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## SPICe Briefing

# Crofting (Amendment) (Scotland) Bill

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The Crofting (Amendment) (Scotland) Bill was introduced on the 9 May 2013. The Bill seeks to resolve a technical legal problem which is affecting the ability of owner-occupier crofters to decroft land, which they may need to do in connection with housing or other developments.

The briefing provides some background on owner-occupier crofters; the Crofting Register, which is a map-based register of croft land; and on decrofting. It considers the problem; and describes the provisions in the Bill.



The Scottish Parliament  
Pàrlamaid na h-Alba

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## EXECUTIVE SUMMARY

Prior to the enactment of the Crofting Reform (Scotland) Act 2010 (asp 14) (“the 2010 Act”), the legal definition of a crofter was the tenant of a croft. There was a problem with this definition, in that it did not take account of the fact that crofters had been able to buy their croft since 1976. This meant that crofters who bought their crofts did not have the same rights or conditions of occupancy as crofters who remained tenants.

One of the policy intentions of the 2010 Act was to equalise the rights and duties of owner-occupier and tenant crofters as much as possible. As part of this owner-occupier crofters were defined in crofting law, and the Act provides a right for owner-occupier crofters to apply to the Crofting Commission for consent to divide their croft and to let it. It also creates a duty for them to be ordinarily resident on or within 20 miles of their croft, and to cultivate or put it to purposeful use and not misuse or neglect it.

The Crofting Register is a map based register kept by Registers of Scotland. It was provided for by Part 2 of the 2010 Act. The Register is now open to applications and crofters can register their crofts. The Act provides that regulatory applications to the Crofting Commission<sup>1</sup> act as “trigger points” for registration – the Commission cannot consider applications unless the croft is registered, or is registered as part of the process of an application being decided. When the Bill was before Parliament, the Government gave an undertaking that when it commenced the provisions of the Act on the Crofting Register, it would allow a year before commencing the provisions on the trigger points which require registration, to allow croft land to be registered voluntarily, and in particular to allow a croft community mapping approach, which would map and register all the crofts in a township at once, to be piloted. The “trigger points” provisions will come into force on 30 November 2013, and will require registration where a crofter makes an application to the Crofting Commission, including applications for decrofting, after that date.

When a crofter purchases their croft, they are in effect buying the landlord’s interest. The land remains croft land, and subject to crofting law. Where a crofter wants to obtain finance for a development on the croft, to build a house for example, lenders have tended to prefer that the house site and garden ground are taken out of crofting. Decrofting is a process whereby a crofter, or a croft landlord (in the case of a vacant croft), can apply to the Crofting Commission for a declaration that a particular piece of land is no longer croft land.

In January 2013 an issue with decrofting by owner-occupier crofters was drawn to the attention of the Crofting Commission. The legal basis for the Commission to approve decrofting applications by owner-occupier crofters was questioned. The Crofting Commission sought legal advice which it received in February 2013. The advice was that there was a problem, and that there was no legal basis on which they could accept or determine decrofting applications from owner-occupier crofters. The Commission communicated this finding to the Scottish Government, and suspended consideration of the 50 decrofting applications from owner-occupier crofters that were then before it, pending resolution of the legal problem. On 25 February 2013, the Commission published a note to the effect that owner-occupier crofters

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<sup>1</sup> The Crofters Commission was reconstituted as the Crofting Commission by the Crofting Reform (Scotland) Act 2010

could not apply to decroft, and the Commission could not give decrofting directions, unless the croft was vacant. On 7 March 2013 the Commission confirmed in a news release that it had sought further legal advice and that as the law currently stands, the view of its Board is that there is no provision that allows owner-occupier crofters to decroft. The Commission is not currently accepting further decrofting applications from owner-occupier crofters, pending resolution of the problem. Between 1 October 2011 when the definition of owner-occupier crofter was brought into force, and the problem coming to light, the Crofting Commission had approved 159 applications for decrofting directions from owner-occupier crofters.

The Minister for Environment and Climate Change, Paul Wheelhouse MSP, made a statement to the Parliament on this issue on the 28 March 2013. He explained that there was a defect in the legislation, and that it was not operating as Parliament had intended. Parliament's intention was that in equalising the rights of owner-occupier and tenant crofters, owner-occupier crofters would be able to continue to apply to decroft land, as before. The Minister explained that the Government had decided a short Bill was needed to resolve the problem, and that the Government would seek the Parliament's approval to expedite the passage of a Bill so that it passed its Parliamentary stages before the summer recess.

Brian Inkster, a solicitor with a practice specialising in crofting law has argued in an article that the existing legislation can be interpreted differently, that it is lawful for owner-occupier crofters to apply to decroft land, and that further legislation is not needed.

The Crofting (Amendment) (Scotland) Bill was introduced in the Parliament on the 9 May 2013. It has seven sections and a schedule. Due to the tight timescales involved in the preparation of the Bill the Government has not been able to hold a formal consultation on its proposals. The Bill would amend the Crofters (Scotland) Act 1993 (c. 44) ("the 1993 Act") to:

- allow owner-occupier crofters to apply to the Crofting Commission to decroft the whole or part of their crofts, whether the croft is vacant or not;
- allow the Crofting Commission to give decrofting directions on such applications
- allow the Crofting Commission not to consider a decrofting application if they have issued a direction to an owner-occupier crofter requiring them to submit proposals for letting the croft (where the Commission have determined that the owner-occupier crofter had breached one or more of their duties)
- enable the new legislation to be applied retrospectively to address issues arising from 1 October 2011 when the owner-occupier crofter status was introduced

## **BACKGROUND: OWNER-OCCUPIER CROFTERS**

Prior to the enactment of the Crofting Reform (Scotland) Act 2010 (asp 14), the legal definition of a crofter was the tenant of a croft. There was a problem with this definition, in that it did not take account of the fact that crofters had been able to buy their croft since 1976. The Crofting Reform (Scotland) Act 1976 (c21) gave a crofter the option of acquiring an owners title to his croft land. Under these provisions, now consolidated into sections 12 to 19 of the 1993 Act, a tenant crofter may require his landlord to sell him the whole of the inbye land of the croft or any part of it. If the landlord refuses to sell, or there is disagreement on terms and conditions, the crofter can apply to the Land Court for an Order authorising him to acquire the land. Where it is left to the Court to fix the price, it will be fixed at a sum equal to 15 times the amount of the current annual rent payable for the land to be acquired. The Land Court can refuse to grant the crofter's application for an Order authorising him to acquire croft land. It will refuse if satisfied:

- that the sale of the land would cause a substantial degree of hardship to the landlord, and/or
- that the sale would be substantially damaging to sound estate management

If a crofter exercises their right to buy their croft they become the landlord. A strict interpretation of the law would have required that the croft then be relet - as the crofter could not be both landlord and tenant, they would have become the landlord of a vacant croft, which crofting law requires to be relet. Recognising that this would be a perverse outcome, the Crofters Commission's policy on croft purchase was that the Commission would not normally intervene to seek re-letting proposals if the crofter or a member of their family continued to work the croft.

The way a crofter was defined as being the tenant of a croft also created other problems. Crofters enjoy certain rights in crofting law e.g. they can sublet their croft; they can (with the Crofters Commission's consent) divide their croft into one or more crofts. They also have certain duties, one is to live on or near their croft (within 20 miles); and under the terms of the Crofting etc. Scotland Act 2007 (asp 7) they must put their croft to a purposeful use; and they must not misuse or neglect it. Crofting law did not provide a legal basis for a crofter who purchased their croft to sublet it, or to divide it. This could be an issue e.g. if a crofter wanted to divide the croft into a house and garden site for themselves, and create a new bare land croft which could be let to a new crofter. Whilst at that time there was no statement in law requiring a crofter who bought their croft to live on or near it, it was Crofters Commission policy to take action where a former crofter did not do this, and require them to submit proposals for re-letting the croft. Crofting law did not provide for action to be taken where a crofter who bought their croft were misusing or neglecting their croft.

Among the policy intentions of the Crofting Reform (Scotland) Act 2010 (asp 14) were to create a definition of an owner-occupier crofter in crofting law for the first time, and to equalise as much as possible the rights and responsibilities of owner-occupier crofters and tenant crofters.

The Act achieved these intentions by inserting new section 19B into the 1993 Act. This set criteria which can be used to establish whether a person is an owner-occupier crofter. These are that:

- the person is the owner of a croft and;
- before becoming the owner, the person was the tenant crofter who exercised the right to buy the croft, the nominee of such a crofter or an individual who purchased the croft from the landlord who created the croft (or a successor in title to any of these persons); and
- the croft has not been let to any person as a tenant crofter since it was acquired from the landlord or constituted as a croft.

Section 19C of the 1993 Act was inserted by the 2010 Act and sets out the duties of owner-occupier crofters, which are to:

- Be ordinarily resident within 32 km of their croft
- Not to misuse or neglect the croft
- To cultivate the croft or put it to another purposeful use
- To keep the croft in a fit state for cultivation

Section 19D allows an owner-occupier crofter to divide their croft for the purpose of transferring part of it, with the consent of the Crofting Commission

Section 29A provides a basis for an owner-occupier crofter to let their croft for a period of up to 10 years, and new section 29B clarifies that the tenant of any owner-occupied croft so let is not to be treated as a crofter, or an agricultural tenant within the meaning of agricultural holdings law.

Around a quarter of Scotland's c.18,000 crofts are owner-occupied. The spread of owner-occupancy is not even – there are more owner-occupiers in Shetland and Orkney, while in the Western Isles, the vast majority of crofters remain tenants (Edwards 2010a).

## **BACKGROUND: THE CROFTING REGISTER**

The Crofting Register is provided for in Part 2 of the Crofting Reform (Scotland) Act 2010 (asp 14). It is kept by Registers of Scotland. It records the name and address of the croft tenant or owner-occupier crofter; and the name and address of the landlord and any other owner. It also holds a map showing the boundaries of registered crofts. The Act sets out the process for registration, which requires a crofter to notify their neighbours, and allows a period for any neighbour to object, if they think the boundaries are shown incorrectly.

Confusingly, the Crofting Register is distinct from the Register of Crofts, kept by the Crofting Commission. That register is not map-based.

When the Crofting Reform (Scotland) Bill which became the Act was being debated in the Parliament the proposals on the Crofting Register were the subject of much debate. In its Stage 1 report, the Rural Affairs and Environment Committee divided evenly over the merits of the proposed Register in Part 2 of the Act. During Stage 2, non-Government amendments to remove the provisions on the Register from the Bill were rejected on the Convener's casting vote. Over one hundred Government amendments to Part 2 of the Bill were agreed to by division. The four members of the Committee opposed to the Register abstained in these divisions. The Bill as amended at stage 3 was passed with the support of a majority of members (for 66, against 0, abstentions 59). Labour and Liberal Democrat members abstained because they did not support the provisions in the Bill on the Register of Crofts.

The Act provides that regulatory applications to the Crofting Commission act as "trigger points" for registration – the Commission cannot consider applications unless the croft is registered, or is registered as part of the process of an application being decided. A crofter can of course choose to register their croft at any time. The Scottish Crofting Federation expressed concerns that the trigger point approach could mean that it could take a generation or more before all crofts were registered and mapped. It has taken forward a croft community mapping approach, where whole crofting townships can be mapped at once, the idea being to avoid any boundary disputes between crofters, which can be very costly to resolve.

When the Bill was before Parliament, the Government gave an undertaking that when it commenced the provisions of the Act on the Crofting Register, it would allow a year before commencing the provisions on the trigger points which require registration. Voluntary registration would be allowed, and the croft community mapping approach could be developed and piloted. Following enactment, the Government worked with Registers of Scotland to develop procedures for keeping the Crofting Register. The provisions on the Crofting Register were commenced on 30 October 2012, allowing voluntary registrations by crofters. The “trigger points” provisions will come into force on 30 November 2013, and will require registration where a crofter makes an application to the Crofting Commission, including applications for decrofting, after that date.

Donald Murdie, of Galtrigill, Skye, became the first crofter to have their croft entered on the Crofting Register on the 21 March 2013 (Scottish Crofting Federation 2013).

## **BACKGROUND: DECROFTING**

When a crofter purchases their croft, they are in effect buying the landlord’s interest. The land remains croft land, and subject to crofting law. Where a crofter wants to obtain finance for a development on the croft, to build a house for example, lenders have tended to prefer that the footprint is taken out of crofting. This means that should there be a default, they can recover the full value of the asset, as any subsequent purchaser would not need to take account of the requirements of crofting law. Decrofting is therefore a process whereby a crofter, or a croft landlord (in the case of a vacant croft), can apply to the Crofting Commission for a declaration that a particular piece of land, e.g. a house site and garden ground, or, more rarely, a whole croft, is no longer croft land.

Prior to the 2008 financial crisis, house prices in the Highlands had been rising steeply. There was concern within crofting that crofting law was being used by some for speculative property development. Since crofting law requires the crofter to live on or near their croft, there has been a presumption that a crofter should be able to build a house on the croft. There are many ways in which crofting law could therefore be used for property development e.g. a bare land croft tenancy could be bought. A house site and garden ground on the croft could be decrofted, built and then sold, leaving a new bare land croft, from which another house site and garden ground could be decrofted and so on. Or, as in the case of one cause celebre at Taynuilt, an entire croft was decrofted and turned into house sites for luxury homes. The then Crofters Commission’s powers to intervene were circumscribed by the then provisions in crofting law, and also by the case law of the Scottish Land Court, which had held that the Commission could not refuse a decrofting application where a development proposal had already secured planning permission. There was a feeling within crofting that a slow erosion was taking place, with crofting land being continually lost, especially of the better quality in-bye land which tends to be closer to roads and services and so more suitable for development, but also crucial to the working of crofts as agricultural units, as it is used e.g. to grow fodder crops for stock through the winter, or for grazing at particular times, such as lambing (Edwards 2006, Scottish Parliament Environment and Rural Development Committee 2006) .

A further policy intention of the Crofting Reform (Scotland) Act 2010 (asp 14) then, was to strengthen the provisions of crofting law on decrofting and increase the scope for the Crofting Commission to resist decrofting applications. The current position is described in paragraphs 8-11 of the Policy Memorandum which accompanies the present Bill:

“[...] An applicant can apply to decroft for any purpose. The Commission will grant a reasonable purpose application if it relates to the good of the croft, the estate, is in the public interest or in the interest of the local crofting community, and if the extent of the

land to be decrofted is not excessive in relation to the purpose. In making this decision, the Commission may take into account the effect the stated reasonable purpose will have on the sustainability of:

- crofting in the locality of the croft or such other area in which crofting is carried on as appears to the Commission to be relevant;
- the crofting community in that locality or the communities in such an area;
- the landscape in that locality or such an area; and
- the environment of that locality or such an area.

The Commission may also consider the sustainability of the social and cultural benefits associated with crofting. Where a reasonable purpose application is made that relates to the development of the croft and has associated planning permission, the Commission may still take account of the effect this will have on the croft, the estate and the local crofting community.

When considering applications to decroft land for a purpose other than a defined reasonable one, the Commission have discretion to refuse where it is established there is a local crofting community whose interests would be adversely affected. The Commission must take into account the demand for a croft tenancy of the land subject to the decrofting application. Demand can be from any person who might reasonably be expected to obtain the tenancy if the croft (or part croft) were available for letting at that time. When it issues a direction to decroft for a reasonable purpose, the Commission normally imposes conditions relating to the use of the land.

Special provision is made for dwelling houses in the decrofting process. The Act provides that, if an application relates to the site of the dwelling house only and a crofter is entitled or has been entitled to a conveyance of that site, the Commission **must** decroft the site if the extent of the garden within the site is appropriate for residential purposes. Such a right is limited to only one house site on the croft per crofter.”

## **THE LEGAL PROBLEM : NO LEGAL BASIS FOR OWNER-OCCUPIER CROFTERS TO DECROFT**

A potential problem was drawn to the attention of the Crofting Commission on the 16 January 2013. Derek Flynn, an expert in crofting law, has explained the problem in the following terms:

“Recognising the owner-occupier crofter as a person who properly occupies a croft appears to prevent such a person applying to decroft any of his croft land. The changes that corrected the legal fiction - that a crofter who purchased his croft was the landlord of a vacant croft – have removed the right of an owner-occupier crofter to apply for a decrofting direction.

The process of decrofting was introduced by the Crofters (Scotland) Act 1955 for every holding in the crofting counties to which the Act applied became protected as from 1st October 1955 and a process was required whereby that protection was removed.

Prior to the Crofting reform (Scotland) Act 1976, applications to decroft croft land were available only to a landlord when a croft was vacant. The present provision is in s 24(3) of the

Crofters (Scotland) Act 1993 and requires an application by the landlord of a vacant croft. Until 1976, no tenant crofters had any interest in decrofting land.

When crofters were given the right of purchase in 1976, crofters proposing to purchase had an interest in knowing whether the land they intended to buy would be decrofted. This was explicitly allowed for in the 1976 Act (now s 25(4) of the 1993 Act) “as if the land were a vacant croft and the application were made by the landlord”.

From 2011, a croft occupied by an owner-occupier crofter could no longer be considered vacant, it being occupied in the plain meaning of the word. Whereas the s 23(12A) now allows any reference to a landlord in section 24 to include a reference to an owner-occupier crofter, this only allows an owner-occupier to be treated in the same way as a landlord, for instance he would be the right person to make an application for decrofting. But it does not resolve the necessity in s 24(3) for the croft to be vacant before an application to decroft can be made.” (Flyn 2013)

The Crofting Commission sought legal advice, which it received on 1 February 2013. The Scottish Government became aware of the problem by the 8 February 2013 (Scottish Parliament 2013a S4W-13446 and Policy Memorandum). The Crofting Commission put out a news release on the 25 February 2013 which gives a summary of the problem:

“Prior to 1 October 2011<sup>2</sup>, a crofter was defined solely as the tenant of a croft. Anyone who purchased their croft was essentially a landlord without a tenant i.e. the landlord of a vacant croft. There are separate provisions within crofting legislation for both croft tenants in advance of purchase, and landlords of vacant crofts, to apply to the Commission for a direction that their croft (or part of it) shall cease to be a croft.

The Crofting Reform (Scotland) Act 2010 introduced the new category of owner-occupier crofter from 1 October 2011. [...]

Our understanding is that the intention of sub-section 23(12A) of the Crofters (Scotland) Act 1993 was to amend sub-section 24(3) in order to extend the existing decrofting provisions to owner-occupier crofters. However we have been advised that as sub-section 24(3) is concerned with a situation where a croft is “vacant”, and as crofts occupied by owner-occupiers crofters are by separate provision in the Act deemed not to be vacant, then it does not appear to be competent for the Commission, on the application of an owner-occupier crofter who is occupying their croft, to make a direction that the croft (or part of it) shall cease to be a croft (Crofting Commission 2013a).

The Crofting Commission has suspended consideration of the 50 decrofting applications currently before it, and these have been held in abeyance, pending a resolution of the problem. On 7 March 2013 the Commission confirmed in a news release that it had sought further legal advice and that as the law currently stands, the view of its Board is that there is no provision that allows owner-occupier crofters to decroft (Crofting Commission 2013b). The Commission is not currently accepting further decrofting applications from owner-occupier crofters, pending resolution of the problem. Prior to the problem being identified, the Commission had granted 159 decrofting directions to owner-occupier crofters.

The Minister for the Environment and Climate Change, Paul Wheelhouse MSP, made a statement to the Parliament on the subject of decrofting on the 28 March 2013. In his statement the Minister explained that the Government had first sought to clarify that it was the intention of Parliament to allow owner-occupier crofters to continue to be able to decroft land, and that the

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<sup>2</sup> This is the date when the Crofting Reform (Scotland) Act 2010 (Commencement No. 2, Transitory, Transitional and Saving Provisions) Order 2011/334 brought the relevant provisions of the 2010 Act which introduce the new definition of owner occupier crofters into force.

lack of a legal basis for them to do so was inadvertent. Having established that this was indeed the will of Parliament by checking back on the discussions that took place on the Crofting Reform (Scotland) Bill, the Minister explained that he had concluded that a Bill would be needed to resolve the problem, that a Bill would be introduced as soon as possible after the Easter recess, and that the Government would seek a timetable for the Bill which would allow it to be passed before the Summer recess. In his statement, the Minister gave some examples of the types of difficulties which owner-occupier crofters were facing, as a result of the Crofting Commission not being able to determine their decrofting applications:

Some are unable to start building their houses until the land is decrofted; however, because time-limited planning consent has been granted, deadlines for completion might be approaching. Others are unable to decroft to increase the size of the house site in order to extend their houses and provide sufficient garden ground for them.

One young crofter feels unable to proceed with acquiring part of an owner-occupier crofter's croft because of the uncertainty of being able to decroft part of his new croft to build a house for himself to live in. A young crofting couple who are planning to start a family are unable to decroft the house site so that they can sell it to finance a larger house while retaining the original croft land. There are other examples of owner-occupier crofters being unable to decroft potential wind turbine sites or other parcels of croft land for development in the knowledge that personal financial investment will be required (Scottish Parliament 2013b).

Following the statement there was an opportunity for questions. Jamie McGrigor MSP raised the issue of another technicality in crofting law, which was whether the Bill would clarify the legal position on decrofting a croft that has been divided. He said that the Crofting Commission say that people who own part of a croft cannot decroft in that part without the agreement of the neighbours who own the remainder of what was the original croft. The Minister said he would write to Jamie McGrigor MSP on that point (Scottish Parliament 2013b).

## **IS THERE A PROBLEM?**

Brian Inkster is a solicitor with a practice specialising in crofting law. He has written an article in the Journal of the Law Society of Scotland arguing that there is not a problem and that the legislation is not needed. He argued that the legislation could be interpreted differently (Inkster 2013):

First, it is assumed that the provision in the 1993 Act whereby it is considered that crofts occupied by owner-occupier crofters are deemed not to be vacant is s 23(10). That reads:

“For the purposes of this section and sections 24 and 25 of this Act, a croft shall be taken to be vacant notwithstanding that it is occupied, if it is occupied otherwise than by—

- (a) the tenant of the croft;
- (b) the owner-occupier crofter of the croft;
- (c) the subtenant of a sublet to which section 27 applies; or
- (d) the tenant of a let to which section 29A applies.”

I do not believe that this necessarily means that a croft occupied by an owner-occupier crofter, or any of the three tenants listed, can never be classed as vacant under provisions of the 1993 Act. This provision is really just stating that if someone who does not fall within

the four categories listed is in occupation of the croft, that croft shall be treated as vacant notwithstanding the occupation in question.

Section 23(12A) is the provision that the Crofting Commission state was, as they understand it, intended “to amend subsection 24(3) in order to extend the existing decrofting provisions to owner-occupier crofters”. I believe that it does arguably achieve that purpose. It reads:

“Where the owner-occupier is an owner-occupier crofter, this section and section 24 have effect as if—

(a) the owner-occupier crofter were required under subsection (1) of this section, within one month of becoming such an owner-occupier crofter, to give notice to the Commission of that fact; and

(b) the reference to a landlord in subsection (2), and any reference to a landlord in section 24, included a reference to an owner-occupier crofter.”

I suggest that the reference back to subs (1) (quoted below), which relates to situations where a croft has become vacant, means that in effect an owner-occupier crofter is deemed to be occupying a vacant croft for the purposes of s 24 (which relates to decrofting in the case of vacancy).

Thus an application for decrofting by an owner-occupier crofter is competent and should be processed as such by the Crofting Commission.

It has been suggested to me that s 23(12A) “allows an owner-occupier crofter to be treated in the same way as a landlord; for instance, he would be the right person to make an application. But it does not resolve the necessity in s 24(3) for the croft to be vacant before an application to decroft can be made”.

I agree that this allows an owner-occupier crofter to be treated in the same way as a landlord, and that they would be the right person to make an application. However, I disagree that this subsection does not resolve the necessity in s 24(3) for the croft to be vacant before an application to decroft can be made. I refer to my comment above on the reference in s 23(12A) back to subs (1).

This is saying that s 23 (vacant crofts) and s 24 (decrofting in case of resumption or vacancy of croft) shall have effect **as if** the owner-occupier crofter **were** required under subs (1) of s 23 to give notice to the Commission.

The emphasised words highlight that this is not something the owner-occupier crofter actually has to do – i.e. they do not have to physically give notice to the Commission – but they are treated for the purposes of the legislation as if they were required to give this notice.

Section 23(1) of the Act reads: “Where—

(a) the landlord of a croft receives from the crofter a notice of renunciation of his tenancy or obtains from the Land Court an order for the removal of the crofter; or

(b) the landlord of the croft either gives to the executor of a deceased crofter, or receives from such an executor, notice terminating the tenancy of the croft in pursuance of section 16(3) of the 1964 Act; or

(c) for any other reason the croft has become vacant otherwise than by virtue of a declaration by the Commission in the exercise of any power conferred on them by this Act;

the landlord shall within one month from—

(i) the receipt of the notice of renunciation of the tenancy, or

(ii) the date on which the Land Court made the order, or

(iii) the date on which the landlord gave or received notice terminating the tenancy, or

(iv) the date on which the vacancy came to the landlord's knowledge,

as the case may be, give notice thereof to the Commission.”

By, in effect, being deemed to have given notice under this subsection, the owner-occupier crofter is deemed to have given notice to the Commission that the croft is vacant. This then allows s 24(3) to apply, as the croft is for the purposes of that section vacant.

Indeed, the effect of s 23(12A) is that an owner-occupied croft is quite simply always “vacant” for the purposes of decrofting under s 24(3).

The article concludes by saying that:

The Crofting Commission should not be halting procedures based on one possible interpretation where the effect of so doing will be dramatic on the lives of those crofters and third parties affected by it. Until such time as the issue is formally and legitimately challenged in the Land Court, which may never happen, the Crofting Commission should withdraw the stance it has taken and continue to process applications for decrofting directions by owner-occupier crofters in the manner that they were doing prior to the 26 February announcement (Inkster 2013a)

Brian Inkster has, however, always maintained that he stands to be corrected as his opinion has been given in the vacuum of not having seen the legal advice sought and obtained by the Crofting Commission. He has given one possible interpretation of the legislation and there may be others. He is of the view that the legal advice in question should be published in full so that crofting lawyers are fully apprised of the perceived problem and the necessity of amending legislation. Otherwise, he argues, it is difficult to know what is being amended and why (Inkster 2013b).

## **THE LEGAL SOLUTION: THE BILL**

### **CONSULTATION ON THE BILL**

Since it became aware of this issue, the Government's intention has been to resolve it as quickly as possible. There has not been sufficient time to hold a formal consultation on the proposals in the Bill. However, the Scottish Government is holding discussions with key stakeholders around the time of the Bill's introduction. The proposals in the Bill have been developed by the Government following discussion and advice from the Crofting Commission, the Scottish Land Court, and Registers of Scotland, among others (Policy Memorandum).

### **THE PROVISIONS OF THE BILL**

The Crofting (Amendment) (Scotland) Bill was introduced in the Scottish Parliament on 9 May 2013. The Bill contains seven sections and a schedule.

Section 1 of the Bill would amend the 1993 Act by inserting four new sections (24A – D).

The first of those new sections (24A) makes it possible for owner-occupiers to apply to the Crofting Commission for a decrofting direction, a direction that the owner-occupier's croft or part thereof is to cease to be a croft.

The second new section (24B) clarifies that the Commission would not need to consider an application if they have already asked the owner-occupier crofter to submit re-letting proposals. This would apply where the Commission have determined that the owner-occupier crofter had breached one or more of their duties relating to:

- Being ordinarily resident on or within 32 kilometres of their croft;
- Cultivating the croft or putting it to a purposeful use; or
- Not misusing or neglecting the croft

This section also clarifies that the croft in respect of which the application is being submitted must either already have been registered on the crofting register, or it must be registered within 6 months of the crofter submitting the decrofting application.

The third new section (24C) concerns the application of section 25 of the 1993 Act in relation to decrofting applications. Section 25 of that Act makes provision about decrofting applications, such as advertising applications; the tests which must be satisfied before the Commission makes a decision; notification of decisions; and the procedure for appealing decisions. The new section 24C ensures that these requirements will apply to owner-occupiers as well as tenants. It also clarifies that the Commission must give a direction if the application is in respect of a house site and garden ground, as is the case with tenant crofters.

Finally, the fourth new section concerns the effect of a decrofting direction, confirming that, as with the case for tenant crofters and landlords under the 1993 Act, a decrofting direction means a croft is no longer a croft and not subject to the 1993 Act. Also, again as is the case for tenants and landlords under the 1993 Act, this will not mean that the land cannot be included in another croft in the future. The final part of new section 24D states that a decrofting direction made in relation to a registered croft must be registered in the Crofting Register, and if that application is not made within three months, the direction falls.

The Crofting Commission approved 159 applications for decrofting directions from owner-occupier crofters between 1 October 2011, and the problem coming to light. Section 3 provides that the changes made in section 1 are to be treated as having come into effect from 1 October 2011, which is when the changes made by the 2010 Act came into effect. This would mean that these directions, which were issued in good faith, would remain valid.

If applied retrospectively, subsection 24D(3) would require owner-occupier crofters of registered crofts to apply to register their crofts even though the trigger point provisions of the 2010 Act on the Crofting Register were not commenced at the time they made the application. Section 3 of the Bill provides that Section 24D(3) would not apply retrospectively.

The 1993 Act provides that appeals to the Scottish Land Court about a Crofting Commission's decision on a decrofting application can be made:

- by the applicant where the Crofting Commission has refused an application
- by the applicant or a member of the crofting community where the Commission has approved the application, either with or without conditions

Appeals must be made to the Scottish Land Court within 42 days of the Commission's decision.

On 25 February 2013 the Commission published a note to the effect that owner-occupier crofters could not apply to decroft, and the Commission could not give decrofting directions, unless the croft was vacant. During the period 14 January 2013 and 25 February 2013 the Commission had given 21 decrofting directions and had refused 1 application to decroft. These 22 cases were still within the 42 day period when an appeal could have been made to the Scottish Land Court against the giving of a decrofting direction by the Commission or the decision by the Commission not to give a direction. Therefore the Section 4 of the Bill allows someone who had not exercised their right of appeal in these cases the opportunity to do so. It would provide that in these cases that this 42 day period would be counted from the time when the provisions of the Bill are brought into force, rather than the date of the Commission's decision.

Section 5 of the Bill also contains transitory provisions relating to the Crofting Register. The Bill will provide for owner-occupier crofter decrofting applications to "trigger" registration from 30 November 2013, thereby treating owner-occupier crofters the same as tenant crofters and landlords of vacant crofts in relation to the requirement to register. Until 30 November 2013, registration will be on a voluntary basis.

The intention is for the Bill to come into force on the day it is given Royal Assent. This will allow the legislation to address owner-occupier crofter decrofting issues as early as possible.

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## RELATED BRIEFINGS

[SB 10-01 Crofting Reform \(Scotland\) Bill](#)

SB 06-26 Crofting Reform etc. Bill (please ask SPICe for a copy of this briefing)

SB 05-50 Crofting (please ask SPICe for a copy of this briefing).

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