

CROFTING (AMENDMENT) (SCOTLAND) BILL

Rural Affairs, Climate Change and Environment Committee

Stage 1 Report

SCOTTISH GOVERNMENT RESPONSE

11 JUNE 2013

Parliamentary Scrutiny

Committee Recommendation (Paragraph 16)	The Committee while understanding why the Scottish Government sought an expedited consideration of the Bill, regretted that such a short time was available for written views to be submitted to the Committee. The Committee therefore strongly recommends that the Scottish Government carefully considers all evidence sent to the Committee ahead of the Stage 1 debate.
Scottish Government Response	The Scottish Government accepts the Committee's recommendation. In so doing, it greatly appreciates the input which has been provided by key stakeholders and others, and will carefully consider all the contributions provided as evidence to the Committee.

Committee Comment (Paragraph 19)	The Committee extends its thanks to all those who gave evidence on the Bill within a very tight timeframe. The cooperation of all was very much appreciated.
Scottish Government Response	The Scottish Government joins the Committee in extending its thanks and appreciation to all those who have contributed to the progression of the Bill, including the Committee in conducting Stage 1 and publishing its Stage 1 Report.

Scottish Government Consultation

Committee Comment (Paragraph 27)	The Committee understands the reasons why the Scottish Government did not consult formally on a draft bill in this instance, and welcomes the Government's attempts to seek stakeholders' views once the problem had been identified, and once the Bill had been published.
Scottish Government Response	<p>The Scottish Government notes that the Committee welcomes its attempt to seek the views of stakeholders, despite insufficient time on this occasion to undertake the usual 13 week consultation exercise.</p> <p>In developing the draft legislation, ongoing discussions took place with key stakeholders and a meeting was held to provide an opportunity for key stakeholders to discuss the Scottish Government's draft bill proposals with officials involved in preparing the Bill.</p> <p>The support for an expedited Parliamentary procedure for the Bill was reflected in the desire from colleagues</p>

	across the Parliament to deliver a solution before the summer recess. In the circumstances therefore the Scottish Government had to strike a balance between dealing with the issue urgently whilst carefully considering the options, and ensuring key stakeholders had the opportunity to contribute.
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Committee Recommendation (Paragraph 28)	It is clear to the Committee that should any further changes to crofting law be proposed by the Scottish Government, they should be subject to public consultation, within appropriate timescales.
Scottish Government Response	<p>The Scottish Government notes the Committee's view on public consultation in respect to any further changes to crofting law. It is expected that any future changes to crofting legislation would be subject to the standard consultation period rather than the necessarily abridged period utilised in relation to this Bill as a result of the expedited procedure.</p> <p>Indeed, in seeking to limit the scope of the Bill to these issues identified regarding decrofting by owner-occupier crofters, we wish to avoid a scenario where other substantive matters would not be given fuller opportunities for consultation and scrutiny.</p>

Is a Bill required?

Committee Comment (Paragraph 44)	The Committee notes the comment of stakeholders on whether legislation was required and whether a bill, rather than an alternative vehicle was the most appropriate method for addressing the situation. On balance, the Committee is satisfied that legislation was required, and that given the desire to resolve the issue quickly, a bill is the most appropriate vehicle for dealing with the current problem.
Scottish Government Response	The Scottish Government welcomes the Committee's conclusion that legislation was required and that a bill was the appropriate vehicle for dealing with the current problem. The Scottish Government is aware of alternative views expressed but believes that a Bill provides the necessary clarity and legal certainty that owner-occupier crofters are able to apply to decroft and that the Commission has the power to consider such applications.

Has the Bill been appropriately drafted?

Committee Comment (Paragraph 54)	The Committee notes the criticism of the drafting of the Bill, particularly by those who will be left to interpret and advise on the law.
Committee Recommendation (Paragraph 55)	The Committee strongly recommends that the Scottish Government give appropriate consideration to evidence submitted to the Committee with a view to determining whether any of the issues raised require to be addressed by amending the Bill at Stage 2.
Scottish Government Response	<p>The Scottish Government notes the Committee's comments and accepts its recommendation. All drafting issues raised in evidence to the Committee have been carefully considered in light of evidence received. However, it is considered that the Bill, as drafted, achieves its purpose, which is to allow owner-occupier crofters the ability to decroft.</p> <p>The Scottish Government is committed to drafting in as plain and accessible a manner as is consistent with achieving the necessary outcome. It is satisfied that the provisions are drafted in such a manner and, while others have suggested a more succinct approach, the Bill's provisions, as drafted, do what is required to achieve their purpose.</p>

Will the Bill solve the problem?

Committee Comment (Paragraph 58)	The Committee is satisfied that the Bill, as drafted, will address the identified problem with the current legislation, and will enable owner-occupier crofters to apply to the Crofting Commission for a decrofting direction.
Scottish Government Response	The Scottish Government welcomes the Committee's conclusion that the Bill address the identified issue which has arisen as a result of an unintended consequence of the current legislation.
Committee Recommendation (Paragraph 59)	The Committee recommends that the Scottish Government gives full consideration to the exact wording of the Bill to ensure that all sections are appropriately worded and that it amends existing legislation in a way that will provide clarity, rather than add confusion, to an already complex area of law.

<p>Scottish Government Response</p>	<p>The Scottish Government acknowledges that crofting legislation is renowned for its complexities and accepts the Committee's recommendation. There is a responsibility on everyone - the Government, stakeholders and Parliament - to ensure that legislation is fit for purpose and achieves what is intended.</p> <p>The Crofting Reform (Scotland) 2010 Act linked owner-occupier crofter decrofting to provisions for vacant crofts in the Crofters (Scotland) Act 1993, and it subsequently came to light that the legislation did not work as intended. The Bill removes the link between owner-occupier crofter decrofting and vacant crofts, and inserts new stand-alone provisions into the 1993 Act to enable owner-occupier crofters to decroft.</p> <p>By so doing, the original intention will be achieved of ensuring that owner-occupier crofters can decroft and that owner-occupier crofters are treated on an equitable basis to tenant crofters and crofting landlords. This is consistent with the Scottish Government's commitment to ensuring that, insofar as possible, all crofters are treated equally, taking account of the differing status between tenant and owner-occupier crofters.</p>
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Section 1 – applications to decroft by owner-occupier crofters

<p>Committee Comment (Paragraphs 77 &78)</p>	<p>The Committee regrets the anomaly created by amending the 1993 Act via the 2010 Act, and that the consequence of this, whilst unintended, has prevented the Crofting Commission from deciding on applications from owner-occupier crofters to decroft all or part of their crofts.</p> <p>The Committee welcomes the Scottish Government's seeking to correct this issue quickly, and supports the provisions set out in Section 1 of the Bill which seek to do this. The Committee believes the Bill, as drafted, will rectify the issue and provide the clarity required for the Crofting Commission and for those making applications.</p>
<p>Scottish Government Response</p>	<p>The Scottish Government shares the Committee's regret that the 2010 Act did not achieve its purpose in terms of enabling owner-occupier crofters to decroft on a similar basis as tenant crofters.</p> <p>Furthermore, the Scottish Government welcomes the Committee's recognition of the steps taken by the Government, with the support of Parliament, to achieve a</p>

	<p>solution before the summer recess. It also welcomes the Committee’s conclusion that the Bill will achieve its intended purpose.</p>
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<p>Committee Recommendation (Paragraph 79)</p>	<p>The Committee notes that a number of issues have been raised regarding the drafting of this section of the Bill, particularly with regard to the definition of a “decrofting direction”; the new section 24(C) which the Bill would insert into the 1993 Act; and the protecting of access to crofting land. The Committee recommends that the Scottish Government gives careful consideration to these specific issues ahead of Stage 2.</p>
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<p>Scottish Government Response</p>	<p>The Scottish Government accepts the recommendation of the Committee, and a summary of our considerations of the issues raised follows.</p> <p>(1) Section 24A: Definition of “decrofting direction”.</p> <p>The principle concern was that the Bill defines a “decrofting direction” for the purpose of Section 24A, when such directions are not so defined in the rest of the legislation.</p> <p>After due consideration, the Scottish Government considers that no change is required and that the terminology used as a label here is suitably descriptive. There is no adverse effect in retaining this wording.</p> <p>(2) Section 24C: Application of section 25 in relation to decrofting directions.</p> <p>The principle concern appeared to be Section 24C(2) which allows owner-occupier crofters a right to decroft the site of a dwelling-house on or pertaining to the croft. However, the Scottish Government’s view is that this provision is necessary to align decrofting by tenant and owner-occupier crofters as far as possible. Section 24C(2) mirrors the provisions for tenant crofters in Section 25(1)(b) of the 1993 Act which allows a crofter to decrofting one dwelling-house on the croft. Section 24C(2) is necessary as section 25(1)(b) relates to where there is a conveyance under section 12(2). Owner-occupier crofters already own the dwelling-house hence modification is necessary.</p> <p>The Scottish Government notes the concern expressed but does not consider that passing the right to decroft the site of a dwelling-house from one owner-occupier crofter</p>
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to another would lead to speculative development. This is already the position with tenant crofters and it does not appear to have created any issues. However, this can be considered further if it proves to be a problem in practice. I have asked the Commission to monitor this in case there is a need for further consideration.

It was suggested that by retaining the link between owner-occupier decrofting and the vacant croft provisions that this would simplify the Bill and make it shorter. There is a criticism that as a result of breaking that link, the Bill contains “new law”.

It was considered best to avoid reference back to the section 24(3) provision and to move away from the concept of the croft being vacant because, by definition, an owner-occupied croft is not “vacant”.

(3) The protection of access to croft land.

The principle concern related to the fact that elements of section 25(4A) (disapplied by the Bill) should be retained to deal with the issue of the Crofting Commission being able to not give a decrofting direction if it would impede access to another part of the croft or other croft land.

It is noted that sections 25(4) and (4A) relate to conditions that may be included in a direction affecting a proposed purchase by a tenant crofter. Issues regarding access to the rest of the croft arise because ownership is being split, with the croft owned by the landlord and the house owned by the tenant. An owner-occupier crofter already owns the land being decrofted and therefore different issues in relation to access arise.

The Scottish Government considers that a change is not required as the Commission may consider access issues under section 25(5), which states that a direction “...may be given taking account of such modification of the application in relation to which the direction is given as the Commission consider appropriate.”

Access issues in relation to owner-occupiers’ crofts are already dealt with by the Commission under section 25(5), rather than under section 25(4A). The Scottish Government therefore considers that the Bill allows the Commission to consider access issues as they relate to decrofting applications by owner-occupier crofters.

Section 2 – Consequential modifications

Committee Comment (Paragraph 82)	The Committee is content with section 2 of the Bill, subject to the comments made on the Bill and comments on the Schedule later in the report.
Scottish Government Response	The Scottish Government welcomes the Committee's conclusion on this point. The Schedule to the Bill amends the Crofters (Scotland) Act 1993 and the Crofting Reform (Scotland) Act 2010 as a result of the insertion of the stand-alone provisions to enable owner-occupier crofters to decroft.

Section 3 – retrospective effect and applications

Committee Comment (Paragraph 92)	The Committee supports the retrospective application of the provisions in the Bill, to ensure that the intended effects of the 2010 Act are applied to owner-occupier crofters, both in the future, but also since the provisions for defining owner-occupier crofters came into force in October 2011.
Scottish Government Response	The Scottish Government welcomes the Committee's conclusion on this point. The retrospective provisions will ensure that the 159 decrofting directions issued between 1 October 2011 and 25 February 2013 and the 44 cases (updated from 50 since the Stage 1 Report) held in abeyance by the Commission are competent, without the requirement of a new application to be submitted.

Committee Recommendation (Paragraph 93)	The Committee recommends that the Crofting Commission seek to process any outstanding applications, and any that have not been able to be brought forward in the interim, as swiftly and efficiently as possible.
Scottish Government Response	The Scottish Government accepts the recommendation of the Committee. The Commission should be in a position to progress these cases to a conclusion when the Bill comes into force. The Commission has already progressed these applications as far they could in the absence of legislative provisions.

Section 4 - appeals against certain decisions etc.

Committee Comment (Paragraph 98)	The Committee supports the policy intention behind this section of the Bill, which should ensure that the appeals process is applied fairly and appropriately to all who have made decrofting applications, regardless of the suspension in the decision-making process. The Committee welcomes and supports the inclusion of these provisions.
Scottish Government Response	The Scottish Government welcomes the Committee's conclusion on this point. This applies to those 22 cases which were decided in the 42 days prior to the Commission publishing its note on 25 February 2013 and were therefore at the time still potentially appealable. For fairness, the Bill provides a further right of appeal for those involved in these cases.

Section 5 – transitory provisions

Committee Comment (Paragraph 100)	The Committee is content with this section of the Bill.
Scottish Government Response	The Scottish Government welcomes the Committee's conclusion on this point. These provisions allow voluntary registration to apply to owner-occupier decrofting applications as they apply to other regulatory applications until 30 November 2013. Thereafter, owner-occupier crofter decrofting applications, will “trigger” the requirement to register the croft. This is consistent with the Government's intention to, as far as possible, treat tenant crofters and owner-occupier crofters equally.

Section 6 – commencement

Committee Comment (Paragraph 102)	The Committee is content with this section of the Bill.
Scottish Government Response	The Scottish Government welcomes the Committee's conclusion on this point. These provisions allow the Bill to come into force on the day of Royal Assent. This will allow the legislation to address owner-occupier crofter decrofting issues as early as possible, provide surety to the 159 owner-occupier crofter recipients of decrofting directions issued since 1 October 2011, and allow the Commission to process to a conclusion the 44 applications currently being held in abeyance.

Schedule – consequential modification

Committee Comment (Paragraph 106)	Notwithstanding comment made elsewhere on the Bill as a whole, and on section 2, the Committee is content with this section of the Bill.
Scottish Government Response	The Scottish Government welcomes the Committee's conclusion on this point. These modifications to the Crofters (Scotland) Act 1993 and the Crofting Reform (Scotland) Act 2010 are made as a direct consequence of the insertion of Sections 24A to 24D, which will allow owner-occupier crofters to decroft in a similar manner to tenant crofters. This reflects the initial intention of the changes introduced by the 2010 Act.

Issues not included in the Bill

Committee Comment (Paragraphs 120 & 121)	<p>The Committee notes the significant number of other issues which were drawn to the Committee's attention during its scrutiny of the general principles of the Bill.</p> <p>The Committee is of the view that this Bill is not the appropriate place to seek to address the other issues raised, given the urgency of the current problem, and the expedited process that is being sought to try and rectify the situation as soon as possible.</p>
Scottish Government Response	<p>The Scottish Government appreciates that, through the consultation process, stakeholders have raised issues wider than the scope of the current bill, including: the definition of owner-occupier crofter; residency duty requirements; registration triggers; owner-occupier crofter succession provisions; a 2-tier system of croft ownership; etc. The Scottish Government will carefully consider all the issues raised and will engage with stakeholders in doing so.</p> <p>However, the Scottish Government welcomes and concurs with the Committee's view that these issues are outwith the scope of the Bill, which is intentionally tightly focussed on addressing the key issue which has arisen as a result of an unintended consequence of the Crofting Reform (Scotland) Act 2010, i.e. to enable owner-occupier crofters to apply to decroft in a manner similar to tenant crofters and landlords of vacant crofts.</p>

<p>Committee Recommendation (Paragraph 122)</p>	<p>The Committee urges that, outwith this Bill, the Scottish Government reviews all of the issues raised with the Committee, in order to determine the extent and effect of each issue, consulting widely where necessary. This review should explore all possible options for making any changes to legislation or process which may be required as a result. This includes options such as further primary legislation; secondary legislation (including powers contained in the 2010 Act); powers of direction; and making use of powers in the Public Services Reform (Scotland) Act 2010. The Committee recommends that the Scottish Government identifies a clear timeframe for the review and provides the Committee with progress updates on this work once it is underway.</p>
<p>Scottish Government Response</p>	<p>The Scottish Government notes the Committee’s request that they review the various issues raised during stage 1 of the Bill and the areas to be covered. During the Stage 1 debate on 6 June 2013, Paul Wheelhouse (Minister for Environment and Climate Change), in responding to issues raised which were recognised as being outwith the scope of the Bill gave the following undertaken “...we intend to engage with stakeholders and take stock of the full range of problems.” He went on to state that “We hope to engage with stakeholders, including the Cross-Party Group on Crofting, the Scottish Crofting Federation and the Crofting Commission, on those matters, to see what the most appropriate way of going forward is.”</p>

Complexity of crofting law and how best to address it

<p>Committee Comments and Recommendation (Paragraphs 134 to 137)</p>	<p>The Committee was struck by the strength of opinion, particularly from lawyers working in crofting, on the current poor state of crofting law. Many of those who provided evidence to the Committee said that it was not fit for purpose, and that it was overly complex and impenetrable. There was a concern expressed that the Bill was adding another layer of complexity.</p> <p>It is clear to the Committee that there are significant concerns, particularly within the legal profession, about current crofting legislation and that the Scottish Government needs to respond to these concerns.</p> <p>The Committee is also of the view that consolidation of the law on crofting would not, in itself, address issues of simplification, comprehension and inconsistency. Consolidation would place all of the law in one place, to make it easier to access, but not necessarily to</p>
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	<p>understand. What may also require consideration is codification of the law, i.e. restating the policy in revised, simplified terms.</p> <p>The Committee recommends that the Scottish Government considers all the evidence given to the Committee on the current state of crofting legislation, and writes to the Committee to outline how it intends to respond to the points made, and how it plans to ensure crofting law is as clear, competent, consistent and as fit for the 21st century as possible.</p>
Scottish Government Response	<p>The Scottish Government notes the concerns expressed on the present state of crofting legislation and agrees with the Committee that consolidation is not, in itself, a panacea which would resolve all the issues relating to crofting legislation.</p> <p>During the Stage 1 debate, the Minister stated that he had "...heard members today mentioning issues such as codification and the need for consolidated legislation, or consolidation plus, to take amendments into account." This would form part of the Scottish Government's undertaking to engage with stakeholders as detailed in its previous response to the Committee's recommendation at paragraph 122 of the report.</p>

Policy Memorandum

Committee Recommendation (Paragraph 139)	<p>The Committee believes the policy document should be amended at paragraph 7 if the Scottish Government agree with Derek Flynn's comment that the reference to "owner-occupier crofter" should in fact read "owner-occupiers".</p>
Scottish Government Response	<p>The Scottish Government notes the Committee's view on Derek Flynn's suggestion that the reference to "owner-occupier crofter" should read "owner-occupiers".</p> <p>The Scottish Government does not accept this revision as the legislation as presently drafted allows an owner-occupier crofter to apply to decroft land where the croft is vacant. The issue is whether or not an owner-occupier crofter's croft, in fact, can be vacant.</p> <p>The Scottish Government is content to clarify this by providing the following replacement second sentence in paragraph 7 of the Policy Memorandum: "Applications to decroft areas of croft land may be made, at present, by</p>

	tenant crofters and by landlords, owner-occupiers and owner-occupier crofters when the croft is vacant.”.
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Committee Comment (Paragraph 140)	The Committee is otherwise content with the Policy Memorandum which accompanies the Bill.
Scottish Government Response	The Scottish Government welcomes the Committee’s conclusion on this point.

Committee Comment (Paragraph 149)	The Committee is content that the Financial Memorandum which accompanies the Bill adequately, and as accurately as can be reasonably expected, sets out the potential costs on a range of bodies and individuals which could be financially affected by the Bill.
Scottish Government Response	The Scottish Government welcomes the Committee’s conclusion on this point.