

## Response ID ANON-A27G-ZWAW-T

Submitted to Crofting and Scottish Land Court Bill  
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Name:  
Scottish Crofting Federation

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Email:  
susi@crofting.org

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Organisation

### Organisation details

1 Name of organisation

Name of organisation:  
Scottish Crofting Federation

2 Information about your organisation

Please add information about your organisation in the box below:

The Scottish Crofting Federation is Scotland's only membership organisation exclusively dedicated to representing the interests of crofting and crofters. SCF's mission is to safeguard and promote the rights, livelihoods and culture of crofters and their communities and to preserve and develop crofting through advocacy, training, representation and support, while encouraging diversity through new young entrants to crofting.

### Question page 1

1 Part 1 of the Bill would make a number of changes to crofting legislation. Do you have any comments on any of these changes? Please say which sections of the Bill you are commenting on in your answer.

Please provide your response in the box provided.:

While the Bill is not the comprehensive reform we would like to see, and while we insist that such reform is undertaken in the next parliamentary term, we broadly agree with the proposed technical changes. We agree with provisions that strengthen the Bill to prevent misuse, neglect, absenteeism and excessive decrofting. Accordingly, we only highlight sections where major concerns remain.

Section 1 on enabling environmental uses of crofts:

We do not have concerns about environmental uses as such. However, we would like to see safeguards as to ensure that a) environmental uses are not encouraging absenteeism and land speculation on croft tenancies, and b) that environmental uses do not prevent future cultivation.

On the former, we propose to strengthen the evidence required to establish that residency duties are complied with (for crofters to have their ordinary residence within 32 kilometres of the croft) as suggested in the comment on section 4.

On the latter, we propose to remove the exemption that allows for a croft not being kept in a state fit for cultivation in paragraph (3)(c).

Further, we suggest that the wording of the provision on environmental use could be strengthened by replacing:

“...‘environmental use’ means any planned and managed use...”

with:

.....“environmental use means any form of land use that is intentionally designed and systematically managed to support or enhance environmental objectives.” (or similar)

Section 3 on reporting of breaches of duties:

The definition of “crofting community” is too narrow. Imposing a duty on the Commission to investigate reported breaches of duties only when coming from the same crofting township will not lead to any meaningful increase in uncovering breaches of duties. Crofters will not report their neighbours with whom they have to get along.

While some of our members have suggested a widening of the definition of crofting community to encompass the respective Parish instead, others have suggested that some other body, such as the local Community Council or the local RPID office could assist in reporting suspected breaches of duties and that in these cases, the Commission should be under a duty to investigate, too.

While we acknowledge that it is challenging to find the right “radius” to apply, the current definition will, in our view, not lead to any improvement in terms of reporting any breaches and further thought should be given to ways to widen the community definition, not least in the interest of aspiring crofters who live in the townships and would like to access a croft to work.

Section 4 on enforcement of duties:

While we welcome the provisions strengthening the enforcement of breaches of duties, we do think that the Commission should require crofters to come up with sufficient evidence to prove that residency duties are complied with i.e. that people actually live within 32 kilometres.

This could be a number of things that would, cumulatively, be needed to establish ordinary residency, such as driving licence, electoral register, registered with the local GP etc.

The problem is that the Commission currently appears to accept it as sufficient if an absentee occupier living overseas just states that they are complying with residency duties - which clearly is not enough. While we are not suggesting that the evidence required is listed in primary legislation, there could be a provision that establishes a duty for crofters to provide such evidence (to be defined more closely through secondary legislation or policy plans).

Section 8 on assignation to family members:

We accept that this is the compromise that has been reached instead of withdrawing scrutiny on assignations altogether. However, we still think that the number of three crofts is arbitrary given crofts can largely vary in size.

Accordingly, we suggest considering adding a hectareage threshold as an alternative to number of crofts and adding a provision that allows for third parties currently not considered to intervene on assignations (just as in relation to breaches of duties).

Section 9 on the meaning of “owner-occupier crofter” etc:

The application to acquire owner-occupier crofter status will go under section 58A with the section on public notification and the right to object being removed. However, the Commission is still obliged to consider all the other requirements of section 58A(7) and that appears to introduce some contradictions. In considering the likes of the interests of the crofting community and its sustainable development, the Commission has been inclined to take no representation as entailing there are no issues. However, in this regard there is no means to make representation so how does the Commission assess this and fulfil its responsibility? A transaction of this nature should be transparent as it is providing a recognised crofter status and greater potential to access crofting grants and public funding.

Generally, we believe that scrutiny on conferring owner-occupier status should mirror the scrutiny on assignations of tenancies and only be granted upon sufficient proof that crofting duties will be adhered to in any case (not only the instances the Bill seeks to rectify). We would like to see a provision that ensures that, whenever any owner-occupied croft is transferred, owner-occupier crofter status will only be granted after the Commission is satisfied as to the evidence given by aspirant crofters, analogous to the assignation process.

The initial consultation has highlighted impact of the free market in crofting and its impact upon the potential for younger people from crofting communities to acquire crofts in their localities. Hence, counter-arguments to this proposition were that an upfront check on owner-occupier crofter status will inhibit the market in crofts, however, dampening the market is exactly what is needed. Further, people’s genuine willingness to cultivate and live on the croft could be proven upfront, avoiding a lengthy and costly breach of duty process. While we appreciate that it may be difficult to establish if people are genuine in some instances, just now it is often the case that people buy owner-occupied crofts without knowing what they are buying - at least these cases could be prevented.

Another issue we would like to highlight in relation to owner-occupier crofter status is an opportunity to simplify things when new owner-occupied crofts are created: In this instance, the crofter should be able to gain owner-occupier crofter status from the outset – at the moment such a person becomes a constituting landlord, and has to employ various devices to gain owner-occupier status for themselves which is costly and bureaucratic. Even if the new Bill will provide a mechanism to apply for owner-occupier crofter status, in this context it is unnecessary bureaucracy after the event, as compared with the opportunity to simply tick a box on the croft creation application form.

Section 10 on Prohibition on transfers of owner-occupied crofts to persons who are not individuals:

The intention here is presumably to ensure that crofts are occupied by real people who can work them and be resident, and prevent owner-occupied

crofts being bought and sold by private companies for speculative reasons, both intentions being ones we do support. However, there are unintended consequences to the current wording.

Firstly, this section would prevent projects involving new croft creation as currently being pioneered in Glengarry: where a new croft is created for owner-occupation, and a Rural Housing Burden (RHB) attached to the whole croft, the purpose of the RHB being to both allow a discount on market value and also give a right of pre-emption (so that if the crofter chooses to sell, the onward sale can be controlled). An RHB must be in favour of a Rural Housing Body which is by definition not a person, so the current section as drafted would prevent the right of pre-emption being exercised. We propose to stipulate some sort of exemption within this section for the situation where RHBs are attached to the croft.

Secondly, this issue extends beyond new croft creation, in a situation where an owner-occupied croft comes up for sale, and a local community organisation wishes to acquire it in order to sell it on to a local purchaser of their choice, most likely introducing an RHB as above to protect the croft. The community body could even be a community owner of the crofting estate which includes the croft in question. This would appear to be a very desirable outcome – bringing an owner-occupied croft within the control of the community so they can influence its future occupation. However, once again Section 10 as currently drafted would prevent this, as the community body would not be legally able to acquire the croft (with a view to selling it on to a suitable occupier).

Section 11 on the ten-year restriction on assignation and purchase following Commission let:

We welcome this provision but feel that the aspiration should be bolder: the justification given for the proposed restriction would apply equally to withholding the right to acquire the croft from the tenancy permanently. Similarly, the restriction on the right to assign could also be permanent, with a slight adjustment to allow assignation to immediate family at any point. This would echo the approach currently being taken by most community landowners who create new crofts.

Section 14 on commission's power to adjust boundaries: Has there been a conversation with the team currently working on the community right to buy review? Mapping requirements are the biggest obstacle for crofting communities when trying to exercise a Part 3 crofting community right to buy. We would ask that steps are taken to dovetail any legislative changes to fit with the community right to buy review aimed at simplifying and strengthening CRTBs.

Section 15 on unattached grazing shares:

Some of our members are of the opinion that grazing shares should reside with the croft as a matter of principle. Doing otherwise will lead to further fragmentation and disbanding of crofting townships and common grazings. While one could argue that separating shares from crofts could potentially lead the way towards providing wider access to croft land for those who have not, creating more deemed crofts can lead to the destruction of common grazings and the spirit of collaboration and cooperation that is at the heart of crofting.

There is a risk that split grazing shares are acquired for speculative reasons related to natural capital markets. While we (as detailed below) support sensible environmental initiatives on common grazings, we would like these to be a joint endeavour of the active shareholders, rather than “patchy” individual initiatives which also do not conform with the government's aspirations to taking a landscape-scale approach to environmental restoration.

On the other hand, there is a risk that whilst there may be little harm in the share being purchased with croft in the initial process, any subsequent transfer of that share entails that there is no scrutiny by the regulatory body or by those with rights to representation as to who has access to and rights to share in a community asset. The proposal would make sense where the transfer of owner-occupier crofter status in all cases was subject to section 58A(7) requirements. In this case, there would be some form of scrutiny and a joined-up approach to crofting regulation that would make this coherent and sensible.

Section 18 on the use of common grazings for forestry and environmental purposes:

While we do welcome the provisions aimed at making it easier for crofters to pursue environmental initiatives on common grazings, there are various problems. Firstly, we are concerned that the instances in which a landowner can refuse consent are too wide and open to all sorts of interpretation. What, for example, would qualify as “intended” resumption? What proof would be required for such an intent? Likewise, what does “the sound management of the estate” mean?

Further, while the intention behind the proposed changes is good, it appears unlikely that they will lead to a substantial uptake in environmental initiatives. Too many uncertainties remain, above all with regard to rights flowing from carbon sequestration and other ecosystem services. While there are assertions from legal experts affiliated with the landed sector that carbon rights actually reside with whoever owns the land, this is not a settled legal opinion. Carbon rights in other jurisdictions can flow from the activity undertaken, rather than the underlying landownership, and precedents in Scots law show that the ownership of the surface of land does not necessarily mean the ownership of all resources on or under the land (See SLC Land Lines Paper by Robbie / Jokubauskaite 2022).

There are, however, other barriers too, in terms of accessibility of grants for such projects, and in relation to the uncertainties how nature markets interfere and interact with other policy areas, namely agricultural policy and its overarching objectives to reduce emissions and restore nature. We believe that, in the light of the Scottish government's commitment to furthering circular economies, the agricultural support framework should incentivise the inseting of residual carbon emissions, rather than selling emission reductions abroad which then will not be available to crofters and communities anymore to reach their own net zero requirements. We would expect options in this respect to be outlined in the upcoming rural support plan.

We are of the opinion that in the case of crofter-led developments on common grazings, crofters should have the right to exclusive economic and recreational use not only, as stipulated in paragraph 6 of the relevant provision, with regard to woodlands, but also in the other scenarios such as peatland restoration and habitat creation as outlined in paragraph 7. We understand this to include any economic and other benefits flowing from carbon and other ecosystem services. These exclusive rights should reside with the community of shareholders as a whole and must not be divisible and

apportionable by individual shareholders.

## 2 What changes would you have liked to see included in the Bill but which are not included?

Please provide your response in the box provided.:

There has been agreement among stakeholders that the current bill should endeavour to deliver some long overdue technical fixes, rather than a more comprehensive reform. This is acknowledged by the explanatory notes to the Bill. However, many of our members are disappointed that it took eight long years to even propose these minor tweaks.

As per the comments above we would like to see amendments to the Bill in relation to:

- evidence required to satisfy residency duties
- extend Commission scrutiny to award of owner-occupier crofter status (check for genuine intention to croft before owner-occupier crofter status is granted just as done with assignments outwith family) in all cases where an owner-occupied croft changes hands (and not only in the instances the Bill addresses)
- grant rights to exclusive benefits of any crofter-led environmental initiatives to common grazing committees

Mindful of the Committee workload and the short time remaining in this parliamentary term, we refrain from lodging amendments that would be stretching the scope of the Bill proposal beyond reasonable extent. However, we do insist on a clear commitment in form of a clause that requires government to undertake a comprehensive crofting law reform which should, in our view, enable an extensive in-depth conversation on the following topics among others:

- evaluate the implementation and operation of the current legislation.
- If not already addressed in this Bill: ensure that - in the interests of coherent, consistent and transparent regulation - the transfer of owner-occupier crofter status is subject to the same requirements as tenancy assignment under section 58A
- address the escalating market in croft tenancies through tighter regulation
- contemplate provisions that limit on crofts/area one individual may occupy
- prohibit individual rights to buy on newly created crofts
- revoke the individual right to buy on existing crofts
- creation of new crofts on public land
- evaluate how to expand the crofting model across Scotland

For these proposals to be worked out in detail, a fresh look should be taken at Prof. Mark Shucksmith's 2007 Inquiry on crofting to evaluate which of the report's findings are still relevant today.

## Question page 2

1 Part 2 of the Bill would allow for the merger of the Scottish Land Court and Lands Tribunal for Scotland. Do you have any comments on this merger?

Please provide your response in the box provided.:

No. We generally support amendment proposals that would facilitate access to justice for less affluent parties.

## 2 Do you have any other comments to make on this Bill?

Please provide your response in the box provided.:

As above at question 2: We would like to see a clear commitment that imposes a duty on government for a comprehensive crofting law reform to be undertaken over the course of the next parliamentary term.