

SCF Response to Crofting Consultation 2017 - A consultation on the future of crofting law

Thank you for the opportunity to comment on the Crofting Consultation 2017. The Scottish Crofting Federation is the only organisation solely dedicated to campaigning for crofters and fighting for the future of crofting. Its mission is to safeguard and promote the rights, livelihoods and culture of crofters and their communities.

Working through its membership structure it can respond authoritatively to agencies and government officials at local, national and international levels on the many issues affecting crofting and crofting communities.

Introduction

The response we have had from our members and advisors to this consultation has been that they are, overall, disenchanted. The tone of the material is down-beat and negative: there is emphasis on duties rather than protection or development and questions asked in section 3 are confusing and irrelevant. The pictures used are patronising, which may seem trivial, but the choice of images speaks volumes. There is the perpetual hope that crofting legislation, and thereby Scottish Government, will interfere with crofting less and help it more.

There seems to be a lack of specialist understanding of crofting or crofting law throughout the Scottish Government. The bill team appear to have very little prior experience or knowledge of crofting and this consultation process looks to be simply a learning exercise for the officials. This is not a personal slight - it is acknowledged that officials are encouraged to move around within the Civil Service which negates the building of institutional knowledge and memory. This does not instil confidence in Scottish Government being charged with taking crofting legislation forward alone. This must be done with the help of those with the competence to do it, so working-groups need to be formed, particularly involving the Crofting Law Group (CLG) – this is about crofting law reform after all – and crofting specialists.

A common theme from our membership has been to question why we are going through this again from scratch when the Committee of Inquiry on Crofting (CoIoC) did a very thorough investigation into crofting and the Crofting Law Group did a very thorough investigation into the inadequacies of crofting law. The passage of the bills in 2006 to 2009 reaped vast amounts of information from responses submitted; please refer to SCF submissions. There is a feeling that this consultation process is wasting valuable time given that the Scottish Government have set the target of 'modernising crofting law and making it more transparent, understandable and workable in practice' within the term of this government.

This has already been a long road and needs to be brought to a satisfactory conclusion. The current crofting legislation reform started with the formation of the Land Reform Policy Group in **1998**. This led to the Crofting Reform etc Act 2007 and the Committee of Inquiry on Crofting, the most wide-ranging investigation into crofting for a generation. Only some of the recommendations of the Inquiry were taken up by Scottish Government who then passed the Crofting Reform (Scotland) Act 2010. Following its enactment glitches emerged, necessitating the passing of an emergency bill and the Crofting (Amendment) (Scotland) Act 2013, and leading to 126 problem issues being placed in the 'Crofting Law Sump' by stakeholders, lawyers and members of the crofting public. The Scottish Government Crofting Legislation Stakeholder Consultation Group (SGCLSCG) considered the findings of the Sump and sent recommendations for action to the minister for crofting.

The SCF remains committed to these recommendations.

Summary

SCF recommends Option 2 for taking legislation reform forward, by amendment of the current legislation followed by consolidation. A great deal of work has already been done in amendments collected in The Crofting Law Sump which should be used as the basis. It can be reviewed as appropriate.

It is clear that crofters do not want to lose any of their existing protection and rights. This is a profound principle that must be adhered to.

A regulated system is only as good as its regulator. The Crofting Commission has improved its function considerably and we believe effectiveness would be enhanced were the Commission to expand its remit to include crofting development and be given the budget to do it. It appears that the Crofting Commission is grossly under-resourced.

SCF recommends therefore that the Crofting Commission's remit be expanded to include crofting development and that Scottish Government provide adequate resources for it to do an effective job. If Scottish Government is unable to provide the resources it should state this unequivocally. If it can, then do so and most other issues will fall into place.

SCF recommends that the term "crofter" be defined as the occupier of croft land. We believe that anyone, not just a crofter, who has the right to occupy land should live close by and use the land.

SCF recommends that existing unused crofts are brought back into use as part of crofting development, backed by regulation. Simultaneously, new crofts need to be created. Crofting legislation should be extended to all of Scotland to allow this. If it is believed by Scottish Government that crofting is valuable to Scotland¹, logic would dictate that crofts and crofting regulation should be accessible across all of Scotland.

SCF recommends that registration of existing crofts is done by community mapping, area by area; this would get the job done effectively in a methodical, timely and predictable way. The 'trigger' system does not work well and should be dropped.

Support payment mechanisms are developed in the absence of any thought for common grazings. **SCF recommends** that, if Scottish Government agrees that common grazings are a valued resource², it must create appropriate development schemes. Shares in common grazings must be used and be connected to crofts.

SCF anticipates opportunities to contribute more fully to discussion as a bill progresses through the Scottish Parliament so this response is not to be taken as full or final.

¹ "The Scottish Government values crofting as a form of land tenure and recognises the added contribution that crofting continues to make to the rural economy and the sustainability of rural and remote rural communities."

² "Common Grazings are a significant asset to crofting, crofters and crofting communities"

Question 1

Do you agree with the stated **Scottish Government policy on crofting**?

No. It needs to include crofters' rights and protection in the statement (it only includes duties). The introduction and policy statement seem to reflect a lack of understanding of crofting and crofting law. The protection of crofters is fundamental to crofting law.

The policy would also benefit from a statement referring to crofters' custodianship of the environment.

"Reforming crofting" is a negative concept. Crofting is fine, it is the legislation and regulation that needs reforming.

Is it correct that there are over 20,000 crofts, as quoted widely by Scottish Government? We have the understanding that there are actually around 18,000 registered crofts and that there are shares in common grazings that are not attached to a croft but for legal administrative purposes are deemed to be crofts – a situation that has been in existence for decades. We welcome clarification on this.

Question 2

Please select your **preferred option** to indicate which you believe to be the most suitable way **to proceed with any crofting law reform**.

SCF prefers option 2 – a pre-consolidation bill amending existing legislation followed by a consolidation bill. This is felt to be the most thorough approach and can use the collated findings of The Crofting Law Sump prepared by the Crofting Law Group, as well as any further amendments thought necessary for improvement of crofting law, to prepare the pre-consolidation bill. The retention of crofters' rights and recognition of the fundamental principle that this law is there for the protection of crofters is essential.

We question why it is stated that a pre-consolidation bill and consolidation bill could not pass through the current parliament which runs until 2021. Much of the work has already been done by the CLG. Splitting the process into two bills does provide a safer route.

It is important to simplify statute, taking the detail that doesn't need to be in primary legislation out and putting it in a guidance document. It is essential to provide clear guidance explaining how the law is interpreted so that crofting law is accessible to all – including new entrants, who need to know what their responsibilities are on entering crofting.

Reasons for rejecting other options:

Option 1. Consolidation only is not enough, it would not fix the problems.

Option 3. Amendment and restatement implies a 'light' version of option 2 with the likelihood that all amendments needed will not get done, or the bill will not be completed by the end of the current parliamentary session and will be dropped.

Option 4. 'Clean sheet' implies that existing legislation would be repealed. This puts at risk rights or protections of crofters. The analysis of the current position of crofting legislation, prepared by Derek Flyn for the SGCSF, refers. Furthermore, we believe finding consensus on a completely new bill would be very lengthy, if not impossible, and would be rancorous. Experience of previous attempts at crofting law reform endorse this opinion. At a time when the future of the UK and of Scotland is uncertain, to go down this route would be imprudent.

Option 5. The status quo is not an option and we have no other suggestions.

Question 3-9: We think that only question A is relevant at this point. Were the legislation accessible and comprehensible enough for us to answer questions B, C and D confidently, we would do so. Alas, it is not. We will therefore comment generally on questions 3-9 only.

Question 3.

What do you think are the main matters and opportunities for change relating to **Absenteeism, Misuse and Neglect?**

Dealing with absenteeism is about preserving communities. People need to be present and active to be a crofting community. We want to see crofts being used. Crofters are people who live on or near to their crofts which they put to purposeful use. If they do not fulfil these basic duties they do not satisfy the definition 'crofter'.

There is adequate provision within existing law to deal with absenteeism and neglect and we think that this should be addressed as a matter of urgency. We believe that a combination of crofting development, backed by regulation should be taken and that the Crofting Commission should be the regulatory and croft development body. We appreciate that bringing existing crofts back into use will take time so we recommend the creation of new crofts in the crofting areas simultaneously, as well as across the whole of Scotland. The demand is there.

The excuse of there not being a clear enough definition of 'neglect' to deal with it is curious; make the definition clear, if not in law then in policy. There is plenty of neglect existing that is very clearly neglect.

The Annual Return, the 'crofting census', was put into law to provide information on which the Crofting Commission could act. This is a statutory duty of the Crofting Commission which it is unable to address effectively due to lack of resources. Inaction makes a mockery of the law and crofters know that the annual return is an empty paper exercise. There are hundreds of crofters who have not responded and hundreds of crofters who have said they do not comply with statutory conditions of occupancy and/or use. These are crofts that young people could be using, ensuring the future of crofting.

Question 4.

What do you think are the main matters and opportunities for change relating to **Assignment and Succession?**

Assignment and compensation for improvements must be retained as fundamental rights.

Regarding succession, we agreed with the matters raised (9.1 to 9.12) in the Sump and, in November 2014, a call was made for the matter of succession (i.e. to the rightful occupancy of crofts) to be reviewed by a committee of practitioners well-versed in crofting law and the law of succession in Scots Law. This was supported by the SGCLSCG which submitted that the formation of such a committee was the way forward. This call has so far been ignored.

The issue of the tenancy of a croft being willed in parts to several people needs to be sorted out as it doesn't work and was ill-conceived. There is no like right given to an owner-occupier crofter to will his croft in parts to separate people.

Question 5.

What do you think are the main matters and opportunities for change relating to **Common Grazings**?

A great deal of work has been done on this issue by the Crofting Commission and the Commission's stakeholder group so we can only reiterate that common grazings must be maintained and developed for the future as a huge potential resource. The Crofting Commission is working on finding the way to make the regulations and administration through grazing committees work and the development of stock clubs should be a high priority for the Commission in its role of crofting development.

Common grazings must be effectively regulated and grazings shares must be used. Whilst it is recognised to be a sensitive issue, we are urged by members to support a 'use or lose' policy. It is absurd and inequitable that absentees and people who are not using their shares can retain them and even claim financial benefit from them, and block active users in developing the grazings. A crofter is defined as someone who occupies and uses croft land. An absentee or someone not using grazing shares forfeits their rights as a crofter or shareholder, surely?

Shares getting separated from crofts is a failure of the law that really needs to be rectified and referring to these separated shares which are, only for legal administrative purposes deemed to be crofts, as crofts, and registered as such, makes no sense. The law needs to be amended and shares reconnected to active crofts.

Support payment from agricultural and rural development schemes needs to be appropriate to common grazings. Payment mechanisms are developed in the absence of any thought for common grazings. Shareholders using grazings are shackled by payments being confined to their souming, rather than to their actual use of the land. If Scottish Government agrees that common grazings are a valued resource it must create appropriate development schemes.

Question 6.

What do you think are the main matters and opportunities for change relating to the **Crofting Commission's regulatory functions**?

The law needs to be implemented; a regulatory system needs to be regulated. The Crofting Commission has improved its regulatory functions enormously: for example, the recent work the Commission has done in letting crofts which have been vacant due to unresolved succession shows what can be achieved. However, the Commission cannot carry out all its functions under law if inadequately resourced. Scottish Government needs to resource the regulator to do its job effectively. If Scottish Government cannot resource the regulator this needs to be stated and an alternative plan for crofting put forward. A well-resourced Crofting Commission is at the heart of crofting legislation.

Following the 2010 Act the functions and budget for crofting development were taken from the Crofting Commission and placed with HIE, where they disappeared into 'Community Development'. Crofting development must be returned to the Crofting Commission which is best placed to implement it in conjunction with regulation. The Crofting Commission will then have a more holistic role in which to best serve crofting.

Question 7.

What do you think are the main matters and opportunities for change relating to **Crofting Registration**?

Remove the whole section on trigger points from the legislation and fund facilitated community mapping, taking a crofting area (township or parish) at a time. It would simplify the act and would stop the impeding of basic administrative functions such as

assignment. It would get the job done effectively in a methodical, timely and predictable way, and would allow the mapping of crofts and common grazings to be done simultaneously.

Get rid of expensive prescribed advertising regimes – especially from primary legislation where that level of detail has no place. Planning asks an ‘applicant for consent to develop’ to inform adjoining neighbours in writing. There is no obvious reason why this could not be the same with croft registrations.

We recommend that crofting legislation is applied across Scotland to allow existing smallholdings and newly created crofts be registered under crofting tenure.

Question 8.

What do you think are the main matters and opportunities for change relating to **Owner-Occupied crofts**?

This is an area of great confusion in the law causing untold difficulties, confusion and unnecessary negative consequences. The term owner-occupier should be removed from crofting legislation. A definition of crofter would be simply that person or persons who have the right to occupy the defined croft. Identify the croft, identify the people entitled to occupy the croft and call them crofters.

The occupier must be a natural person with the potential to be on the electoral roll.

Issues regarding multiple occupiers need to be clarified – it should not be a problem.

Question 9.

What do you think are the main matters and opportunities for change relating to a **Standard Security** over a croft tenancy?

This is a complex issue which does not apply itself well to crofting law. The implications of a Standard Security in a crofting context do not appear to be fully understood by those who would champion its use. This was why it failed to be taken forward in the 2009 bill.

Regarding standard securities, we agreed with the matters raised (10.1 to 10.4) in the Sump and, in November 2014, a call was made for the matter of crofting mortgages to be reviewed by a committee of practitioners well-versed in crofting law and the law of securities in Scots Law. This was supported by the SGCLSCG which submitted that the formation of such a committee was the way forward. This call has so far been ignored.

Security to obtain loans is still an outstanding issue, particularly with trying to raise a loan to enter crofting by buying a croft tenancy. This must be addressed with different options being looked at, e.g. a Scottish Government loan or a crofting credit union.

Question 10.

Of the issues identified, please **list those which** you think **should be a priority** for Crofting Bill reform to address, in order of ‘highest priority’ first to ‘lowest priority’ last.

Crofting Commission regulatory and development functions are the priority. The Committee of Inquiry on Crofting found that crofters want effective regulation and crofting development. The Crofting Commission can only do its job properly if adequately resourced. This is clearly not the case at present. If the Commission is resourced adequately and uses its resources to best effect the rest of the issues affecting crofting will, in the main, fall into place.

The rest of the issues identified in this consultation, including those in Annex A are all important and all need to be addressed – there is not a hierarchy for doing so. We are reluctant to list issues in order of priority for fear that the lower-down-the-list issues will be neglected.

Question 11.

Are there any **other priorities** for crofting that have not been considered in this consultation?

SCF produced 'The Five Actions for Crofting' and presented these to Scottish Government. The actions have been issued as pledges in the SNP manifesto and need to be addressed in full by Scottish Government. These actions correspond to the outstanding issues in the Final Report of the CoIoC, the "unfinished business" referred to by the Chair of the CoIoC Professor Shucksmith. The findings of that once-in-a-lifetime investigation must be reviewed and used in taking crofting legislation reform forward.

Crofting law does need to be modernised but with due care and attention. There are possibly redundant terms within crofting law such as 'land held runrig' and 'cottars' that may not exist in reality. If this is so they should be removed from the legislation along with bankruptcy being capable of making a crofter liable to eviction. The protection of crofters is fundamental to crofting law and must be retained.