



FACULTY OF ADVOCATES

Response to Scottish Parliament's

Rural Affairs and Islands Committee

Call for views on Crofting and Scottish Land Court Bil

General Comment on Bill

The Bill seeks to address two distinct areas where the Scottish Government has previously stated a commitment to legislate. In relation to Part 1 of the Bill, this deals with some issues concerned with the law and practice of crofting and crofting regulation. It is much more modest than the Scottish Government's proposal to update and simplify crofting legislation, which proved to be quite contentious when a Bill team was previously asked to develop proposals. The result is that the current Bill is looking to make amendments to an already complex framework, and the current Bill is an accumulation of changes which are not easy to follow. In relation to Part 2 of the Bill, this deals with the merger of the Scottish Land Court and the Lands Tribunal for Scotland into a single body. The Faculty of Advocates did not support this proposal when it was first made. The Faculty notes that some of the original elements of the proposal are not carried forward into the Bill, and the Faculty welcomes those changes.

The Faculty generally supports the proposals which are in the Bill. The Faculty does not comment on policy decisions which have been made in relation to specific proposals, e.g., the potential role of the Scottish Land Court as an environmental court. As a result, there is no need to comment on each Section. The following comments relate only to specific aspects of the proposals where the Faculty considers that there will be potential practical consequences. Those comments all relate to provisions within Part 1 of the Bill.

Specific Comments

Clause 2 removes specific timescales for the Crofting Commission to take decisions. Clause 8 should have the result that decisions on assignments of tenancies and approval in straightforward cases are sped up. The Faculty is aware that there has on occasion been a concern at the length of time it can take the Commission to make a decision. It is recognised that having a specific statutory timescale for certain decisions imposes a burden on the Commission, and may have an adverse impact on other decisions. It is also recognised that having a short statutory timescale also may not be appropriate as some individual cases will be more complex or require more time for proper consideration. The Faculty considers that there will be sound practical reasons for Clause 2, but that the timescales within which

decisions are taken is potentially a matter that could cause practical problems in an area where changes and development are subject to additional regulatory oversight and restriction. Clause 8 is welcomed.

Clauses 12 to 13 are intended to bring about a consistent approach towards de-crofting applications. They will at the same time increase the discretion of the Commission, and are likely to result in the Commission having a greater ability to refuse applications. Having a consistent test for determining whether applications are granted or refused is welcomed. The policy reasons for refusing decrofting applications are not a matter that the Faculty comments on. The Faculty recognises concerns about multiple applications to decroft parts of a croft. There can be a tension between maintaining land within the crofting system and allowing a supply of land for social or economic development. Multiple decrofting of areas from a croft can serve beneficial purposes. The Faculty also notes that an ability to consider late objections can reduce certainty. The Faculty considers that these measures have the potential to create increased challenges to decisions made by the Commission, either from unsuccessful applicants or objectors.

In relation to Clause 14, the Faculty considers that the heading of the proposed Section 39B has the potential to be misleading. As a matter of law, either croft land has always been croft land (even if not recognised as such), or it has been removed from crofting control, or it never was croft land. The Commission is therefore not actually moving land into or outwith crofting tenure. The Commission has no power to change the legal status of land. It is making a change to the recognised boundary of a croft to reflect the proper crofting status of the land, and between two crofts will have the power to re-draw the boundary between them. The Faculty also considers that the use of the term “undesirable in some respect” in the proposed Section 39(1)(a) and 39(5)(a) is ambiguous and lacks certainty. Whilst this was no doubt intended to allow the Commission to have a large degree of discretion, if the present wording is retained it will be necessary for the Commission to have a clear policy as to what might be “undesirable in some respect” in order to create clarity in relation to what is intended, and allow anyone with a potential interest to have some certainty as to what circumstance justifies the alteration of the extent of a boundary of a croft where that extent or boundary is not inaccurate.