



Law Society  
of Scotland

# Consultation Response

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

November 2017



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Rural Affairs Sub-committees welcomes the opportunity to consider and respond to the Scottish Government's *Crofting Consultation 2017: A consultation on the future of crofting law*.<sup>1</sup> The Sub-committee has the following comments to put forward for consideration.

## Response to questions

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### **Question 1 - Do you agree with the stated Scottish Government policy on crofting?**

**Yes/No**

**Please explain your answer.**

Yes.

**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. Should you wish to suggest another approach that has not been discussed above, then please select "other" and provide details.**

**1. 2. 3. 4. Other**

**Please can you explain your answer and any other comments you may have on any of these options.**

A consolidation bill as suggested in Option 1 would be helpful but as noted in the consultation would not provide an opportunity for the kind of substantive changes or additions which we consider could be helpful in certain areas.

<sup>1</sup> <https://consult.gov.scot/agriculture-and-rural-communities/crofting-consultation-2017/>

We consider that Option 2 could be confusing as it would necessitate two bills. Following on from this, there are advantages to the “clean bill” approach set out under Option 3 but the consultation document omits to set out any vision as to what that would look like. We also note that there are a large number of technical issues which could probably be solved quite easily – for example Scottish Land and Estates and Scottish Crofting Federation already hold a lot of detailed technical information which could provide assistance.

Option 4 could be used to frame a new approach to crofting law, doing away with problems of the existing legislation. At the same time we do not consider that it is necessary to abandon the existing crofting law system in its entirety. It is not the system itself which is the problem and members are not aware of any real desire to change it. Rather what is needed is a more consistent and transparent approach to legislation in this area.

We are therefore of the view that Option 3 is the most practical way forward in terms of providing a clear restatement of what the law actually is and offering the flexibility to make changes where required.

### **Question 3 - Absenteeism, Misuse and Neglect**

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

**B) What specific parts of the current legislation that you are aware of regarding Absenteeism, Misuse and Neglect could be changed to help address these matters?**

**C) What do you think would be the practical effects of making these changes to the legislation (eg financial, environmental, social, equality, or other effects)?**

**D) Apart from changes to legislation, are there other more appropriate ways that issues relating to Absenteeism, Misuse and Neglect could be addressed?**

**Please provide any other comments you may have on Absenteeism, Misuse and Neglect**

This is not necessarily a question of legislation but ultimately about the most effective ways to encourage better use of crofting land. These questions may be more practical than legal and we would be pleased to comment on the detail of any suggested reforms put forward in due course.

We also note that there is a question of resourcing from a Crofting Commission perspective in ensuring that crofting land is used to its full potential. From a legal perspective, we note that the term “neglect” is difficult to define and interpret and would therefore welcome reform in this area to ensure greater clarity and certainty.

## Question 4 - Assignment and succession

The law relating to Croft succession is overly complicated and means that the process is more difficult than it needs to be. There are sound reasons for ensuring the law is clarified and simplified in this respect.

There are some difficulties and inconsistencies that need to be reconsidered, including as follows:

### **Executor of owner-occupied croft decrofting**

An executor of an owner-occupied croft is not entitled to de-croft the site of the dwelling house (or indeed any part of the croft). We consider that an executor of an owner-occupied croft should be entitled to de-croft the site of the dwelling-house and garden ground. Currently in order to either give effect to a provision in the will transferring the house separately, or simply to enable an executor to sell the house or other property separately from the croft, then the croft needs to be transferred first. It would make it much easier if an executor was able to apply to de-croft the house and garden ground, thereby maximising the potential value of the estate for the beneficiaries. Consideration should certainly be given to allowing an executor to de-croft a house and garden ground.

### **Executor of tenanted croft decrofting**

Currently an executor of a croft tenancy is not entitled to de-croft either. We consider that in certain circumstances it may also be appropriate to allow the executor to de-croft the house and garden ground.

There is currently provision to enable the executor of a croft tenancy to sub-divide a croft tenancy and the sub-division will be granted when one of the areas being sub-divided is a house site and garden ground. This enables the croft house and garden ground to be transferred separately from the remainder of the croft but strictly speaking leaves one part as a very small crofting tenancy.

This may be better achieved by in addition granting an executor a right to apply a de-crofting direction. There would also be potential for this right to be exercised at the same time as dividing the croft house and garden from the rest of the croft as it is accepted that when a croft tenant applies for a de-crofting direction, then that direction is subject to the croft tenant then purchasing and taking title to the area in question. There would be a benefit in an executor being able to demonstrate that the croft house and garden ground had been decrofted in principle and were subject only to the landlord granting title to a new tenant.

## **Division of Tenanted Croft in a will**

Under Section 10 of the Act, the deceased tenant crofter may seek to divide their croft in terms of their will, with part of their croft tenancy going to one party and the remaining part to another party or parties. If this is provided for in a will, then an executor is able to make an application for division to the Crofting Commission which enables the croft to be divided and title transferred accordingly. However, we note that this may have unforeseen consequences for there can be no guarantee that consent to the division will be granted, except where the division relates to a bequest of the tenancy of the part of the croft comprising the site of the dwelling-house to one person and the tenancy of the remaining part to another person. If the Commission does not give consent to the division of the croft the bequest is null and void, and there is a risk that the croft could fall into intestacy. Where the deceased has proposed a division of the croft, there can be issues in an executor trying to identify how the croft is to be divided (if the plans are unclear or if no plans at all are annexed to a will).

There are good reasons why a croft house may be separated from the remainder of the croft in a will, we therefore support the retention of this provision. We also consider it would also be sensible for there to be a right to decroft the house (perhaps as part of the same process as dividing it).

However, we do not believe that it would usually be necessary for executors to be entitled to sub-divide a croft other than to divide the dwelling house and garden from croft land and consider that to make general provision for division other than along these lines in a will, could in fact create additional problems.

## **Executor of owner-occupied croft applying to sub-divide**

The executor of a croft tenancy is entitled (as stated above) to sub-divide a croft. The same privilege is not granted to an executor of an owner/occupied croft. An executor of an owner-occupied croft cannot apply to sub-divide or decroft. This appears to be inconsistent. Whilst the division rules should be re-examined, there should be consistency between owner-occupied crofts and tenanted crofts. If it is decided that it should only be possible to divide the croft house and garden from the remainder of the croft, this would be best achieved by way of decrofting when dealing with owner-occupied crofts.

## **Assignment**

The law related to assignment is not as complicated as the law related to succession. Nonetheless, we consider that the process of assignment of a croft tenancy has been complicated by the introduction of the registration process. Currently the 2010 Act requires the assignor to give notice and update the registration once the Commission have already granted their consent. Failure to give notice causes the assignment not to have taken effect, which is inconsistent with the 1993 Act and seems disproportionate. The interaction between croft registration and assignment should therefore be re-considered.

## Question 5 - Common Grazings

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

**B) What specific parts of the current legislation that you are aware of regarding Common Grazings could be changed to help address these matters?**

**C) What do you think would be the practical effects of making these changes to the legislation (e.g. financial, environmental, social, equality or other effects)?**

**D) Apart from changes to legislation, are there other more appropriate ways that issues relating to Common Grazings could be addressed?**

**Please provide any other comments you may have on Common Grazings.**

### General issues

Some of the activities being carried out by grazings committees involve the administration of not inconsiderable sums of money, which can come from a variety of sources. These can include for instance applying for SRDP in connection with agri-environmental schemes. Some have argued that modern grazings committees need a legal status that is fit for the modern world and recognises that grazings committees do not simply manage the common grazings, but carry out a wider range of activities in relation to the common grazings. Others argue that grazings committees should be restricted to specific management/ improvement activities.

One possibility for discussion would be to allow grazings committees to apply for limited liability status, perhaps modelled on a SCIO or CIC or company limited by guarantee, in order that there are clear lines of responsibility in terms for instance of financial accountability to shareholders, etc, and also so that the liability of individual members is limited. Any new legal personality applicable to grazings committees would have to be developed specifically for common grazings, with careful thought given to the relationship between membership of the common grazings company and having a share (as an individual crofter) in the common grazings. Alternatively, it could be considered that the existing grazings committee structure has sufficient clarity to enable committee members and shareholders to understand their respective rights and obligations.

### Specific issues:

Section 47(3) etc	Constable	It is suggested that the term “constable” is old-fashioned and has unhelpful connotations and a term such as “grazings administrator” (or similar) would more accurately reflect the role of a person appointed
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		by the Commission to manage and administer the common grazings.
Section 48(4A)	Proposals	<b>Partial repeal</b> of section 48(4A), as it refers to subsection (9) of section 50B, which was repealed by the Crofting Reform (Scotland) Act 2010. Use of a common grazings in connection with any “proposal” may well require consents or approvals other than that provided by the Commission, which is inconsistent with the terms of subsection (4A). It is suggested that subsection (4A) is amended to provide that where subsection (6) of section 50B approval is obtained, the grazings committee may use the relevant part of the common grazings “in connection with any proposal approved under section 50B(6)” (replacing the existing “for the purpose of implementing any proposal approved under section 50B(11)”).
Section 48(6A)	Borrowing	Subsection (6A) refers to subsection (11) of section 50B, which has been repealed. It is suggested that this is amended to refer to subsection (6) of section 50B, which makes provision for Commission approval.  It is suggested that where the grazings committee intend (on the proposal of a crofter) to use the common grazings for purposes other than maintenance or improvement, it should be clear that the committee can raise money for such a purpose. At present the reference to a part of the 2007 Act that has been repealed casts doubt on the extent to which a committee can rely on this subsection.
Section 49(2)(a)	Recovery of monies	The reference to section 50B(11) in section 49(2)(a) should be amended to refer to section 50B(6).
Section 49(3)(a)&(b)	Improved areas	Should there be <b>repeal</b> of section 49(3)(a)&(b)? In practice it is very difficult to administer improved and restricted areas, some of which may have been improved many decades ago. It is suggested that it is the duty of the committee to improve the grazings for the benefit of all shareholders in order to move away from the practice of “improvement parks” with restricted membership. Alternatively, does it make sense for shareholders who do not have the financial resources to take part in an improvement scheme to be able to opt-out of the scheme?
Section 49A	Duty to report	Should the duty to report be repealed? It is understood that very few grazings committees have reported. A corresponding change would need to be made to section 26A(1) of the 1993 Act.
Section 50B(2)	Other purposes	<u>EITHER</u> suggested amendment of subsection (2) to add the words “in the Commission’s determination” between the words “would” and “be” <u>OR</u> <b>repeal</b> , with section 58A(7) applying to such applications. It is not clear whether the Commission can process a section 50B application where it is unclear as to whether

		subsection (2) of section 50B applies. The second option (repeal) could be perceived to involve a dilution of the owner's rights in the common grazing
Section 50B(6)	Approval	It is suggested that the words "for its implementation" are deleted as implementation may require other consents (including statutory consents, such as from the planning authority, SNH, SEPA) and approvals, including grid connection agreements with the relevant energy utility company.
Section 51	Enlargement	Provide for the avoidance of doubt that only the crofters agreeing in terms of section 51(1)(b) shall be granted rights in the grazing land.
Section 52(4)	Apportionments	It is suggested that the words "and, where the Commission considers it appropriate, some or all of the crofters sharing in the common grazings" are added after the words "grazings committee". Land Court authority provides that the Commission must take account of the interests of other shareholders when deciding whether to approve an apportionment application. Accordingly, it would be appropriate for the Commission to be able (but not obliged) to consult with the crofters sharing in the common grazings where it considers it fit to do so. Should a reason be given for an apportionment application? Can the Commission consider a reason that is a purposeful use requiring the consent of the landlord?

## Question 6 - Crofting Commission regulatory functions and processes

**A) What do you think are the main opportunities for change relating are for the Crofting Commission's regulatory functions?**

**B) What specific parts of the current legislation that you are aware of regarding the Crofting Commission's regulatory functions that could be changed to help address these matters?**

**C) What do you think would be the practical effects of making these changes to the legislation (e.g. financial, environmental, social, equality or other effects)?**

**D) Apart from changes to legislation, are there other more appropriate ways that issues relating to the Crofting Commission's regulatory functions could be addressed?**

**Please provide any other comments you may have on Crofting Commission regulatory functions and procedures.**

No comment.

## Question 7 – Crofting registration

- A) What do you think are the main opportunities for change relating to Crofting Registration?**
- B) What specific parts of the current legislation that you are aware of regarding Crofting Registration could be changed to help address these matters?**
- C) What do you think would be the practical effects of making these changes to the legislation (e.g. financial, environmental, social, equality or other effects)?**
- D) Apart from changes to legislation, is there other more appropriate ways that issues relating to Crofting Registration could be addressed?**

**Please provide any other comments you may have on Crofting Registration.**

The rationale that a crofter who is purchasing his/her croft does not induce registration, is unclear if the aim is to get information about the extent of croft land on to a map based register. At that point the crofter will be dealing with a solicitor, who may well be involved in the preparation of 2012 Act compliant plans and therefore the requirement to register could easily be swept up in what is already a legalistic framework with little added burden.

## Question 8 - Owner-occupied crofts

- A) What do you think are main opportunities for change relating to Owner Occupier crofts?**
- B) What specific parts of the current legislation that you are aware of regarding Owner Occupier Crofts could be changed to help address these matters?**
- C) What do you think would be the practical effects of making these changes to the legislation (eg financial, environmental, social, equality or other effects)?**
- D) Apart from changes to legislation, is there other more appropriate ways that matters relating to Owner Occupier Crofts could be addressed?**

**Please provide any other comments you may have on Owner Occupier Crofts.**

There would appear to be two distinct issues here, namely:

- the role of owner-occupier crofters within the crofting system; and
- the legal definition of owner-occupier crofters in terms of section 19B of the Crofters (Scotland) Act 1993.

## **Owner-occupier crofters within the crofting system**

With regard to the first issue, there are two countervailing factors. On one view, one of the fundamental principles of the Crofting Reform (Scotland) Act 2010 was that owner-occupier crofters and croft tenants should be subject to the same, or at least very similar, duties. Both classes of crofter would be subject to a duty (i) to be ordinarily resident on or close to the croft (at least within 32 km of the croft) and (ii) to cultivate and maintain the croft. However, others would argue that owner-occupier crofters should be free from crofting regulation.

Crofters were provided with a qualified right to purchase their holdings by virtue of the Crofting Reform (Scotland) Act 1976, and an absolute right to purchase the croft house and garden ground. Since then, there has been ongoing tension between differing points of view. Some people are of the view that the freedom that comes with ownership should be accompanied by a freedom from crofting regulation. Others have argued that crofters have benefited from the discounted price at which crofts could be purchased and that part of the “bargain” of croft purchase is that such crofts remain an integral part of the crofting system, available for other members of the crofting community if the crofts are neglected or if the owner is no longer ordinarily resident on or close to the croft.

Although this is a matter more of policy than of law, it could be pointed out that one of the functions of the Crofting Commission as the crofting regulator is to control the size of crofts, whether from the risks of fragmentation on the one hand or large-scale amalgamation into larger farming units on the other. If owner-occupied crofts were to be released from the scope of crofting regulation, it would not be possible to control the amalgamation of crofts into larger farming units and enterprises. This was one of the main reasons why crofting in its “modern” form was established in the 1880s. Subsequent legislation, such as the Land Settlement (Scotland) Act 1919, authorised the Board of Agriculture to break up farms in order to create crofts, for instance for soldiers returning from the First World War. There could also be a concern that without regulation, some owner-occupied crofts could be divided into small and unsustainable units.

We consider that whatever view is taken, the position of owner-occupier crofts should be specifically dealt with in the legislation to ensure legal certainty.

### **Section 19B of the Crofters (Scotland) Act 1993**

The definition of the owner-occupier crofter excludes various categories of person who are both own and occupy croft land. These include:

- people who own part of a croft only, for instance a croft in multiple ownership or a situation where the crofter has purchased some but not all of his or her croft;

- an executor who has acquired title to the whole of the croft;
- a person who has applied for land to be constituted as a croft and owns and occupies the new croft;
- a (former) owner-occupier crofter who has let the croft for instance to a spouse/civil partner or son/daughter, where the tenancy has been terminated or renounced;
- a person who obtains title to a new croft from a constituting landlord, but does not purchase the croft from the constituting landlord (for instance, a beneficiary in a will or a transfer for nil consideration).

Conversely, the definition of an owner-occupier crofter under other pieces of crofting legislation would tend to include those categories of persons, which would be specifically excluded under s19B of the 1993 Act. When a person obtains title to the croft as nominee of a crofter, it is likely that the croft tenancy subsists unless renounced by the crofter. In a nominee transaction, the crofter has not taken title to the croft or part croft and so the principle of *confusio* will not apply. Most practitioners would seek a renunciation from the nominating crofter, but a renunciation of a part of a croft is not competent.

### **Suggested solutions to the technical problems associated with section 19B**

The issue of the person obtaining title to the croft as nominee of the crofter could be addressed by the following wording:

*“19B(3)(b) acquired title to the croft as the nominee of a crofter (or is such a nominee’s successor in title) and the crofter has renounced the tenancy of the croft; or ..”*

The issue of the various persons who do not qualify as owner-occupier crofters could be resolved by allowing persons to apply to the Crofting Commission for owner-occupier crofter status. The legal result of granting owner-occupier crofter status is that the owner-occupier crofter would be subject to the statutory duties and the croft would not be regarded as vacant and available for letting. A practical result could be that persons who obtain owner-occupier crofter status could apply for crofting grants and subsidies.

### **Question 9 - Standard securities**

**A) What do you think are the main opportunities from granting a Standard Security over a croft tenancy?**

**B) What do you think would be the practical effects of making these changes to the legislation (e.g. financial, environmental, social, equality or other effects)?**

**C) Apart from changes to legislation, is there other more appropriate ways that issues relating to Standard Securities could be addressed?**

**Please provide any other comments you may have on granting standard securities on croft tenancies.**

**Standard Securities over Crofting Tenancies**

Under current law, it is not legally possible to grant a Standard Security over a crofting tenancy.

To enable a Standard Security to be granted over a crofting tenancy then the crofting tenancy needs to be capable of being registered in the Land Register of Scotland. For this to be done then (i) the extent and boundaries of the croft tenancy needs to be clearly plotted; and (ii) the tenancy needs to be for over 20 years. The Crofting Register now provides for certainty on boundaries with clear plans and there is no reason why an extra step should be taken to allow the croft tenancies to be registered in the Land Register of Scotland and enabling then a security being granted over the tenancy. As stated, generally speaking for a lease to be registerable currently in the Land Register of Scotland it needs to be for over 20 years so this would need to be resolved, but otherwise it would appear to be legally possible.

On the public policy grounds there may be concerns about croft tenancies being subject to market forces, however if it is legally possible to grant a Standard Security over an owner/occupied croft then we do not see there being any reason why this should not also apply to a croft tenancy. In theory security may be granted over any lease which is longer than 20 years (and is potentially registerable in the Land Register of Scotland) and accordingly with a legislative change there is no reason that a croft tenancy should not also be capable of registration. It may be the case that it is envisaged that "crofting mortgages" should be provided by way of a specific regime but we consider it would be simpler for croft tenancies to be registered in the Land Register in the same way as other leases and for standard securities to be granted over them and registered accordingly.

Concerns were previously raised about the dangers of introducing market forces into crofting and encouraging a greater market for croft tenancies. Ultimately though, there currently exists a market for crofts, including croft tenancies. Croft tenancies are capable of assignation for value and there is a healthy market for such assignations. In the event of a lender selling a croft tenancy, the tenancy would be sold, and assigned, with the Crofting Commission making a decision on the proposed assignation in the same way and using the same criteria that they currently use for other assignation applications. If a crofter were to get into too much debt they would be at risk of losing the croft tenancy whether or they had granted a security over the croft.

At the same time, we would question whether in practice, the opportunities for raising finance by way of a croft tenancy will become widespread. Banks and other usual lenders may not choose to lend against a security over a croft tenancy for the same reason that these are not currently common for owner-occupied crofts.

### **Owner-Occupied Crofts**

It is already possible to grant a standard security over an owner-occupied croft. Indeed when a croft tenant purchases their owner-occupied croft normally the former landlord will impose obligations under a clawback agreement and such obligations are usually secured by way of a standard security.

However, whilst securities are regularly granted over crofts it is rare that a bank or other lender accepts an owner-occupied croft as suitable security and would normally want a croft or part of it to be decrofted. Lenders therefore already have the legal opportunity to reach the crofting market but do not do so. For this reason we are therefore not convinced that allowing securities to be granted over croft tenancies would necessarily create the market opening which the consultation paper envisages.

There may be a conflation here between the legal possibility of granting the standard security over a croft tenancy on the one hand and commercial desirability, or perceived low level of desirability of a lender holding a standard security over the croft on the other. Practitioners report that it is ultimately as a matter of policy (not law) that many banks or other lenders choose not to take security over crofts due to perceived risks for example, compliance with crofters' duties. In some ways this could be considered misguided as ultimately crofts have a value and if a lender was calling up their security there is a market for selling the croft so there is no reason to suppose that any lender would not recover the desired value (provided the correct assumptions were made in any valuation of the croft). Lenders do have justifiable concerns over the complexities surrounding crofting and for policy reasons lenders have decided that they would simply just rather not get involved in crofting.

The issue may also be due in part to a lack of familiarity with crofts and crofting on the part of lenders it is important to also bear in mind that lending decisions turn on a number of factors, including the purpose of the loan. Ultimately though, if these wider considerations are addressed, and provided the lenders are better educated on the risks then there is no reason why lenders policies should not change in respect of crofting.

It may be the case that in practice it is more likely that a lender would want the security over an ownership interest rather than a leasehold interest as it gives them a greater degree of control and we would think that as a matter of policy if lenders do not take securities over owner/occupied crofts it is quite unlikely that they will wish to take a security over a croft tenancy.

Nonetheless, the ability to grant a standard security over a croft tenancy could still prove to be a useful tool to a crofter, as there may be other opportunities for securities to be granted (for example to secure obligations to other third parties).

We would therefore support the introduction of legislation to allow securities to be granted over crofting tenancies. At the same time should also consider more innovative ways in order for new entrants to be able to fund obtaining a croft. This should include working in collaboration with lenders to create mutually beneficial solutions.

### **Question 10 – Ordering of priorities**

**Please list in order of ‘highest priority’ first to ‘lowest priority’ last;**

1) \_\_\_\_\_

2) \_\_\_\_\_

3) \_\_\_\_\_

4) \_\_\_\_\_

5) \_\_\_\_\_

6) \_\_\_\_\_

7) \_\_\_\_\_

**(The issues identified were: Absenteeism, Misuse and Neglect; Assignment and Succession; Common Grazings; Crofting Commission Regulatory Functions and Processes; Crofting Registration; Owner-occupier Crofts; Standard Securities)**

We consider that the whole of crofting law should be considered in the round. There are no priority areas, but rather the issues highlighted above should be addressed within the general scheme of clarification and consolidation of crofting law. This would allow us to achieve a more accessible and effective system in terms of the law relating to crofting in Scotland.

### **Question 11**

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

**B) Are there any potential unintended consequences of crofting legislation reform?**



**Please tell us any other thoughts you have about the proposed Crofting Legislation reform not covered in your earlier answers. If you have any comments on non-legislative, wider aspects of crofting please provide them.**

No comment.

**For further information, please contact:**

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