



Environment and Rural Development Committee

21st Meeting, 2006

Wednesday 14 June 2006

The Committee will meet at 9.30 am in Committee Room 1.

1. **Declaration of interests:** The new member of the Committee, Eleanor Scott, will be invited to declare any relevant interests.
2. **Choice of Deputy Convener:** The Committee will choose its Deputy Convener.
3. **Crofting Reform etc. Bill:** The Committee will take evidence at Stage 1 on the Scottish Executive's proposed 'proper occupier' amendment from—

Professor Jim Hunter;
 Derek Flyn, crofting lawyer, Consultant with Macleod & MacCallum, Solicitors, Inverness;
 Simon Fraser, solicitor, Anderson MacArthur & Co., Stornoway;
 Norman Leask, Chairman, Donald Murdie, Land Use Projects Manager and
 John MacKintosh, Member of Crofting Reform Working Group, Scottish Crofting Foundation;
 Johnnie Mackenzie, Chairman of Crofting Group, Scottish Rural Property and Business Association;
 Iain Turnbull, Property Manager for Balmacara Estate, National Trust for Scotland; and
 David Green, Chairman, Crofters Commission.

4. **Crofting Reform etc. Bill:** The Committee will take evidence at Stage 1 on the Scottish Executive's proposed 'proper occupier' amendment from—

Rhona Brankin MSP, Deputy Minister for Environment and Rural Development;
 Shane Rankin, Bill Team Leader; and
 Ethel Burt, Senior Principal Legal Officer, Legal and Parliamentary Team, Scottish Executive.

5. **Subordinate legislation:** Rhona Brankin MSP, Deputy Minister for Environment and Rural Development, to move motion S2M-4487—

that the Environment and Rural Development Committee recommends that the draft Scotland Act 1998 (River Tweed) Order 2006 be approved.

6. **Crofting Reform etc. Bill (in private):** The Committee will consider a draft Stage 1 report.

Mark Brough
Clerk to the Committee
Direct Tel: 0131-348-5240

The following papers are attached:

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|-------------------------------------------------------------------------------|---------------------------------|
| <u>Agenda Item 3</u> | |
| Submission from Professor Jim Hunter | ERD/S2/06/21/3a |
| Submission from Simon Fraser | ERD/S2/06/21/3b |
| Submission from the Scottish Crofting Foundation | ERD/S2/06/21/3c |
| Submission from the Scottish Rural Property and Business Association | ERD/S2/06/21/3d |
| Submission from the National Trust for Scotland | ERD/S2/06/21/3e |
| <u>Agenda Item 4</u> | |
| Briefing from SPICe [<i>Members only</i>] | ERD/S2/06/21/4a |
| Submission from the Scottish Executive | ERD/S2/06/21/4b |
| Correspondence from the Deputy Minister for Environment and Rural Development | ERD/S2/06/21/4c |
| <u>Agenda Item 5</u> | |
| The draft Scotland Act 1998 (River Tweed) Order 2006 | ERD/S2/06/21/5a |

SUBMISSION FROM PROFESSOR JIM HUNTER

1. The committee's evidence session of 14 June will be concerned principally, I understand, with the Scottish Executive's 'proper occupier' proposals – those proposals having come forward too late to be considered previously. While I have views on the proper occupier proposals (views summarised in Paras 2-4 below), I should like to take this opportunity to put to the committee my growing conviction that, not least in the light of the evidence which the committee has heard so far, only the more widely supported provisions of the Crofting Reform Bill should be taken forward by the Executive and by parliament.

2. The nature of the Executive's proper occupier proposals, and the way they have been introduced, are factors in my having reached this conclusion. I appreciate that these proposals have been introduced by the Executive with a view to countering at least some of the negative feeling engendered by the Crofting Bill. That said, the Executive's proposals seem to me to add a further layer of legal complexity to a regulatory system which is already far too complex. In this connection, I urge the committee to take note of the fact that such complexity has arisen because of repeated past instances of a practice of which the Executive's proper occupier proposals are merely the latest instance. A good (or bad) example relates to the legislative and regulatory provisions dealing with absenteeism. As noted in my first written submission to the committee, when crofters were granted security of tenure by the Crofters Act of 1886, it was universally assumed (on what then seemed a commonsense basis) that such security was to be enjoyed only by crofters living on crofts. Some 30 years later, this was challenged in the courts which ruled in 1917 that, in fact, a crofter's secure tenancy over his croft persisted even if he lived several thousand miles distant from it. A proliferation of absenteeism followed – this absenteeism being one of the major problems which the Crofters Act of 1955, the Act which established the present Crofters Commission, was meant to solve. However, rather than return to first principles and again define a crofter as a person whose main home is on his or her croft, the 1955 Act bestowed on the Commission a convoluted set of controls over absenteeism – controls which, as this committee has heard, the Commission has struggled (and often failed) to exercise ever since. I regard the Executive's proper occupier proposals as being firmly in this tradition. And I predict that, if implemented, these proposals (even if accompanied, as promised, by a 'more aggressive' stance on the Commission's part) will work no more effectively than the 1955 Act's anti-absenteeism measures – those measures, which were supposed to eliminate absentee tenancy, having left us, more than 50 years after their introduction, with (as this committee has heard) many, many hundreds of absentees.

3. My reservations about the proper occupier notion are confirmed by Paragraph 8 of the explanatory paper which the Scottish Executive have

submitted to the committee by way of introducing their proposals. This paragraph begins with the statement: 'Controlling the price paid for croft tenancies or crofts ... is impossible.' The paragraph then goes on to assert, in summary, that there can, by definition, be no effective price controls in relation to crofting. To be honest, having read this paragraph, I found it hard to take the Executive's paper seriously – the paragraph in question having apparently been compiled in ignorance of the fact that crofting rests, in a very fundamental way, on a system of price controls which has operated with absolute effectiveness for 120 years. Prior to 1886, croft rents were set by landlords and (understandably from a landowning point of view) were as high as the market would bear. In real terms, those rents were between 50 and 100 times higher than croft rents are now. From 1886 forward, however, the level of croft rents has been set not by the market but by means of judicial regulation – this regulation operated first by the original Crofters Commission and then by the Scottish Land Court which took the original commission's place in 1912. Given that a rent is, in essence, the price you pay annually to have the use of someone else's property, our having managed to control croft rents for 120 years (and to have reduced them to a tiny fraction of what they would have been if their levels had been determined by the market) seems to me to demolish the Executive's quite extraordinary contention that price controls can't ever be imposed effectively in a crofting context.

4. One further point arises in this connection. It's a point I attempted to make in my earlier submission to the committee, and which I now repeat. I fail to see why, given that market forces were fenced out of crofting by the security of tenure and rent-control provisions introduced in 1886, it somehow makes sense to have a market (an allegedly uncontrollable market at that) in crofts and croft tenancies inside the fence. A truly free market approach to crofting would be one that took down the 1886 fence, re-introduced time-limited tenancies and did away both with rent controls and with the tenant's right-to-buy – an approach, incidentally, that might well encourage landowners, in current circumstances, to create lots of crofts with a view (there being no lack of prospective crofters with the necessary cash at their disposal) to renting out those new crofts at several thousand pounds annually apiece.

5. This brings me back to my starting-point – my conviction that the Crofting Reform Bill, as now drafted, should be abandoned.

6. Can this be done while also saving the Bill's positive features – notably its provisions regarding the creation of new crofts and its provisions (crucial to developing windfarms and the like on the large areas of croft land now going into community ownership) in relation to so-called interposed leases? I don't know. But it seems to me that a relatively short Bill which takes care both of interposed leases and new crofts (matters commanding, as the committee has heard, substantial support) could be introduced and proceeded with fairly quickly.

7. Any recommendation by this committee to that effect should be accompanied by an equally strong recommendation that the Executive immediately set in motion a process intended to establish how crofting can

best be taken forward. Both the committee and the parliament have heard testimony, not least from ministers, to the effect that crofting makes a lot of sense in the context of a wider rural policy that aims to foster, as Scottish, UK and EU policy now does, a well-populated, economically diverse and environmentally attractive countryside. There is, then, a high degree of consensus as to crofting's continued desirability. Judging by the tenor of evidence to this committee, there is an equally high degree of consensus that crofting, if its potential is fully to be realised, requires regulation. Where consensus breaks down, again judging by evidence to this committee, is how such regulation is to be exercised. Any regulatory system in a free society can only work well if the agency responsible for regulation, in this case the Crofters Commission, has the respect of the people whose conduct the agency aims to regulate. Again judging from evidence to this committee, the Crofters Commission is in some danger of losing (if it has not already lost) such respect. Also judging by evidence to this committee, proceeding with the Crofting Reform Bill as currently framed threatens to make the Commission's position worse in this regard, not better.

8. The two major Crofting Bills there have been, Bills which became the Acts of 1886 and 1955, were preceded by commissions of enquiry, the so-called Napier and Taylor Commissions. The older, top-down mechanism, however, will not meet the present case. It will not be sufficient to get together a set of alleged experts, ask them to take evidence from interested parties and instruct them to prepare proposals for action. What's required is a consultative exercise which, so to speak, directly engages crofters, prospective crofters and other interested parties in the task of mapping out crofting's future. Only thus will it be possible to obtain the crofter buy-in that's missing from so much of the present Bill's approach to crofting.

9. Getting such an exercise to deliver, I appreciate, will not be easy. But if we're serious about securing a good future for crofting and for crofters, the attempt must be made. I am not persuaded by the more apocalyptic views expressed about the present Bill – views to the effect that it will rapidly bring about the death of crofting. But I am persuaded by the evidence this committee has gathered that the administrative arrangements which the Bill envisages are not generally thought to offer an effective means of keeping crofting in good health. It's greatly to the credit of this committee, and to the credit of the pre-legislative procedures put in place by the Scottish Parliament, that the disquiet surrounding the way we run crofting has been brought out so clearly in this way. Now the committee, the Executive and parliament have to respond constructively to the disquiet they have been instrumental in revealing. The best way of so doing, in my opinion, is for the Executive and parliament to proceed with speed on interposed leases and new crofts. In the interim, crofting's administrative structure (including the Crofters Commission) will have to be left as is. This structure should be so left, however, on the strict understanding that a consultative exercise on crofting's future will commence promptly and will lead, sooner rather than later, to a new, and more consensus-commanding, Bill being drafted.

SUBMISSION FROM SIMON FRASER

Further to recent correspondence regarding the proposed amendment to the Bill with regard to “Proper Occupier” status, I have just a few comments to make. The numbering is taken from the Scottish Executive Explanatory Paper: -

6. In general I think that these provisions will be of some benefit in that as at present there seems to be little if any regulation of the occupation of crofts post purchase. As with the other regulatory mechanisms this will only be of any benefit to the crofting community if applied rigorously and with strict regard to policy. As in other issues relating to regulation policy will require to be flexible in that what suits one area will not suit another area and it will therefore be necessary in my view to have policy developed which relates to the needs of individual areas.
7. “Lenders expect borrowers to offer Security” This is correct but few lenders would accept a security over non de-crofted land. De-crofting of course can be applied for before or after purchase and an area to be de-crofted after purchase may not necessarily be as large as the area purchased.
8. In my view it is not price control which is required but stricter control over eligibility. Without such control market forces will always prevail.
12. There does not seem to be any other possible way of dealing with existing owners other than by their acquiring the Proper Occupier status from the outset. They should of course however be followed up as regularly and with the same rigour as new owner occupiers.
- 19- 28. These cover the regulatory mechanism. At first sight it may appear to be overly bureaucratic. However it does appear to be relatively clear. Whether it is of any affect in achieving policy outcome entirely depends on the extent of which the Crofters Commission are prepared to enforce the provisions.

SUBMISSION FROM THE SCOTTISH CROFTING FOUNDATION

INTRODUCTION

We welcome this opportunity to give evidence pertaining to the concept of “Proper Occupier”, an amendment to the Crofting (Scotland) Act 1993 that appeared too late to comment upon in earlier evidence sessions of the ERDC looking at the Crofting Reform Etc Bill. Whilst we will try to confine our evidence to this concept we will have to refer to the wider Bill as the “Proper Occupier” was heralded as that which would make up for so much that was lacking from the Bill as introduced to Parliament.

“PROPER OCCUPIER”

1. **The proposal as introduced goes a long way about to present a concept that could potentially achieve nothing positive and could produce further confusion and resentment.** The Explanatory Paper submitted by SEERAD at first reading does appear to offer hope, but when the actual amendment is read it is hard to say very much positive about it – the same could be said of the Bill as to whether it actually reflects the good intentions expressed in the Policy Memorandum. We have already suggested a short list of alterations but as it is unlikely that such a complete turnaround would be possible at this late stage we will confine ourselves to a few realistic modifications that could make the proposal workable.

2. **The Crofters Commission has to be resourced to be proactive in addressing absenteeism and neglect over the whole of the crofting areas.** The Absentee Initiative has been successful to an extent but the feeling is that it is operating too slowly to ever be able to realise its ultimate aim (it would be interesting to compare how many crofts have been made available by the Absentee Initiative and how many crofts are unused due to absenteeism and to then extrapolate to see when if the absentee initiative will ever address the problem).

It would help to re-establish the Executive/Commission credibility if they acted under the existing legislation on so-called absentee owner-occupiers (of course this is a misnomer - an absent owner-occupier is the landlord of a vacant croft, no more or less) as the failure of the regulatory regime on this aspect is an ongoing scandal which they should at least acknowledge. We say this because the proposal for “Proper Occupier” appears to put most onus on the Commission reacting to complaints rather than being proactive which could mean that very little would actually be done at all.

The Commission needs to be resourced and **obliged** to take a proactive approach using something along the lines of the absentee initiative – a “croft restoration initiative” for example, to address absenteeism and neglect sensitively, for both owners and tenants, with a timetable set for achievement of realistic targets and completion.

There should also be more cash available to significantly upgrade the Crofters Commission's technical staff capacity and knowledge levels, by external recruitment if necessary.

3. This type of initiative will only work with the full co-operation and ownership of the crofters. . Crofters need to be represented democratically at township level and at area level - grazings committees and clerks need to be supported effectively and they need to be accountable. Reform of the Grazings Committee system is essential.

The concept of Local Panels is fine but they must be democratic. The panels must have the ability to contribute to the formation of the Board of the Crofters Commission either by power of veto or by nomination. A central role of the Commission is to advise ministers on crofting affairs so it is essential that the Commission is democratic in its membership and operation.

If the Crofters Commission is reacting to a complaint, the identity of the complainer must be made known (as objectors to planning applications are made publicly known)

4. There must be a probationary period of 5 years for all croft entrants with an emphasis on helping the entrant to achieve their agreed 5 year management plan. This would go a great way to realising the implicit objective of the "Proper Occupier" concept, that is to temper the purchasing of crofts for house sites or speculation with no intention to use the croft. If the probationer makes no attempt to use the croft, penalties such as withholding of grants and, ultimately, withdrawal of tenancy agreement(s) could be imposed. However, if the consequences are too harsh, each case will be ripped apart by lawyers and so become ineffectual. Therefore a "points system" similar to drivers' licences endorsement points could be used.

New croft entrants should also be selected on a points system, similar to that used in housing (higher points for young families, those with no other crofts etc), and should not have full "Proper" crofter status and the Right To Buy in the probation period.

5. "Purposeful Use" has to be set in clearly defined parameters and the "nature conservation" (or wilful neglect) get-out has to be closed. The main thrust of the "Proper Occupier" proposals, "Purposeful Use", is entirely negated by Section 23C (2), which invites justification of neglect and dereliction as "nature conservation". This is a loophole for exploitation by landlords, occupiers of whatever dubious status, solicitors, estate agents and the Commission. If a crofter is claiming the croft is used for nature conservation they must have evidence of a strategy – i.e. be part of a recognised scheme or have a conservation management plan that can be demonstrated if challenged. The same applies to misuse of the forestry schemes to justify neglect.

6. Control of absenteeism and neglect should apply equally to all crofters whether tenants or owner-occupiers. The "Proper Occupier" proposal has been written to address the inequalities of owners and tenants; croft owners appearing to be able to exploit loopholes that allow them to evade regulation on absenteeism and neglect. Whilst the proposal quite rightly attempts to redress this imbalance the creation of a new term "Proper Occupier" not only complicates an already complicated system but may also create a perceived imbalance with a new type of

crofter, one that is "more equal than others". So one name is still preferable and could simply be a clearer definition of "Crofter".

7. There should be no restriction to the number of crofts currently used by an individual, if they are being used for crofting. Enlarging the size of ground used for crofting by using multiple crofts was actively encouraged by the Crofters Commission at one time so to reverse that would be an infringement of rights. However, there exists the notion that a croft should be no larger than 30 ha, which is supported. In some areas crofts are very small so the control should be more about total area rather than number of crofts.

We agree that assignation to individuals that do not already have a croft should be favoured (re. 4.).

8. This proposal can only have validity if all reference to "market value" is removed from the Bill. This should be replaced with "compensation for permanent improvements" or some such term. The idea of a free market in crofts is extremely contentious and "strikes at the very root of what holds us together", as a crofter put it.

9. Inbye Croft land should have the same protection as agricultural land – in the T & C Planning Bill. The objective of the "Proper Occupier" proposal would be reinforced by the presumption to protect croft in-bye land from development. Would the Taynuilt development application have resulted in the fiasco it did if the croft had been protected as agricultural land?

CONCLUSION

We agree that legislation reform is necessary and we support the passing of this Bill through stage 1, with significant cropping. This has been a difficult decision to get consensus on as the Bill as introduced has, on balance, more harm in it than good. However, we feel that to lose the Bill altogether would lose an opportunity to improve the legislation, perhaps for many years. A very difficult dilemma that we are sure the ERDC appreciates.

Our support of the Bill at this stage is tempered by the assertion that it will only be useful if the committee presses for some radical amendments at stage 2 including the removal of the "market value" references, the restoring and enhancing of the democracy of the regulatory system including the Crofters Commission and the other suggested amendments to the "Proper Occupier" concept.

The SCF, and as the SCU, has always been very supportive of the need to change crofting legislation and has been involved in gathering reviews and forming consensus in order to advise and contribute to the reform of crofting legislation. Crofters have many varying views on legislation and the wider philosophies of crofting, and the SCF works very hard to gather, consolidate and present a consensus. However we do feel that our efforts do provide an accurate reflection of the majority view and that our inputs have been corroborated by the evidence that has been gathered by the ERDC. We do not feel that this Bill accurately reflects stakeholder opinion yet.

We were told that as a result of the consultation a proposal called "Proper Occupier" would be presented as an amendment to legislation that would resolve many if not all of the issues that we felt were missed in the draft. This is not the case. The proposal

has little resemblance to the concept that was discussed and presented originally in the late Nineties by the Crofting Legislation Reform Group and does little to address the many suggestions given by the SCF in its response to the consultation.

A change of attitude at senior SEERAD level on a number of crofting issues; the future of CCAGS, Bull Scheme, LFASS to name but a few, and a move away from their present, blatantly anti-crofting agenda is essential. It is unlikely that the Bill could be amended enough to reflect what is needed for crofting legislation to really work effectively long term. The true value of crofting is not recognised and a full socio economic evaluation is still needed.

The evidence that has been gathered by the ERDC could also go a long way to providing the baseline data needed to develop new legislation at a later date; the lack of participatory appraisal by SEERAD is demonstrated in the poor quality of the Bill and the lack of ownership by crofters - in stark contrast to the ERDC taking evidence and in a relatively short time getting very much to the heart of the matter.

It is vital that the decline is at least slowed by this Amending Bill being passed in a somewhat more workable form and the commitment being given to develop further appropriate legislation in the next parliamentary session.

SUBMISSION FROM THE SCOTTISH RURAL PROPERTY AND BUSINESS
ASSOCIATION

INTRODUCTION

The SRPBA is grateful for the opportunity to give further written and oral comments to the Committee on the issue of regulation of owner occupier crofters, as set out in the Scottish Executive's proposed Stage 2 amendment.

As an initial comment we would stress that we recognise that upon exercise of the individual crofter's right to buy his croft house site and/or the inbye croft land/apportionment of grazings, the role of the landlord as regards that particular croft is brought to an end. At that point, the Crofters' Commission is the only body with a valid interest in regulating the crofter, on wider public interest basis in the implementation of government policy. However, the landlord's interest, in common with other croft tenants, will be the interests of the remainder of the crofting estate, and the health and well-being of the crofting community, of which the remainder of the crofting estate is part. It is in this context that our comments are made.

BACKGROUND TO THE NEED FOR THE PROPER OCCUPIER

The SRPBA recognises that the perceived requirement for the Proper Occupier ("PO") amendment has come about for a number of reasons, which we see as follows:-

1. Upon exercise of the right to buy, the Commission has no statutory basis upon which to regulate the occupation of the croft other than forced re-letting;
2. The ability to buy in the croft frustrates the Commission's and the landlord's ability to effectively regulate croft assignments because it acts as an alternative for crofters unwilling to be regulated in the choice of assignee;
3. The lack of perceived effective regulation of both owner occupiers and the assignment process is seen to fuel an unrestricted market in crofts (tenancies and heritable interests) at high prices which do not reflect the true value of improvements (in the case of assignments), nor the regulated nature of croft land (in the case of heritable interests). As is well documented, prices in both cases tend to be well beyond the reach of most local people wishing to get involved in traditional crofting and who may contribute to the local rural economy.

There appears to be a consensus in the evidence to the Committee at stage 1, that with hindsight, the right to buy mechanism has been detrimental to crofting in the wider sense, namely as a tool for rural development and social cohesion.

The incentives for an individual to exercise the right to buy are acknowledged. Firstly the ability to borrow on the security of the crofter's house and garden ground

brings a number of benefits for the crofter, and allows investment, whether in the croft itself or elsewhere. This is an understandable driver.

Secondly, the ability to buy-in the croft house site and garden at agricultural value and subsequently sell at open market value, creates a large windfall gain, particularly if the nominee purchase loophole is used to avoid the payment of clawback to the landlord within the first 5 years. The croft house site can also be de-crofted, and possibly with grant funding, a new croft house built on the remaining croft land. It should however be noted that this practice could be challengeable in terms of Schedule 2 paragraph 8 of the 1993 Act, if a landlord was minded to or had the resources to do so. That paragraph was intended to prevent the crofter from using croft land for speculation in housing sites because the Act requires that the new house should be in substitution for a house which was already in existence on the croft as it was in 1993. Again the policy intention of the legislation has in some cases been exploited to the individual's benefit but arguably to the detriment of crofting generally, as more croft land is lost to housing, invariably unaffordable to local people.

The above mechanisms have been made available through gaps in the legislation. It cannot be expected that all individuals will act with the long term best interests of the crofting communities at heart, if it is at the expense of a substantial immediate financial benefit. The challenge surely for government is to tighten the legislation wherever possible to ensure that these types of practices are restricted where possible and that the individual's interests are fairly balanced against the wider policy objectives of the government as regards crofting.

If the Scottish Ministers believe (as we understand they do) that crofting is a valued form of land tenure, which delivers real benefits to these particular areas of Scotland, then it may be necessary to re-examine the background to the necessity for the PO provisions, before embarking upon a whole new set of regulation and bureaucracy.

POSSIBLE ADDITIONAL OR ALTERNATIVE SOLUTIONS

Crofter Borrowing

The ability by the crofter to use their house/garden etc as security would mean they could invest in their own buildings and activities and would in some situations reduce the need to purchase, with the disadvantages this can have (access to crofting grants etc).

Because a crofting tenancy is technically (by banks and others) seen as being on a year to year basis an amendment to conveyancing legislation (Land Registration (Scotland) Act 1979) to include croft tenancies in the definition of a real right would mean they would be available as security. This would bring benefits to whole crofting communities. It is suggested that the committee should give this further consideration, perhaps seeking evidence from the Scottish Executive's legal advisers or legal profession representative bodies.

Clawback/Nominee Purchases

The SRPBA's views on this issue have already been set out in earlier evidence. We believe the nominee purchase loophole should be closed. The enclosed extract from Hansard during the debate on the 1976 Act clearly demonstrates that this would simply implement the intention of parliament. Similarly we believe that an extension of the clawback period to 10 years would act as a disincentive to speculation and fragmentation of croft land.

Restriction of the right to buy to house site and garden

Whilst perhaps not essential if crofters were able to borrow on the basis of their croft tenancy, this measure would nevertheless enable the assignments of croft land to operate as originally intended, with a role for the Commission in regulating effectively, and thus dampening prices.

COMMENT ON THE PO AMENDMENT

In making our comments above, we recognise that the suggested mechanisms may help in the future, but that there are a number of existing owner occupiers, who have to date not been troubled by regulation or intervention from the Crofters Commission.

The SRPBA's comments on some of the detail of the PO amendment are confined to the following points:-

1. It is not clear why a crofter occupying 3 crofts is not at risk of losing PO status (Section 23C(4)) whilst section 23B(9)(d) precludes the crofter achieving PO status in the first instance if he has 2 crofts.
2. Section 23A(4) seems to exclude the possibility that the crofter's estate could comprise more than the croft. It is suggested that "comprises" should be replaced by "includes".
3. Section 23B(4) allows "members of the crofting community in the locality" to object. Section 41 of the Bill makes it clear that the landlord is not considered to be part of that community. Whilst the applicant may have no landlord, there may well be a landlord in respect of neighbouring crofts who should be afforded the right to object along with the remaining crofters.

We hope these comments will be considered useful and constructive for the committee in its deliberations, and we will be happy to elaborate further on any of these points at the Committee's meeting on 14th June.

NB The SRPBA evidence refers to the House of Commons Hansard transcript for 10 February 1976, columns 65 - 68.

SUBMISSION FROM THE NATIONAL TRUST FOR SCOTLAND

Summary

The Executive states that the 'Proper Occupier' amendment is being introduced to moderate 'speculation' in croft land. The implication behind the rationale given in the Explanatory Paper is that this is the only realistic measure that can be pursued to tackle this problem. However, we re-iterate our concerns that no genuine consideration appears to have been given to either partially or completely removing an individual's right to buy, and that individual interests are being protected at the expense of the wider community interest and the crofting system itself. Evidence given so far has highlighted a number of suggestions to address the growing free market in croft tenancies¹ and it would have been productive to have had greater discussion and exploration of these ideas at an earlier stage of the drafting of this Bill.

Should the individual right to buy continue in its present form, then we welcome any attempt to regulate the management and use of owner-occupied crofts. However this will *only* succeed if:

- the provisions are properly regulated and enforced
- powers given to the Crofters Commission to address issues such as absenteeism and neglect of crofts become a *duty* on the Commission to act
- the law is specific and not open to misinterpretation

Regulation/Enforcement

Better regulation of crofting tenure is of paramount importance to the long-term sustainability of crofting communities. Many of the existing regulations are not enforced. This is widely recognised as a fundamental issue, yet the Bill offers no meaningful solutions. The proposals for owner-occupiers are likely to suffer a similar fate unless the reasons for such regulatory failures are properly addressed. Much of the existing legislation is not fundamentally flawed, rather it is the way in which the legislation is interpreted and implemented that needs to be reviewed. Adding further powers and sanctions under these proposals may well prove beneficial, but without proper regulation and enforcement they will fail to achieve any meaningful outcome and will only add to the Commission's bureaucratic workload.

¹ Our idea on the right to buy is that, if the right were abolished, it would not mean individuals could not acquire their croft. There is a subtle difference between having a right to buy and being able to buy. A crofter could buy a croft if he or she could justify taking the land out of the community pool, ie if it met the wider community's objectives and aspirations or demonstrated some social or environmental benefit. Ideas from other witnesses included the introduction of a potential delay in the ability of an individual to exercise his or her right to buy, during which time a croft must be seen to be worked.

Commission Powers

Commission powers should be replaced by a *duty* on the Commission to act. Policy guidance to this effect should be given to the Scottish Land Court to enable it to fulfil its functions. This is particularly critical in areas where regulation has been weak to date, such as ensuring proper use of croft land, absenteeism, multiple occupancy of croft land and inappropriate development of croft land.

The ultimate sanction over 'Proper Occupiers' who fail to comply with the proposed conditions, following the proposed withdrawal of 'Proper Occupier' status, is an increased risk of having a croft tenant imposed. However this power already exists, yet is rarely executed. This may too easily lead to the new proposals also being ignored by those who have no interest in crofting. Section 23 (5) of the 1993 Act states that 'the Commission *may*, at any time ... give notice to the landlord requiring him to submit proposals for re-letting the croft'. Where owner occupiers lose their Proper Occupier status this should be altered to the effect that the Commission *must* give notice in such cases. The Explanatory Paper states that the existing legislation does not deal with any potential European Convention on Human Rights (ECHR) implications of this power. This should have been properly researched at the start of the drafting of this Bill, and in light of the proposed amendments regarding Proper Occupiers, this issue must be explored before the legislation is finalised.

Crofting Law

Many regulatory problems stem from the fact that crofting law itself is not sufficiently robust in a number of key areas. This has left it too open to legal interpretation, with the result that various attempts at proper enforcement have failed. This in turn has led to an unwillingness on the part of the Commission to bring cases in front of the Land Court. Many of the provisions outlined under the Proper Occupier proposals mirror those governing croft tenants, and will fare no better unless the Bill delivers a workable and meaningful solution to overcome the obstacles to proper enforcement. The tightening up of current regulations, with clearer definitions and guidance for the courts and the Commission, is a pre-requisite to successful implementation.

We therefore urge the Executive to take proper legal advice (and adhere to expert opinion) on key areas where the law is insufficiently specific or likely to be so. For example, the proposed addition to Section 11(1)(b)(2A), which applies both to tenants and proposed owner-occupiers, requires tightening up. This states that where a crofter is doing or not doing something to conserve the natural beauty or the flora and fauna of the locality, he is not to be treated as in breach of the statutory conditions. We are advised that it would be very difficult to establish any case of irritancy as presently worded and may lead to a crofter or owner-occupier claiming to conserve his croft by effectively doing nothing in the way of meaningful conservation. We believe the law should be reviewed and tightened in a number of critical areas, in particular what constitutes neglect of a croft, proper use/cultivation of a croft and absenteeism.

Holiday Lets

The proposed new provision to allow a Proper Occupier to let any house or other building on the croft to holiday visitors (which matches the proviso to Para 6 of Schedule 2 to the 1993 Act enabling croft tenants to do the same) highlights the pressing need for greater regulatory control of such lets. Such activity is only adding to the acute lack of affordable housing and only serves to increase the value of crofts. At the very least such lets should

be subject to the same conditions that cover 'purposeful use', thus ensuring they do not happen automatically but can be appraised in line with any local area policies and the wider community interest.

Monitoring/Review

Should these proposals be implemented, it is vital that a date is set now to review their impact on the speculation in croft land. Should they at that time be found to be ineffective then the Executive must commit itself to further action.

SUBMISSION FROM THE SCOTTISH EXECUTIVE

1. Proper occupier creates a legal framework which defines what an owner occupier is expected to do with a croft he/she occupies and which protects an owner who complies with these requirements. This gives the owner and potential lenders assurance and thus reduces pressure for decrofting of house sites. This also makes it clear that any owner who does not achieve or retain proper occupier status may be required to re-let the croft. By doing this demand for crofts for holiday and retirement homes will be suppressed thus taking away some of the price pressures.

Obligations imposed on proper occupier

2. Proper occupier imposes obligations on owners which are largely the same as those which affect tenants and thus ensure that crofts are lived on and used by their occupants. One significant difference is that there is no scope for an owner to have a tenant other than a croft tenant whereas it is possible for a croft tenant to sublet a croft.

Reason for the late addition

3. There was not any evidence of demand for change in the status of owner occupiers prior to the consultation on the draft Bill. The decision to include these proposals was therefore made at a late stage and there was insufficient time prior to the planned introduction date to develop the proposals after the decision was made to include them in the Bill.

Impact

4. The proper occupier proposals will have an impact because of the implications for the owner who is not a proper occupier. Such an owner could be required to find a tenant for the croft and on failing to do so could have a tenant imposed. That tenant would have a right to buy the croft at 15 times the rent.

Deciding who is a proper occupier

5. If a person is currently an owner occupier of a croft and is a natural person that person will become a proper occupier when the legislation comes into force. Thereafter anyone who buys a croft from a proper occupier, anyone who successfully applies to become a proper occupier plus for a time limited period the executor of a proper occupier and any lender who takes possession of a croft in settlement of a debt would also be a proper occupier.

6. The issue for existing owner occupiers will therefore be to establish what he/she needs to do in order to continue to be a proper occupier. The primary

requirements are that the person in question must permanently live on or within 16 kilometres of the croft and use the land.

7. We have included provision to allow lenders proper occupier status when they take possession of a property from a defaulting borrower because there is a chance that this will persuade them to lend to proper occupiers without insisting on decrofting of any land to be used as security for a loan. This provision may over time encourage lenders to give preference to proper occupiers over other owner occupiers. This in turn should have an impact on values.

Application for proper occupier status

8. We have provided that persons who purchase from proper occupiers start out as proper occupiers. The majority of these transfers will not be controversial and there is no point imposing extra bureaucracy on the majority of purchasers. However, the proposals provide that those who purchase from a person without proper occupier status will need to apply for proper occupier status. Some croft tenants purchase their crofts to avoid regulation and in these circumstances the new owner would have to apply for proper occupier status or face having a tenant imposed on them. Any tenant imposed would then have the right to buy the croft from an owner who did not have proper occupier status. In relation to purchases of part crofts, the purchaser of a part croft would have to secure proper occupier status from the Crofters Commission if the previous did not have proper occupier status.

Removal of proper occupier status

9. The proposals provide that proper occupier status can be removed in a range of circumstances which match those in which a croft tenant can be removed now and after passage of this Bill. This includes absenteeism, neglect of the croft, misuse of the croft, and failure to cultivate the croft. In addition the status may be removed if as a result of acquiring a croft the number of crofts owned by the proper occupier exceeds a total of 4 crofts.

10. Limiting the number of crofts of which a person can be a proper occupier enables a distinction to be drawn between crofters and estate owners. The specific number was set in the context of and following consultation on the proposal to allow owners to let their crofts in the same way as tenants can sublet. It reflects a view that people who accumulate large numbers of crofts should not be considered to be crofters since their operations are indistinguishable from mainstream farming. This rule will inhibit future croft accumulation.

11. As with every other regulatory decision of the Crofters Commission the Bill provides a right of appeal to the Scottish Land Court against a Commission determination as to whether or not a person is a proper occupier. That right of appeal will extend to anyone who objected to a person being granted proper occupier status.

CORRESPONDENCE FROM THE DEPUTY MINISTER FOR ENVIRONMENT AND RURAL DEVELOPMENT

Further to the Committee's request (expressed during my oral evidence in Inverness on 15 May) for detail on the main policy aspects of crofting reform that would not be achieved without primary legislation, I am writing to you with an outline of these. It should be made clear that none of these policy aspects could be achieved without primary legislation and there is no existing legislation under which these provisions could be achieved. Furthermore, subordinate legislation could only be used to do things if there is already primary legislation which gives explicit permission to do so. This is why we have legislated for crofting reform and introduced the Crofting Reform etc. Bill to Parliament.

New crofts and new grazings will not be created in existing crofting areas - At present the law only permits the creation of new crofts by a reorganisation of existing crofts in a crofting community which could include non croft land which is contiguous to the croft and by division of existing crofts. It should be noted also that reorganisation of croft land can only be done with the consent of the crofters in the community who are currently tenants of crofts. Furthermore, an agreement by a crofter and landlord not to use the right to buy does not bind a successor to the crofter who makes the contract. The Forestry Commission would not be able to create woodland crofts from Forest land.

New crofts outwith the Crofting Counties – No provision exists in current legislation for the creation of croft land outwith the current crofting counties. The Forestry Commission would not be able to create woodland crofts from Forest land.

Interposed leases will continue to be used to frustrate crofting community rights to buy under land reform legislation – It is uncertain that the Land Court will find the Pairc lease to be void and even if that lease is void that will not prevent this mechanism being used in future.

Neglect and misuse will not be dealt with – The Commission currently has no power to deal with neglect or misuse of tenanted croft land. The powers available to landlords are not effective and most landlords see no benefit in using them.

The Crofters Commission will not have power to devise grants targeted to crofters.

Bureaucracy associated with regulation cannot be reduced – So the Crofters Commission will continue to spend a lot of time on non-controversial cases and the expense and delay for crofters associated with the current arrangements will continue.

A one size fits all regulatory regime will continue – The Commission has no power to modify its approach to regulation to suit different circumstances in different areas.

The Register of Crofts will continue to be of little value to crofters and landowners – Because the Commission will not gain the powers it needs to ensure the provision of accurate and comprehensive data for inclusion on the register.

There will be no provision for Small Landholders to change their status – In effect small landholders will uniquely be unable to buy their holdings.

There will be no right of appeal against Commission decisions – This paradoxically may make it difficult for the Commission to enforce existing legislation because of the potential for a breach of the ECHR right to a fair hearing before a court.

Commercial energy development on croft land will remain extremely difficult – This will probably result in large tracts of croft land being resumed from crofting tenure and projects being dropped where other land is available.

Scope for landlords to interfere will remain – Opportunities for landlords to frustrate change by inaction will continue.

No return of land to crofting tenure – Measures to allow land which has been resumed or decrofted to be returned to crofting tenure will not be put in place.

No effective means of enforcing compliance with grazing regulations – The existing criminal sanction does not work and the only civil alternative is costly as it involves obtaining a court order.

Landlord veto over crofter forestry projects remains.

Proper Occupier status – There would be no Proper Occupier amendment to dampen down croft values and speculation and no new powers for the Crofters Commission to address the neglect of croft land by owner occupiers which, contrary to some ill-informed comments, are not currently available to them. There could be pressure on the Crofters Commission to adopt a more aggressive stance on owner occupied crofts. This could result in a change of their existing policy on reletting of vacant (owner occupied) crofts. More aggressive policy on reletting could be constrained by ECHR especially if they have a house on the croft.

SSI DESIGNATION FORM

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|------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|------------------------|-----------------|------|----|--|
| SSI Title & No: | The Scotland Act 1998 (River Tweed) Order 2006, (SSI 2006/draft) | | | | | | |
| Responsible Minister | Rhona Brankin, Deputy Minister for Environment and Rural Development | | | | | | |
| Standing Order | Affirmative | 10.6.1(a) | ✓ | Negative | 10.4 | | |
| | | 10.6.1(b) | | | 10.5 | | |
| | 10.6.1(c) | | Other | NL | | NP | |
| Lead Committee | Environment and Rural Development | | Other Committee | | | | |
| Purpose of Instrument | The purpose of this Order is to retain what is effectively Scottish legislation in relation to salmon and freshwater fisheries conservation, management and exploitation in the River Tweed catchment. | | | | | | |

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|-----------------------------------|----------------------------|-----------------------------------|--------------------------------|
| Laid Date | 25 th May 2006 | 20 day date | 14 th June 2006 |
| 1st SLC Meeting | 30 th May 2006 | 40 day date | 6 th September 2006 |
| Lead Committee Report Due | 26 th June 2006 | Other Committee Report Due | |

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|--------------------------|---------------------------|
| SE Contact | David Dunkley, ext. 46227 |
| Committee Contact | Mark Brough, 85240 |

For SLC Use Only:

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|-------------------------------|--------------------------|-------------------------------------|--------------------------|-----------------------------------------|------------------------|--|---------------------------|--|
| Article 10 Compliance | Breaks 10(1) rule | | Breaks 10(2) rule | | PO Letter dated | | PO Letter received | |
| Revocations | Revokes | | | Partially Revokes | | | | |
| Executive Note | ✓ | Regulatory Impact Assessment | | European Regulations/ Directives | | | | |
| Additional Information | | | | | | | | |