An order under subsection (1) may amend or repeal any enactment; and if it does is not made unless a draft of the statutory instrument containing the order has been—
 - (a) laid before; and
 - (b) approved by a resolution of,
the Scottish Parliament.

42 Repeals

The enactments mentioned in schedule 3 to this Act are repealed to the extent mentioned in the second column of that schedule.

43 Short title, Crown application and commencement

- (1) This Act may be cited as the Crofting Reform etc. Act 2005.
- (2) This Act binds the Crown.
- (3) The provisions of this Act, except this section and sections 38, 40 and 41, come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.
- (4) Different days may be so appointed for different provisions and for different purposes.

Schedule 1

This Schedule substitutes a new Schedule for Schedule 1 to the 1993 Act. New Schedule 1 brings the constitutional provisions about the Commission together in one place (they appear at present in section 1 of and Schedule 1 to the 1993 Act) and makes changes to the constitutional arrangements and powers of the Commission. The most significant changes in the functions of the Commission in Schedule 1 to the 1993 Act are contained in the following paragraphs of new Schedule 1:

paragraph 3 gives the Commission power to buy and sell property, enter into contracts and charge for services;

paragraph 12 transfers to the Commission the responsibility to pay its members (currently paid by the Scottish Executive);

paragraph 13 enables the Commission to employ staff (they are currently employed by the Scottish Executive);

paragraph 16 will allow the Commission to delegate certain functions, previously reserved to Commissioners, to the staff of the Commission, and;

paragraph 18 requires the Commission to keep accounts.

SCHEDULE 1
(introduced by section 1)

THE CROFTERS COMMISSION

For Schedule 1 to the 1993 Act, there is substituted—

“SCHEDULE 1
(introduced by section 1)

THE CROFTERS COMMISSION

Status

- 1 The Commission shall be a body corporate.
- 2 The Commission shall not be regarded as a servant or agent of the Crown, or as having any status, immunity or privilege of the Crown, nor shall its members or its employees appointed under paragraph 13(3) be regarded as civil servants, nor its property as property of, or held on behalf, the Crown.

General powers

- 3 (1) The Commission may do anything which appears to them to be necessary or expedient for the purposes of, or in connection with the discharge of their functions; and without prejudice to that generality they may in particular—
 - (a) co-operate with other persons in matters relevant to the discharge of their functions;
 - (b) acquire and dispose of land and other property;
 - (c) enter into contracts;
 - (d) charge—
 - (i) in respect of regulatory activities, such amounts as may be prescribed by the Scottish Ministers; and
 - (ii) in respect of any other service provided by them, such amounts as appear to them to be reasonable.
- (2) In head (i) of sub-paragraph (1)(d) above, “regulatory activities” means such activities, or descriptions of activities, as may be prescribed by the Scottish Ministers; but neither such activities nor such other service as is mentioned in head (ii) of that sub-paragraph shall include things for which a fee is chargeable under, or by virtue of, section 41B of this Act.

Members

- 4 The Commission shall consist of no more than nine members, appointed by the Scottish Ministers.

- 5 The members appointed shall include—
- (a) persons with knowledge of crofting; and
 - (b) at least one person who can speak the Gaelic language.
- 6 (1) The Scottish Ministers shall satisfy themselves—
- (a) before they appoint a person to be a member, that the person will have no such financial or other interest as is likely to affect prejudicially the performance of the person's functions as a member; and
 - (b) from time to time, that each person so appointed continues, and has continued, to have no such interest.
- (2) For the purposes of sub-paragraph (1), the fact that a person is a crofter, a landlord or owner-occupier of a croft or a member of the family of any such person shall not of itself constitute an interest mentioned in that sub-paragraph.
- 7 A person in respect of whom the Scottish Ministers require to be satisfied as is mentioned in paragraph 6(1) shall, whenever requested by the Scottish Ministers to do so, furnish them with such information as they may consider necessary for the purposes of fulfilling that requirement.
- 8 (1) The Scottish Ministers may, after consulting such persons or groups of persons as they consider appropriate, by order made by statutory instrument amend paragraph 4 so as to substitute for the number for the time being specified as the maximum number of members of the Commission such other number as they think fit.
- (2) No order under sub-paragraph (1) may be made unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament.

Terms of office etc.

- 9 (1) Subject to the provisions of this Schedule, the appointment of a member under paragraph 3 shall be on such terms and conditions as the Scottish Ministers may determine.
- (2) Subject to section 19 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7), a person holds and vacates office as member in accordance with the person's terms of appointment.
- (3) A person may resign office as member at any time by notice in writing to the Scottish Ministers.

Eligibility for re-appointment

- 10 A person who ceases, otherwise than by virtue of section 19 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7), to be a member of the Commission shall be eligible for re-appointment.

Chairing the Commission

- 11 (1) The Scottish Ministers shall appoint one of the members of the Commission to chair the Commission.
- (2) The appointee above shall—
 - (a) cease automatically to chair the Commission on ceasing to be a member of it;
 - (b) otherwise hold and vacate office in terms of the appointment.
- (3) The appointee may resign the appointment by notice in writing to the Scottish Ministers.

Remuneration, pensions, allowances etc. of members

- 12 The Commission shall—
 - (a) pay to their members such remuneration and allowances as the Scottish Ministers may determine;
 - (b) pay, or make payments towards the provision, to or in respect of such of their members or former members as the Scottish Ministers may determine, of such pension, allowance or gratuity as the Ministers may determine.

Chief executive and other staff

- 13 (1) The Scottish Ministers shall, after consultation with the person appointed or designated to chair the Commission (if there is such a person), make the first appointment of the chief executive of the Commission on such terms and conditions as the Ministers may determine.
- (2) The Commission may, with the approval of the Scottish Ministers, make subsequent appointments to the post of chief executive on such terms and conditions as they may, with the approval of the Scottish Ministers, determine.
- (3) The Commission may appoint such other staff, on such terms and conditions, as they may consider appropriate.
- (4) The Commission may—
 - (a) pay, or make arrangements for the payment of;
 - (b) make payments towards the provision of; and
 - (c) with the approval of the Scottish Ministers, provide and maintain schemes (whether contributory or not) for the payment of,such pensions, allowances and gratuities to or in respect of such of their employees, or former employees, as they may determine.

- (5) The reference in sub-paragraph (4) to pensions, allowances and gratuities includes a reference to pensions, allowances and gratuities by way of compensation for loss of employment.
- (6) The Scottish Ministers may give directions as to—
 - (a) the appointment of staff by the Commission (including any conditions to be fulfilled for appointment);
 - (b) terms and conditions of such appointment; and
 - (c) any provision that may be made by the Commission under sub-paragraph (4).

Committees

- 14 (1) The Commission—
 - (a) shall establish an audit committee for the purpose of—
 - (i) approving the Commission’s audit plans and reports, reviewing the operation of the plans and making recommendations as to their modification;
 - (ii) co-ordinating any response the Commission’s may make to recommendations contained in audit reports produced by others;
 - (iii) securing that the Commission have procedures which will facilitate financial probity and ensure that considerations of quality and effectiveness are given due regard when decisions are taken by them; and
 - (b) may establish such other committees for such purposes as they think fit.
- (2) The Commission may appoint as members of any of their committees persons who are not members of the Commission; but no such committee shall consist entirely of such persons.
- (3) The Commission shall pay to a person so appointed such remuneration and allowances as the Scottish Ministers may determine.
- (4) A committee of the Commission shall comply with any directions given to it by the Commission.

Procedure

- 15 (1) The Commission shall have an office in at least one of the crofting counties for the purpose of receiving communications and notices.
- (2) Subject to the provisions of this Schedule, the Commission may regulate their own procedure and that of any of their committees (including any quorum and, the appointment of a person to chair a meeting where the person appointed under paragraph 11(1) to chair the Commission is unavailable to chair a meeting or is otherwise unable to do so).

- (3) The Commission shall maintain a record of their meetings and decisions and of the meetings and decisions of their committees.
- (4) The validity of any proceedings of the Commission, or of any of their committees, shall not be affected by any vacancy in membership nor by any defect in the appointment of a member.

Delegation of functions

- 16 (1) Anything authorised or required by any enactment to be done by the Commission may be done by any of their members or staff authorised (generally or specifically) for the purpose by the Commission.
- (2) Nothing in sub-paragraph (1) shall prevent the Commission from doing anything which any of their members or staff has been so authorised to do.

Returns etc. to Scottish Ministers

- 17 The Commission shall—
 - (a) furnish the Scottish Ministers with such returns, accounts and other information with respect to the discharge of the Commission's functions, and the Commission's property and activities or proposed activities, as the Scottish Ministers may from time to time require;
 - (b) afford to the Scottish Ministers facilities for the verification of information so furnished; and
 - (c) for the purpose of such verification, permit any person authorised in that behalf by the Scottish Ministers to inspect and make copies of the accounts, books, documents or papers of the Commission and to give that person such explanation of anything the person is entitled to inspect as the person may reasonably require.

Annual accounts etc.

- 18 (1) The Commission shall—
 - (a) keep accounts; and
 - (b) prepare annual accounts in respect of each financial year,
in accordance with such directions as the Scottish Ministers may give them.
- (2) Without prejudice to paragraph 17, the Commission shall submit their annual accounts in respect of each financial year to the Scottish Ministers by such date as the Scottish Ministers may direct.
- (3) The Scottish Ministers shall send the Commission's annual accounts to the Auditor General for Scotland for auditing.

Schedule 2

This Schedule sets out certain amendments to existing legislation.

Paragraph 1 amends a provision of the Crofters Holdings (Scotland) Act 1886 which is still in force to bring that provision into line with the changes which are made by section 14 of the Bill

Paragraph 2(2) reflects the possibility of the return of resumed land to crofting tenure through the provisions contained in section 24 of the Bill.

Paragraph 2(3) leaves the determination of the initial rent of an enlarged croft to be settled between landlord and tenant.

Paragraph 2(4) provides that the standard conditions applied to croft tenants should not apply to a short-term tenancy created by the provisions of section 27 of the Bill.

- (4) If requested by any person, the Commission shall make available at any reasonable time, without charge, in printed or in electronic form, their audited accounts, so that they may be inspected by that person.

Annual report

- 19 (1) Without prejudice to paragraph 17, as soon as practicable after the end of each financial year, the Commission shall submit to the Scottish Ministers a report on the discharge of the Commission's functions during that year.
- (2) The Scottish Ministers shall lay before the Parliament a copy of each report submitted to them under sub-paragraph (1).

Interpretation

- 20 In paragraphs 18 and 19 above, "financial year" means the period of twelve months ending with 31st March."

SCHEDULE 2
(introduced by section 39)

MINOR AND CONSEQUENTIAL AMENDMENTS

Crofters Holdings (Scotland) Act 1886 (c.29)

- 1 In section 1(4) of the Crofters Holdings (Scotland) Act 1886 (crofter not to be removed except for breach of statutory conditions), for the words "subdivide his holding or sublet the same" there is substituted "sublet his holding".

Crofters (Scotland) Act 1993 (c.44)

- 2 (1) The 1993 Act is amended in accordance with this paragraph.
- (2) In section 3(1) (meaning of "croft"), after paragraph (c) there is inserted—
 - "(cc) as from the date of registration, every holding situated as aforesaid and registered by virtue of an application under section 3A of this Act;
 - (cd) as from the date of reversion, every holding reverting under section 20(1B), or by virtue of section 21A(1), of this Act;"
- (3) In section 4 (enlargement where owner and crofter are in agreement), after subsection (2) there is inserted—
 - "(2A) The crofter shall pay to the landlord such rent as they shall agree for the croft as enlarged under subsection (1) above."
- (4) In section 5(1) (the statutory conditions), at the end there is added "; except that this subsection is subject to section 29A(3) of this Act".

Paragraph 2(5) allows the Land Court, in authorising a tenant to purchase croft land, to direct that the costs of the action be borne by the tenant. This is consistent with the arrangements that already apply when the croft tenant is acquiring a house site.

Paragraph 2(6) extends the provisions of section 24(1) permitting enlargement of crofts to new crofts and land reverting to being crofts under the respective provisions in sections 10 and 24 of the Bill.

Paragraph 2(7) means that the Commission is no longer required from publicising an application to decroft land conveyed as a feu under the provisions of the Crofters (Scotland) Act 1955. This means that, in this respect, such applications are treated in the same way as an application to decroft a house site.

Paragraph 2(8) makes a technical amendment to section 41(1) and would amend section 41(2) to provide that the Register of Crofts includes details of common grazings and require owners and those who have shares in the grazings to provide information about the grazings in the same way as landlords and croft tenants are required to do for crofts.

Paragraph 2(9)(a) amends subsection (1) of section 42 of the 1993 Act to widen the use to which grants and loans paid to crofters by Scottish Ministers may be put. Paragraph 2(9)(b) inserts a new subsection 42(1A) into the 1993 Act and this requires that grant schemes shall have specific criteria as to who may receive grant (which for example opens up the possibility of applying an economic status test to applicants who are crofters).

It should be noted that these provisions only apply to grants and loans payable by Scottish Ministers. Section 4 of the Bill gives the Commission power to pay grants in a wide range of circumstances. In future, grants to crofters will in most circumstances be administered by the Commission under the powers given to them by section 4.

Paragraph 2(10)(a)(i) amends section 43 of the 1993 Act to reflect the fact that the Crofters Holdings book will now be held by the Crofters Commission (see new section 2(4) and the repeal of section 54 of the 1993 Act in Schedule 3).

Paragraph 2(10)(a)(ii) amends section 43 of the 1993 Act to remove the provision transferring the tenant's right to compensation for improvements to Scottish Ministers. This right was rarely exercised and is no longer considered necessary. Paragraph 2(10)(b) makes an amendment which is consequential upon this change.

- (5) In section 13 (authorisation by Land Court of acquisition of croft land), at the end there is added—
- “(6) Subsection (3) of section 15 of this Act shall apply in relation to an order under subsection (1)(a) above as it applies in relation to an order under subsection (1) of that section.”.
- (6) In section 24(1) (decrofting in case of resumption of croft), at the end there is added “and to sections 3A and 21A of this Act”.
- (7) In section 25(6) (decrofting: supplementary provision), after the words “pertaining to the croft” there is inserted “or only of land the conveyance in feu of which was granted under section 17 or 18 of the 1955 Act”.
- (8) In section 41 (Register of Crofts)—
- (a) in subsection (1), for the words from “a” to “Crofts”)” there is substituted “the Register of Crofts”; and
- (b) after subsection (2), there is inserted—
- “(2A) Subsection (2) above applies in relation to land constituted as a common grazing under section 51A of this Act, the owner of that land and the persons sharing in the common grazing as it applies in relation to a croft and its landlord and tenant; and an entry made by virtue of this subsection must contain the information that the common grazing is so constituted.”.
- (9) In section 42 (financial assistance to crofters)—
- (a) in subsection (1), for the words “aiding and developing agricultural production on” there is substituted “supporting any reasonable use which promotes the sustainable development of”; and
- (b) after that subsection there is inserted—
- “(1A) Such schemes shall specify criteria for determining who shall be eligible for grants and loans payable thereunder (as for example, the occupier’s income, or the rental or agricultural value or extent of his croft); and different schemes may specify different criteria.”.
- (10) In section 43 (supplementary provisions as to loans under section 42)—
- (a) in subsection (3)—
- (i) for the words “principal clerk of the Land Court” there is substituted “Commission”; and
- (ii) the words from “and as recorded” to the end are repealed;
- (b) subsection (4) is repealed.

Paragraph 2(11) alters the criteria for non-crofters to qualify for grant. Paragraph 2(11)(a) and 2(11)(b)(iii) removes the requirement that the owner of a holding that is not a croft must have the same economic status as a crofter and instead provides that the individual in question must use the holding in substantially the same way as a crofter. Paragraph 2(11)(b)(i) does the same for owner occupiers of crofts. These changes recognise the diverse economic status of crofters today. Paragraph 2(11)(b)(ii) allows Scottish Ministers to pay grants to the short term tenants of croft land created by section 27 of this draft Bill.

Paragraph 2(12) is a simple technical change to do with rationalisation of the use of “common grazing” and “common grazings” in the legislation.

Paragraph 2(13) also contains technical changes as described in relation to paragraph 2(12) above and in addition it amends section 48 of the 1993 Act to empower the grazings committee to put the common grazing to any wider use approved under the provisions of new section 50B, to carry out works for that purpose and to maintain the common grazing for that use. It also empowers the committee to raise funds to implement a wider use approved under section 50B(8) but only if a majority of the grazings committee votes to do so.

- (11) In section 46 (financial assistance to owners and owner-occupiers of crofts and other holdings)—
- (a) in subsection (2)(c), for the words from “is of substantially” to “as a crofter” there is substituted “uses his holding in a way which is substantially the same as that of a crofter”;
 - (i) in paragraph (a), for the words from “are of substantially” to “as a crofter” there is substituted “use their crofts in a way which is substantially the same as that of a crofter”; and
 - (ii) after that paragraph there is inserted—
“(aa) for short-term tenants;”;
 - (iii) in paragraphs (b) and (c), for the words from “are of substantially” to “as a crofter” there is substituted “use their holdings in a way which is substantially the same as that of a crofter”.
- (12) In section 47(9) (payment of annual remuneration to grazings clerk), for “grazings”, in the second place it occurs, there is substituted “grazing”.
- (13) In section 48 (powers and duties of grazings committees)—
- (a) in subsection (1)—
 - (i) in paragraph (a), for the word “grazings” there is substituted “grazing” and for the word “therewith” there is substituted “with such maintenance and with the implementation of any proposal approved under section 50B(8) of this Act”;
 - (ii) after paragraph (b) there is inserted—
“(bb) to carry out works in implementation of any such proposal as is mentioned in paragraph (a) above;”;
 - (iii) in the proviso to paragraph (c), for “grazings”, in the second place it occurs, there is substituted “grazing”;
 - (b) in subsection (2)—
 - (i) for the word “grazings”, in the second place it occurs, there is substituted “grazing”; and
 - (ii) for the words “subsection (1)(b)” there is substituted “subsection (1)(b) or (bb)”;
 - (c) after subsection (4) there is inserted—
“(4A) Where the grazings committee have obtained the approval referred to in subsection (5) of section 50B of this Act, they may, subject to any conditions imposed under subsection (8) of that section and for the time being in force (and to the approval not having been revoked), use any part of the common grazing in accordance with the proposal.”;

Paragraph 2(14) makes technical changes similar to those mentioned in relation in relation to paragraph 2(13) above plus further changes to ensure that the substantive changes made in paragraph 2(13) are given effect in common grazings regulations.

Note that paragraph 2(14)(c)(i) reflects the accurate legal position of the owner of a common grazing vis-à-vis crofters and others with a share in a common grazing. The owner is not the “landlord” in relation to shares and the exercise of other rights under crofting legislation. He is instead the “owner” of the land on which those shares are exercised. This correction has been made throughout the draft Bill.

Paragraph 2(15)(a)(i) changes the description of a crofter with a share in a common grazing from one who is “interested” to one “who holds a right”. This is a clarification of what the law means, and does not imply change.

Paragraph 2(15)(a)(ii) follows the clarification explained at 1(14)(c)(i) above. This clarification is also carried through in Paragraphs 15(b) and (c).

- (d) in subsection (5), for the word “interested” there is substituted “who holds a right”; and
 - (e) after subsection (6) there is inserted—
 - “(6A) The powers of the grazings committee include the power to raise money (whether by borrowing or otherwise) for the purpose of implementing any proposal approved under section 50B(8) of this Act; but on any occasion they shall only exercise that power if a majority of the grazings committee vote to do so.”.
- (14) In section 49 (common grazings regulations)—
- (a) in subsection (2)—
 - (i) in paragraph (a), for the word “grazings”, in the second and third places it occurs, there is substituted “grazing” and for the word “therewith” there is substituted “with such maintenance or with the implementation of any proposals approved under section 50B(8) of this Act”;
 - (ii) in paragraph (b), for the words “subsection (1)(b)” there is substituted “subsection (1)(b) or (bb)”;
 - (iii) in paragraph (c), for the words “and (b) respectively” there is substituted “to (bb)”;
 - (iv) in each of paragraphs (d) and (e), for the word “grazings” there is substituted “grazing”;
 - (b) in subsection (3), in—
 - (i) paragraph (a), for the word “grazings”; and
 - (ii) in paragraph (b), for the word “grazings”, in both places it occurs, there is substituted “grazing”; and
 - (c) in subsection (7)—
 - (i) for the word “landlord”, in both places it occurs, there is substituted “owner”; and
 - (ii) for the word “grazings”, in the first place it occurs, there is substituted “grazing”.
- (15) In section 50 (use of common grazings for forestry purposes)—
- (a) in subsection (1)—
 - (i) for the word “interested” there is substituted “who holds a right”; and
 - (ii) in paragraph (b), for the word “landlord” there is substituted “owner”;

Paragraph 2(15)(d) ensures that where there is a joint crofter forestry venture involving both the landowner and crofters, this may not be interrupted by any ensuing crofter forestry application.

Paragraph 2(16)(a) and (b) as elsewhere, changes the reference in section 52 of the 1993 Act to “grazings” to the singular and the description of a crofter “interested” in the grazing to one who holds a right in a common grazing.

Paragraph 2(16)(c) adds 6 new subsections to section 52 to give the Commission wider powers in relation to apportionments. New section 52(10) allows the Commission to specify that the apportionment should be for a particular period and/or subject to review at fixed intervals. New section 52(11) allows it to extend the original period and new section 52(12) allows the Commission to vary the conditions attached to the apportionment if either the crofter or township asks for that to be done.

New section 52(13) provides that when the period of apportionment ends or the apportionment is terminated the land will revert to being a common grazing and new section 52(14) provides that the Land Court will be empowered to make an order to reallocate grazing shares when land reverts to common grazing use. New section 52(15) makes it clear these powers will not extend to land newly constituted as common grazing under section 51A as that section provides that such land may only be used as agreed by the owner and those sharing in that new common grazing.

- (b) in subsection (2)—
 - (i) for the words “A landlord’s” there is substituted “An owner’s”;
 - (ii) after paragraph (b) there is inserted—
 - “(bb) may be given subject to conditions provided that those conditions are reasonable;”;
 - (v) in paragraph (c), for the word “landlord” there is substituted “owner”; and
 - (vi) in paragraph (e), for the word “landlord’s” there is substituted “owner’s”;
 - (c) in subsection (3), for the words “A landlord’s” there is substituted “An owner’s”; and
 - (d) at the end there is added—
 - “(5) This section is without prejudice to section 50A of this Act and is subject to the terms of any agreement under that section.”.
- (16) In section 52 (miscellaneous provisions as to common grazings, as to lands held runrig and as to use by crofters of peat bogs etc.)—
- (a) in subsection (2), for the word “grazings”, in the second, third and fourth places it occurs, there is substituted “grazing”;
 - (b) in subsection (4), for the words “interested, after consultation with the grazings committee, apportion a part of a” there is substituted “who holds a right in a common grazing, and after consultation with the grazings committee, apportion a part of the”; and
 - (c) at the end there is added—
 - “(10) Without prejudice to the generality of subsections (3), (4) and (8) above, the Commission may under any of those subsections (either or both)—
 - (a) apportion a part for a period;
 - (b) determine that an apportionment shall be subject to review at fixed intervals,
 which they shall specify.
 - (11) The Commission may extend any such period as is mentioned in subsection (10)(a) above on the application of the township which, or as the case may be the crofter who, has exclusive use.
 - (12) The Commission may, on the application of that township or crofter or of the grazings committee or owner vary any condition imposed under subsection (6) above.
 - (13) Where a period of apportionment fixed under subsection (10)(a) above (or so fixed and extended under subsection (11) above) comes to an end or it is determined on review under subsection (10)(b) above that an apportionment is to come to an end, the land in question reverts to being a common grazing.

Paragraph 2(17) clarifies the postal method required for notices which require to be sent by post.

Paragraph 2(18) amends section 60 to reflect the fact that in the Bill the regulation which section 5 empowers Scottish Ministers to make must be approved by a resolution of the Scottish Parliament.

Paragraph 2(19) adds three new definitions to the legislation.

Paragraph 3 introduces change to the Deer (Scotland) Act 1996 which enables a grazings committee to appoint a person to shoot deer marauding in enclosed areas of the common grazing.

- (14) Where land reverts under subsection (13) above, the Land Court may make such order as it thinks fit as to shares in the common grazing.
- (15) Subsections (10) to (14) above do not apply as respects land constituted as common grazing under section 51A of this Act.”.
- (17) In section 55 (service of notices), after subsection (1) there is inserted—
- “(1A) A notice or other document is sent by post under this section if—
- (a) in the case of an individual, it is sent by registered post or the recorded delivery service, addressed to that person at that person’s usual or last known address or, where the person has given an address for service, at the address so given;
- (b) in any other case, by sending it by registered post or the recorded delivery service, addressed to that person at the person’s registered or principal office.”.
- (18) In section 60 (regulations), at the beginning insert
- “Except insofar as specific provision is made to the contrary,”.
- (19) In section 61(1) (interpretation) at the appropriate places there are added—
- ““enactment” includes an enactment comprised in, or an instrument made under, an Act of the Scottish Parliament;”
- ““public notification” has the meaning given by section 55A of this Act;”;
- ““woodlands” includes woodlands created by planned natural regeneration (as defined by section 50A(6) of this Act)”.
- (20) In Part 1 of Schedule 7, in the table, in the entry relating to The Crofters (Scotland) Act 1886, after the word “Crofters” there is inserted “Holdings”.
- (21) That Schedule is to be deemed always to have had effect subject to the amendment specified in sub-paragraph (20).

Deer (Scotland) Act 1996 (c.58)

- 3 In section 26 of the Deer (Scotland) Act 1996 (right of occupier in respect of deer causing serious damage to crops etc.)—
- (a) in subsection (2), at the end there is added “and in relation to enclosed land which is part of a common grazing, the subsection also applies to a person who for the purposes of the subsection is duly authorised in writing by the grazings committee”;
- (b) in subsection (4), in each of sub-paragraphs (a) and (d), after the word “occupier” there is inserted “, or as the case may be the committee,”.

Schedule 3

This Schedule gives details of provisions of the Crofters (Scotland) Act 1993 and the Succession (Scotland) Act 1964 which will be repealed after this Bill has been enacted and brought into force.

The repeal in section 4 of the 1993 Act means that that the rental value of a holding is no longer relevant to Commission consideration of enlargements of crofts. The effect is that in future the Commission will not be able to agree to an enlargement of a croft where the effect of doing so would be to create a croft holding substantially in excess of 30 hectares.

The repeal in section 30(2) of the 1993 Act reflects the change to section 43 effected by paragraph 2(10) of Schedule 2.

The repeal of the proviso to section 41(2) of the 1993 Act is required because it is inconsistent with the provisions of new section 58A and new section 41(3).

The repeals to parts of section 42 of the 1993 Act reflect the fact that Treasury approval is no longer required.

The repeal of section 54 of the 1993 Act is consequential on the new section 2(4) which is inserted into the 1993 Act by section 2 of this draft Bill.

The repeals to parts of section 16 of the 1964 Act reflect the new provisions which this draft Bill inserts into section 17 of the 1993 Act.

SCHEDULE 3
(introduced by section 42)

REPEALS

<i>Enactment</i>	<i>Extent of repeal</i>
<p>30 Crofters (Scotland) Act 1993(c.44)</p> <p>35</p> <p>40</p>	<p>In section 4, in subsection (1)(b) the words “and the rent of the croft together with the rent under the said tenancy exceeds £100”; and in subsection (2)(b) the words “or capable of being let as a croft at an annual rent substantially in excess of £100”.</p> <p>In section 30(2), in paragraph (a) the words from “and” to the end; and in the second sentence the word “either” and the words from “or to” to “to him”.</p> <p>In section 41(2), the proviso.</p> <p>In section 42, in subsection (1) the words “and with the approval of the Treasury”; and in subsections (4) and (5) the words “with the approval of the Treasury”.</p> <p>Section 54.</p> <p>Section 59.</p>
<p>5 Succession (Scotland) Act 1964 (c.41)</p>	<p>In section 16(3)(b), sub-paragraph (ia); and in sub-paragraph (ib), the words “by the landlord to the legatee and the Crofter’s Commission”.</p>

6 DRAFT CROFTERS (SCOTLAND) BILL: REGULATORY IMPACT ASSESSMENT

Overview

- 1 This draft Bill up-dates the Crofters (Scotland) Act 1993. The Bill proposes these changes:
 - Modernisation and clarification of existing rights and duties of tenant crofters
 - Modernisation of the constitution of the Crofters Commission
 - Reduction in the bureaucracy of crofting regulation
 - Provision for wider uses of tenanted croft land
 - Improvements in information held on crofts and introducing public access to that information
 - Introduction of a comprehensive system of appeal on regulatory decisions

- 2 The draft Bill seeks to clarify and extend the rights of tenants when using croft land for economic purposes, including reducing requirements to gain approval of both the Crofters Commission and landlords. It also creates a right to appeal Crofters Commission decisions where no such right previously existed but use of this right could lead to additional costs for those that exercise it. The overall effect of the draft Bill is therefore deregulatory and in only one area – the improving of information held on crofts – are additional responsibilities being created.

- 3 In clarifying and extending the rights of tenant crofters, it is inevitable that the rights of landlords vis a vis those of tenants would be reduced. However, there is no reason to expect that the practical effects of these changes will be considerable. Landlords would no longer enjoy:
 - The right of consent to crofter forestry development
 - The legally doubtful right of consent to crofters felling, using and selling trees planted by them on crofts and common grazings
 - The right of consent to subdivision of crofts by tenants.

Consultation to date

- 4 The proposals of the draft Bill have already been subject to wide ranging consultation:
 - The Land Reform Policy Group considered the future of crofting as part of its work in identifying and assessing proposals for land reform in rural Scotland. The Group published 3 papers for consultation between February 1998 and January 1999.
 - The first consultation paper identified key issues.
 - The second consultation paper assessed possible options for action to resolve those issues and
 - The third consultation paper offered final recommendations for a comprehensive agenda for action.
- 5 The Executive took forward the Group's recommendations through papers and discussion with the Crofting Consultative Panel, involving both representative organisations and other interested and informed individuals.
- 6 A White Paper "Crofting Reform Proposals For Legislation" was issued for consultation in July 2002.

Issues for discussion

- 7 The Executive is now consulting on the detail of the draft Crofters (Scotland) Bill and this Regulatory Impact Assessment (RIA) is part of the consultation document. Comments on this RIA should therefore also be provided by 13 June 2005.
- 8 The purpose of this RIA is not to debate the merits of the draft Bill but rather to identify and analyse the benefits, risks, costs and compliance issues arising from alternative options for taking forward proposals that may create additional costs or burdens for business. We believe that the proposals listed in paragraph 3 above fall into this category.
- 9 This RIA seeks views on the Executive's provisional conclusions on the nature and extent of additional burdens on landowners and/or tenants that will or might arise from the draft Bill. Views on likely cost implications would be welcome, as would the identification of other aspects of the draft Bill which might create burdens or costs for tenants or landowners.

1 Improving information held on crofts

Issue

1.1 There are 17,700 crofts of varying sizes and shapes located within the Highlands and Islands of Scotland. In order to carry out its regulatory duties, the Crofters Commission maintains a Register of Crofts which holds information on each croft including the extent. This Register is also used by crofters and landlords, and by solicitors conducting sales of individual crofts. However, the Register is not map-based and therefore cannot guarantee that the boundaries of crofts are accurately defined. This does lead to problems for solicitors conducting the sale of crofts from landlords to tenants and on occasion for subsequent sales to new owners. It also leads to disputes between crofters.

1.2 There are various forms of plans of individual crofts in existence. Some landlords – including Scottish Ministers – hold well-defined maps of their estates which indicate each individual croft. Some plans produced by crofters applying for agricultural support funds would require little amendment to serve as boundary plans of the whole croft by including non-agricultural elements such as woodland. However, the establishment of a consistent map-based Register of Crofts would require that all plans were produced to the same scale to ensure consistency with the boundaries of neighbouring crofts.

Objective

1.3 The draft Bill proposal would provide for a comprehensive map-based Register of Crofts which would give certainty with regard to the extent and boundaries of each individual holding.

Risk Assessment

- 1.4 The potential risks arising from this change are:
- The process of mapping could uncover boundary discrepancies which leads to litigation in the Land Court.
 - The discovery or decision that boundaries are different from those which were believed to exist may result in a loss of value to individual holdings.

Options

- 1.5 In broad terms, 3 options are available:
- (1) Do nothing
 - (2) Provide government funding to carry through the mapping process.
 - (3) Require individual tenants and owners of individual crofts to provide accurate map based plans of their crofts when the croft first changes hands following the introduction of the new legislation. Landlords should be required to produce a plan when re-letting a croft when no plan is currently held in the Register of Crofts. (This is the option advanced in the draft Bill.)

Benefits

- 1.6 Option 1 involves no change, would bring no benefits compared with the present situation and would leave questions of disputed boundaries unresolved.
- 1.7 Option 2 would allow for a managed programme of change to be completed within an agreed period.
- 1.8 Option 3 would allow for change to be completed over a longer period on an as and when basis.

Costs

- 1.9 Option 2 would have costs to the Scottish Executive which are difficult to quantify as it is not known how many of the 17,700 crofts have already been adequately identified by use of map based plans. It is reasonable to expect that owner-occupied crofts would have such plans as a consequence of existing requirements relating to land registration, thus reducing the potential number requiring plans to 14,000. This estimate is likely to be high, as it is most probable that some crofters will have suitable plans, or will have others capable of adaptation e.g. from those produced in connection with IACS claims. However, the actual number cannot be predicted, and it is therefore safest to proceed on the assumption that plans of most of these holdings will require to be created or upgraded.
- 1.10 Estimates obtained by the Crofters Commission suggest that the costs of preparing a map based plan of an individual croft could average £300 to £400. This takes account of straightforward instances where there is an OS map of the locality to the required scale and the croft boundaries are fenced correctly and so marked on that map. However, the cost of preparing suitable plans of crofts which are relatively large and possess irregular boundaries could be much higher than the average.

1.11 Given that some crofts could be straightforwardly identified from boundaries marked on available OS maps, Option 2 is expected to have a potential cost of up to £5m. There would be no apparent gain to the public interest from this expenditure. There are also clear risks to the public purse in connection with this option as the Scottish Executive might be held liable for any errors or deficiencies in plans it has provided.

1.12 Option 3 would have costs to individual tenants and owners of crofts averaging out at between £300 and £400 per croft where adequate plans are not available to the occupant. It is unlikely that individual landlords would be responsible for the preparation of many plans on re-letting (there are over 300 crofting estates recorded in the Register of Crofts and only 88 applications for re-letting were made in 2002/03) and their costs are therefore unlikely to be much greater. However, it should be noted that some crofters hold multiple tenancies, which implies that they might be required to produce more than one croft plan.

1.13 Both Options 2 and 3 would have costs for the Crofters Commission in filing and storing plans and making copies available to the public on request. We envisage that the Commission should be able to recoup the costs of providing copies by making a charge of around £5.00 to meet each request.

Consultation

1.14 The issue of croft mapping was raised with the Crofting Consultative Panel. As was to be expected, there was considerable resistance from crofting interests to the idea that crofters should pay for the preparation of plans of their own crofts. Many respondents believed that the Executive already had suitable map based plans of their crofts through applications for agricultural support grant. However, these plans exclude non-agricultural croft land areas such as houses and gardens and would require amendment before the Crofters Commission could accept them.

Equity and Fairness

1.15 There are no barriers of race, age, sex, income, religion or disability in crofting legislation, nor are these to be found among croft tenants, owners of individual crofts or landlords of multiple crofts. The proposals in Options 2 and 3 do not therefore raise issues of equity and fairness.

Small Firms Impact Test

1.16 The interests of crofters and owners of individual crofts are represented by the Scottish Crofters Foundation and the National Farmers Union of Scotland. The interests of landlords are represented by the Scottish Rural Property and Business Association (formerly the Scottish Landowners Federation). All three organisations have been consulted at each stage of the Bill process and have had private meetings with officials on subjects arising, including the issue of preparing map based plans of crofts. While the proposal that occupiers should pay for the preparation of these plans is not welcome, it has not been shown that the expected costs would have much impact on croft-based businesses. Whilst Option 2 would have no effect on the sector, Option 3 would have only the minimal effect identified at paragraph 1.12 above.

Competition Assessment

1.17 The 17,700 crofts are tenanted or owned by around 12,000 individuals. Crofts are almost invariably limited to a few hectares with shares in grazing land. Tenants and owners operate on an individual basis, largely in small-scale agricultural production and none enjoy significant market share. All croft tenants and owners, including those of any new crofts created, eventually would be subject to the one-off requirement to produce a plan. No comparative advantage or disadvantage within the sector would be created by the requirements of Options 2 or 3, nor would there be advantage or disadvantage by comparison with non-crofting agricultural production.

Enforcement and Sanctions

1.18 Option 3 requires that where a plan of the croft has not already been provided to the Crofters Commission, the Commission will be able to require that one is provided where the occupier of the croft changes. The Commission will be empowered to refuse to process applications under crofting legislation where the occupier does not produce a plan. This has the effect of preventing legal change to the croft e.g. a change of tenant would not be recognised or be valid. Option 2 would require no sanctions.

Monitoring and Review

1.19 Monitoring and review of the process of preparing plans under Options 2 or 3 will be conducted by the Crofters Commission.

Summary and Recommendation

1.20 The requirement under Options 2 or 3 to provide plans of crofts would not have significant impact on occupiers or raise other issues. The lack of public gain by the provision of croft plans and the potential liabilities suggests that the expenditure estimated for Option 2 could not be justified. The expenditure on Option 3 is minimal and should not have noticeable impact on croft businesses. In the long term it will be occupiers of these crofts who will gain benefits from this process in terms of reduced transaction costs and certainty over boundaries.

1.21 Option 3 – the provision of a plan when the croft changes hands – is recommended.

References in the Draft Bill

1.22 Section 8: “Maps and schemes of charges”.

Review

1.23 The impact of these proposed changes would be reviewed by SEERAD within 10 years of their coming into force as legislation. A new Regulatory Impact Assessment would be conducted at that point.

2 Comprehensive Right of Appeal to the Land Court

Issue

2.1 The current legislation only makes piecemeal provision for appeals from the Crofters Commission to the Land Court, and there is no consistency within the appeal mechanism. The lack of a comprehensive right of appeal raises the question of whether the present provisions are compliant with the European Convention on Human Rights (ECHR).

Objective

2.2 To provide a right of appeal to the Land Court against each regulatory decision by the Crofters Commission. This right of appeal should be extended to interested parties as well as the applicant.

Risk Assessment

2.3 The potential risks of change are that the exercise of a right of appeal would have potential cost implications for parties involved. These would, however, be voluntary as the Bill does not introduce a requirement to either appeal or to defend against an appeal. There is no requirement for legal representation at a Land Court hearing and costs may therefore be minimal. Where the services of a solicitor or advocate are retained by a party to the appeal, costs would be incurred. However, where there is a legal dispute in the courts it is normal for costs to be awarded in favour of the successful litigant. So, in the event of a successful appeal, the appellant's legal costs would most likely fall to be met by the Crofters Commission.

Options

2.4 In broad terms, 2 options are available:

1. Do nothing
2. Introduce the comprehensive right of appeal.

Benefits

2.5 Option 1 would involve no change and would therefore bring no benefits compared with the current situation. It is likely that at some point there would be a challenge to the legislation's failure to provide for appeal against Commission decisions.

2.6 Option 2 would introduce the rights of appeal which are necessary to meet ECHR requirements.

Costs

2.7 Option 2 could result in costs to appellants and other interested parties appearing at a Court hearing but in the case of appellants normally only if they lose the appeal. Although there is no requirement to engage legal representation to appear before the Court, the costs of retaining a solicitor could be around £1000, and with an advocate costs could rise to around £5000. The Land Court has indicated that, subject to the provisions of the Bill (1) enabling the Crofters Commission to review its own decisions prior to an appeal to the Court and (2) avoiding the need for the Court to hear appeals de novo, the costs to the Court should be held within current resources.

Compliance

2.8 We see no compliance issues arising. Indeed this provision is intended to resolve existing compliance concerns.

Consultation

2.9 The issue of a system of appeal was raised with the Crofting Consultative Panel and in the White Paper. There was strong support for the proposal and for the role of the Land Court.

Equity and Fairness

2.10 There are no barriers of race, age, sex, income, religion or disability in crofting legislation, nor are these to be found among croft tenants, owners of individual crofts or landlords of multiple crofts. The options of introducing a comprehensive appeal system does not raise issues of equity and fairness within a crofting context. Indeed it enhances the possibility of ensuring equity and fairness by extending existing rights of appeal. Leaving matters as they stand would retain the existing unfairness of the present situation.

Small Firms Impact Test

2.11 The interests of crofters and owners of individual crofts are represented by the Scottish Crofters Foundation and the National Farmers Union (Scotland). The interests of landlords are represented by the Scottish Rural Property and Business Association (formerly the Scottish Landowners Federation). All three organisations have been consulted about this matter and so far have not raised any concerns about this proposal. This does not impose any new burden on the business interests of crofters and landowners as they are not compelled to appeal a decision made by the Crofters Commission.

Competition Assessment

2.12 Maintaining the status quo or extending the right of appeal to all with a clear interest in the decisions of the Crofters Commission does not introduce advantage or disadvantage to any person. Nor does it have an impact compared with other businesses involved in ownership or tenure of agricultural land since agricultural holdings are also subject to a regulatory regime.

Enforcement and Sanctions

2.13 No enforcement requirements exist and none are proposed.

Monitoring and Review

2.14 Monitoring and review of both options would fall to the Crofters Commission.

Summary and Recommendation

2.15 Maintaining the status quo is not sustainable. A comprehensive right of appeal would secure the legislation against challenge on the basis that the lack of a right of appeal does not meet ECHR requirements. The proposed appeal provisions should not lead to significant costs to be met from public funds.

2.16 The option of introducing a comprehensive right of appeal to the Land Court against decisions of the Crofters Commission is recommended.

References in the Draft Bill

2.17 Section 5 (58A)(10)(b)(ii): “Obtaining Commission approval or consent” and section 33: “Appeal to Land Court and jurisdiction of that court”.

Review

2.18 The impact of these proposed changes would be reviewed by SEERAD within 10 years of their coming into force as legislation. A new Regulatory Impact Assessment would be conducted at that point.

3 Landlord's Right of Consent to Crofter Forestry Development

Issue

3.1 The current legislation requires that, in order for a Grazings Committee to proceed with a Crofter Forestry development on common grazing, the consent of the owner of that common grazing is required. As a result, the ability of crofters to diversify and develop their common grazings through afforestation has been dependent on the attitude of the particular person who owns that common grazings.

Objective

3.2 To give tenants the right to undertake forestry development on their common grazings, subject to a right by the owner to refuse to consent to the proposal on certain specified grounds. Where tenants have been refused consent for a forestry proposal by either the owner of the common grazings or the Crofters Commission, to give those tenants the right to apply to the Land Court to have the refusal of consent overturned.

Risk Assessment

3.3 The potential risk of change is that approval of a crofter forestry development may have some adverse effects on the owner's sporting rights. This is not possible to quantify, but if it resulted in one stag less shot in each year, the loss of value to the estate could be in the order of £20K (valuer's standard estimate). However there is the possibility that once the trees matured, a degree of shelter would be available for deer.

Options

- 3.4 In broad terms, three options are available:
- 1 Do nothing.
 - 2 Remove the owner's right to refuse consent and introduce a right for owners to seek compensation from crofters for loss resulting from crofter forestry.
 - 3 Modify the owner's right to refuse consent to make it a qualified right. The owner would continue to be able to refuse an application in certain circumstances, but grounds for any refusal must be given and these grounds could be tested in the Land Court if challenged by the crofters concerned. The refusal could be overturned by the Court if the Court determines that the circumstances under which consent can be refused do not arise. (This is the option advanced in the draft Bill).

Benefits

3.5 Option 1 would involve no change and would therefore bring no benefits compared with the current situation.

3.6 Option 2 would discourage crofters from forestry development.

3.7 Option 3 would allow for final determination of a forestry proposal by the Land Court and would ensure a proper legal process of determining whether the owner's concerns are sufficient to prevent the proposal going ahead.

Costs

3.8 Option 2 would have unquantifiable costs for crofters but, given that one stag shot on a crofting estate is judged by valuers to be worth £20K to the estate, could be considerable.

3.9 Option 3 could have costs in resorting to the Land Court. Although there is no requirement to engage legal representation to appear before the Court, the costs of retaining a solicitor could be around £1000, and with an advocate this could rise to around £5000. However, all of the costs of court action are likely to be awarded against the party that loses the case – either the crofters or the owner.

Compliance Issues

3.10 With the involvement of the Land Court as final arbiter, we see no compliance issues arising.

Consultation

3.11 The issue of ending the owner's right of final consent was raised with the Crofting Consultative Panel and in the White Paper. There was strong support for the proposal and for the role of the Land Court, other than from the Scottish Landowners Federation (now the Scottish Rural Property and Business Association) and one individual landowner. The matter of compensation was not raised in responses.

Equity and Fairness

3.12 Owners and crofters each have well-defined interests in use of common grazing land. The owner has rents, sporting and mineral rights, together with rights of access to the land at any time and a right to apply to the Land Court to resume the land from crofting tenure and thus end crofters' rights on that land. Crofters have the right to graze animals and apply to the owner for permission to seek the consent of the Crofters Commission to plant trees. Retaining the status quo which allows owners to refuse crofters' applications reflects the traditional balance of rights and responsibility in crofting but gives the owner an absolute veto on proposals from the crofters. However, it is inconsistent with current public policy which aims to encourage greater community involvement and control over land resources in crofting areas.

3.13 Allowing crofters to proceed with forestry developments without the owner being able to prevent these, subject to the owner being eligible to compensation from crofters where trees are planted, might appear equitable and fair in that the owner would not suffer financial loss. However, although compensation is paid, the owner's rights in the property would effectively be overridden by the tenants rights to plant trees. This is not likely to be viewed as fair and equitable by owners and raises questions about the owner's rights to enjoyment of property. This approach is bound to be opposed on grounds of fairness. In any case there are mechanisms for acquisition of croft land in the Land Reform (Scotland) Act 2003 by which crofting grazings can be acquired and these can be used if the intention is to undertake crofter forestry on a scale which would result in depriving the owner of any effective right to use the land.

3.14 Allowing the crofters a right to request the Land Court to determine whether or not an application to plant trees may be made to the Crofters Commission does to some extent impact on the owner's rights. However, the legislation provides for a reasonable refusal to be upheld. This approach would provide a greater degree of equity and fairness between owner and crofters' rights than exists currently. It will not impact unfairly on the owner to the same extent as option 2 because it would be reasonable for the owner to refuse an application if the proposal has a significant impact on his interests.

Small Firms Impact Test

3.15 The interests of crofters and owners of individual crofts are represented by the Scottish Crofters Foundation and the National Farmers Union (Scotland). The interests of owners are represented by the Scottish Rural Property and Business Association (formerly the Scottish Landowners Federation). All three organisations have been consulted on the issue of forestry. The crofters' representatives favoured the introduction of a right to request the Land Court to determine whether a owner's refusal was justified. The owner's representatives favoured retention of the status quo.

Competition Assessment

3.16 The ending of the owner's right to refuse planting of trees by crofters without challenge would apply to all owning grazing land under crofting tenure. The right to seek compensation discussed at Option 2 would equally apply to all such owners. There is no competition issue as the costs of forestry development are the same for all.

Enforcement and Compliance

3.17 Both the option of allowing owners to seek compensation from crofters and that of permitting crofters to challenge an owner's refusal of permission would be bound by Land Court decisions.

Monitoring and Review

3.18 Responsibility for monitoring and review of the effects of an end to the owners' unchallenged right to refuse an application will be the responsibility of the Crofters Commission.

Summary and Recommendation

3.19 The first option of making no change would not produce an improved balance between the rights of owners and those of crofters.

3.20 The second option of discontinuing the owner's right of refusal and allowing landlords to seek compensation from crofters would be costly, open to challenge and would give the tenants unfettered control.

3.21 The third option of allowing crofters to request the Land Court to approve or over-ride an owner's refusal permits the arguments for and against an application to be heard and determined. The costs of going to the Court and the possibility of losing a court action should encourage parties to seek consensus rather than conflict.

3.22 The third option is recommended.

References in the Draft Bill

3.23 Section 29(1)(2C): "Use of Common Grazings".

Section 33: "Appeal to Land Court and jurisdiction of that court".

Review

3.24 The impact of these proposed changes would be reviewed by SEERAD within 10 years of their coming into force as legislation. A new Regulatory Impact Assessment would be conducted at that point.

4 The untested right of owner consent to crofters felling, use and sale of trees

Issue

4.1 The wording employed in section 50 and paragraph 13 of Schedule 2 to the Crofters (Scotland) Act 1993 allows the possibility that an owner of a common grazing or landlord of a croft could adopt the position that crofters who plant trees require a specific permission to cut them down or sell or otherwise use the timber produced.

4.2 This as yet legally untested right of an owner appears to have been an oversight in the framing of legislation rather than an intention. Were these provisions to be tested in a court, it is highly likely that the conclusion would be favourable to a crofter's implicit right to fell and use the trees which he had planted. The prospect of clarification was raised in the White Paper and no adverse comments were received.

Objective

4.3 The draft Bill proposal would make clear that crofters would have the right to cut, sell and use timber and other woodland products derived from trees which they themselves had planted either on their own crofts, or as part of a crofter forestry scheme.

Risk Assessment

4.4 No potential risks of change have been identified.

Options

4.5 Two options are available.

- 1 Do nothing
- 2 Clarify legislation as identified above.

Benefits

4.6 Option 1 involves no change, would bring no benefits compared with the present situation and would leave the question of whether the landlord does in fact have a right to give permission to be eventually resolved in the Courts.

4.7 Option 2 would clarify the position and remove the question as to whether the landlord does in fact have the right to withhold consent to crofters' use of woodland and woodland products.

Costs

4.8 Option 1 would, if the right to consent was ever to be tested in the Land Court, result in the crofters and owner involved incurring expenditure on legal proceedings.

4.9 Option 2 has no identifiable costs.

Compliance Issues

4.10 Under Option 1, it is not known whether compliance issues would arise. Under Option 2, no issue of compliance would be raised.

Consultation

4.11 The issue of clarification was raised with the Crofting Consultative Panel and in the White Paper. There were no objections to the proposal advanced as Option 2.

Equity and Fairness

4.12 It seems difficult to argue that there is equity and fairness in the current uncertainty whether a landlord, in addition to his rents, may take for himself the profits accrued by a crofter's investment. On the other hand, it seems clear that equity and fairness require that a crofter receive the full value resulting from his investment.

Small Firms Impact Test

4.13 The interests of crofters and owners of individual crofts are represented by the Scottish Crofters Foundation and the National Farmers Union (Scotland). The interests of owners are represented by the Scottish Rural Property and Business Association (formerly the Scottish Landowners Federation). All three organisations have been consulted and both crofters' and owners' representatives were content with the proposal.

Competition Assessment

4.14 There is no competition issue as the costs of forestry development are the same for all.

Enforcement and Sanction

4.15 The proposed change should not require enforcement or sanction.

Monitoring and Review

4.16 The proposed change should not require monitoring and review.

Summary and Recommendation

4.17 Option 1 of leaving matters as they stand would continue a degree of uncertainty which may inhibit crofter forestry schemes and result at some future point in legal costs to resolve the issue. Option 2, by clarifying the right of crofters to receive the full value of their investment would remove these potential difficulties and raise no objections from organisations in the field.

4.18 Option 2 is recommended.

References in the Draft Bill

4.19 Section 29(1)(3B): “Use of Common Grazings”.

Review

4.20 The impact of these proposed changes would be reviewed by SEERAD within 10 years of their coming into force as legislation. A new Regulatory Impact Assessment would be conducted at that point.

5 The right of landlords to give or withhold consent to division of a croft by the tenant

Issue

5.1 The current legislation requires that, in order for a tenant to successfully divide his croft, the consent of his landlord is required. As a result, the ability of tenant crofters to create another holding from their own croft has been dependent on their landlord's attitude. This can mean a crofter is unable to provide a separate holding for a family member or other person to build a house and remain in the community.

Objective

5.2 To enable the retention and growth of rural population by giving croft tenants the right to divide their crofts. This would be subject to a right by the landlord to object to the proposal and so require the Crofters Commission to determine whether it should go ahead. To give a right to appeal to the Land Court against that decision to the croft tenant, landlord and – where a share in the common grazings is involved – other shareholders. Where a croft is divided, the rents for the resulting units will be a matter for agreement between landlord and tenant. Where no agreement can be reached, either of the parties could request the Land Court to set a new rent. The reasonable legal costs of this exercise would be borne by the tenant. Where setting that rent, the Land Court should be able to set a rent which would offer the landlord an acceptable margin of revenue over reasonable costs of collection.

Risk Assessment

5.3 The potential risks of change are that recourse to the Land Court on appeal against a decision by the Crofters Commission, would have cost implications for landlord and tenant. Recourse to the Land Court on rent alone would have costs for the croft tenants and, although the legal costs would be borne by the tenant(s), the landlord would require to put some degree of effort into preparing a case.

Options

- 5.4 In broad terms, 2 options are available:
- 1 Do nothing.
 - 2 Remove the landlord's right of consent to a subdivision and replace it with a right of objection.

Benefits

5.5 Option 1 would involve no change and would therefore bring no benefits compared with the current situation.

5.6 Option 2 would exclude veto by landlords of division of crofts. This would further enable the retention of population in rural crofting communities while guaranteeing landlords a fair rent.

Costs

5.7 Option 2 could have costs for croft tenants in resorting to the Land Court on rents or where appealing against a decision of the Crofters Commission. In the latter case, landlords also could have costs. Appeal is not mandatory, and the Court does not require legal representation. Were legal representation employed, the costs could be from £1000 to £5000 depending on whether a solicitor or advocate were retained. Crofters would no doubt consider in advance whether exercise of appeal rights was financially worthwhile. Where there is a legal dispute in the courts it is normal for costs to be awarded in favour of the successful litigant. So, in the event of a successful appeal, the appellant's legal costs would most likely fall to be met by the Crofters Commission.

Compliance Issues

5.8 Where there is involvement of the Land Court as final arbiter, both for division and for a fair rent, we see no compliance issues arising.

Consultation

5.9 The question of subdivision and landlord's consent was raised with the Crofting Consultative Panel and in the White Paper. There were few responses, and these were divided as to the merits of the proposal.

Equity and Fairness

5.10 It seems equitable and fair that a crofter should not require the landlord's permission to divide his croft, provided that the landlord's rents post division are fair and worth the collecting.

Small Firms Impact Test

5.11 The interests of crofters and owners of individual crofts are represented by the Scottish Crofters Foundation and the National Farmers Union (Scotland). The interests of landlords are represented by the Scottish Rural Property and Business Association (formerly the Scottish Landowners Federation). All three organisations have been consulted at each stage of the Bill process and have had private meetings with officials on subjects of interest. The proposal would remove constraints on a crofter wishing to divide his croft. The landlord's interests in appropriate levels of rent would be preserved. The Scottish Crofters Foundation was concerned that easier division of crofts could lead to fragmentation of croft land. The Scottish Rural Property and Business Association believed that legislation on division should remain unchanged.

Competition Assessment

5.12 There do not appear any implications for competition among crofters, landlords or between these and their non-crofting counterparts tenancing or owning land.

Enforcement and Sanctions

5.13 Enforcement and sanctions do not appear to be required. A landlord could not prevent division where this was approved by the Crofters Commission or, where the question went to appeal, the Land Court. A crofter refusing to pay rent risks losing his tenancy if the landlord takes that matter to the Land Court under the current legislation. That sanction will continue.

Monitoring and Review

5.14 Monitoring and review of the effect of removal of the landlord's veto on division of crofts will be the responsibility of the Crofters Commission.

Summary and Recommendation

5.15 To leave matters as they are under Option 1 does not provide any improvement to the current situation. To remove the landlord's right of preventing division of crofts under Option 2 removes a barrier to population retention and growth in rural communities.

5.16 Option 2 is recommended

References in the Draft Bill

5.17 Section 14: “Division of croft”.

Review

5.18 The impact of these proposed changes would be reviewed by SEERAD within 10 years of their coming into force as legislation. A new Regulatory Impact Assessment would be conducted at that point.

7 NEXT STEPS

The Scottish Executive Consultation Process

Consultation is an essential and important aspect of Scottish Executive working methods. Given the wide-ranging areas of work of the Scottish Executive, there are many varied types of consultation. However, in general Scottish Executive consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body. Consultation exercises may involve seeking views in a number of different ways, such as public meetings, focus groups or questionnaire exercises.

Typically, Scottish Executive consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the area of consultation, and they are also placed on the Scottish Executive web site enabling a wider audience to access the paper and submit their responses. Copies of all the responses received to consultation exercises (except those where the individual or organisation requested confidentiality) are placed in the Scottish Executive library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4552).

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

If you have any comment about how this consultation exercise has been conducted, please send them to Dorothy Parr at the above address.

All comments received on these proposals will be carefully considered, and will help the Scottish Executive to prepare the Bill for introduction to the Scottish Parliament, possibly in the 2005–06 legislative session.

Details of how the Bill might progress through consultation, the Parliamentary process and into law are set out below. The Parliament and its Committees have wide discretion, and thus timings for the Parliamentary process cannot be given at this stage.

- The Bill is revised in light of this consultation on the draft Bill.
- A revised Bill together with accompanying papers is provided to the Parliament.
- The Bill is then passed to the chosen lead Committee (likely to be the Environment and Rural Development Committee) for consideration of the general principles of the Bill. The Committee prepares a report for Parliament.
- Parliament then debates the general principles of the Bill in plenary. The Parliament can approve or reject the Bill at this stage.
- If the Bill is approved, it is then referred to the lead Committee for detailed examination and for the consideration of amendments.
- The Bill as amended is then considered in plenary by the Parliament. It may be further amended at that time. The Parliament may approve or reject the Bill.
- If the Bill is approved it then goes to receive Royal Assent and becomes law.

The Land Reform website provides background information and a discussion forum at www.scotland.gov.uk/landreform

© Crown copyright 2005

This document is also available on the Scottish Executive website:
www.scotland.gov.uk

Astron B39949 03/05

Further copies are available from
Blackwell's Bookshop
53 South Bridge
Edinburgh
EH1 1YS

Telephone orders and enquiries
0131 622 8283 or 0131 622 8258

Fax orders
0131 557 8149

Email orders
business.edinburgh@blackwell.co.uk

