



Law Society
of Scotland

Crofting law reform

Executive summary paper by Law Society of
Scotland

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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

Crofting law project

Crofting law has developed over time in a piecemeal fashion. It is generally considered to be a complex and difficult area of the law, made particularly so by the combination of the law relating to property and that relating to landlord and tenant matters. It is clear that widespread reform of the law of crofting is required, both in terms of simplifying and restating the existing law and making some changes, and we consider that this merits prompt action by Scottish Government.

The objective of the project is to propose legislative change in relation to aspects of crofting law, building on work done to date in respect of crofting law, rather than seek to change policy relating to crofting, as well as to highlight the need for reform of the law in this area. It is important to recognise the considerable work already undertaken by crofters and other stakeholders in relation to the reform of the law – the Crofting Law Group’s¹ work on the “Crofting Law Sump”², the 2017 Scottish Government consultation on “the future of crofting law”³ and the subsequent work by a Bill Group to frame legislative proposals. The Bill Group has been disbanded for now and it is not clear when legislative change will be effected in this area.

Certain aspects of the law relating to crofting were identified by the project working group for consideration:

1. Aspects of succession
2. Owner occupier status
3. Statutory conditions of tenure
4. Definition of ‘crofting community’

We issued a call for views on these matters which ran from 3 February to 11 May 2020. We are grateful to those organisations who promoted the call for views to their own members. The call for views sought input on any or all of the four topics in a free-text format. 13 responses were received - six from organisations (46%), three from crofters (23%), three from solicitors and/or solicitor’s firms (23%), and one from a member of the public (8%).

We were also pleased to engage in discussion with a range of stakeholder organisations in relation to the topics identified. We are grateful to all those who responded to the call for views and/or engaged in discussion with us throughout this project. The written responses and discussions with stakeholders have aided our understanding of the relevant issues and possible solutions.

¹ Membership of the Crofting Law Group is open to anyone who has an interest in the subject of Crofting Law. More information about the Group is available on its website: <http://www.croftinglawgroup.org/>

² <https://www.crofting.org/uploads/news/CLGreport.pdf>

³ <https://consult.gov.scot/agriculture-and-rural-communities/crofting-consultation-2017/>

Proposed solutions

A detailed discussion of the issues arising in respect of the four aspects of the project work can be found in our full report. In reaching our proposed solutions, we have taken account of the results of our call for views and discussions with stakeholders as well as other sources of research and the knowledge and experiences of those involved in the working group. We recognise that the matters covered by these proposals are limited and do not extend to a full review of crofting law.

We consider widespread reform of the law of crofting is required and we consider that this merits prompt action by the Scottish Government. There would be merit in undertaking such a task as part of a single package of work so as to avoid further piecemeal development in the law and reduce the possibility of unintended consequences arising by making legislative change in respect of some matters but not others.

1. Aspects of succession

Intestate estates

- The relevant sections of the 1964 Act should be re-framed to set out the differing rules applying to agricultural tenancies and croft tenancies clearly.
- Subject to the proposal below, the existing 24-month period should remain in place to encourage the timeous transfer of crofting tenancies, subject to the flexibility of section 16(3) of the 1964 Act for a longer period where agreed, or as granted by the court. We suggest that consideration be given to bringing applications to the court under this section into the jurisdiction of the Land Court⁴.
- The 24 month period from the “relevant date” (1993 Act) differs with that from the date of death (1964 Act) - the legislation should provide for a single 24 month period from the date of death.
- There are difficulties with the duties in section 11(2) of the 1993 Act resting on the landlord, however, we consider that landlords should be encouraged to be actively engaged in the administration of their croft and to intimate matters timeously to the Commission where they are able to do so.
- There is a need for clarity in the law as to the approach which should be taken where the tenancy has not been brought to an end under section 16(3) of the 1964 Act, no transfer has been undertaken within the required period (or such longer period otherwise fixed) and where the Commission has not taken steps under section 11(4):
 - As such, an application process should be introduced whereby an executor, landlord or potential beneficiary may apply to the Commission for leave to transfer a tenancy outwith the 24 month period and in the absence of agreement or a court order.
 - An application should be on a ‘on cause shown’ basis and it be within the discretion of the Commission as to whether to grant such an application. The right of the landlord to serve a notice terminating the tenancy would be suspended pending the outcome of the application.

⁴ This could be considered in light of Scottish Government’s recent consultation on the *Future of the Land Court and the Lands Tribunal* – accessible at <http://www.gov.scot/publications/consultation-future-land-court-lands-tribunal/>

- Any consent would not have the effect of transferring the tenancy or right as this would require confirmation, but would enable the executor to transfer the tenancy competently once he or she has obtained confirmation and has carried the formalities of transfer.
- The process should be accessible and simple for applicants.
- In some circumstances, the expense of, for example, obtaining confirmation and a bond of caution simply to allow a tenancy to be transferred could be spared before it is known whether consent to the transfer will be granted (although we expect such situations would arise in limited cases only).
- The application process should sit alongside the powers of the Commission under section 11(4) and the subsequent subsections.
- The application process should be subject to a right of appeal, likely to the Land Court.

Testate estates

- The position as to whether a croft tenancy can legitimately pass under the residue clause of a will or testamentary writing needs to be clarified. This could be resolved by the insertion of a statutory definition of 'bequest' into the 1993 Act as being either a specific legacy or a legacy of residue.

Transfer process

- A clear statement should set out the means by which a transfer of a croft tenancy may be effected.
- The law should be clarified to confirm the position of a landlord where a transfer is carried out within the required 24-month period but is not notified to a landlord timeously. It appears that the landlord could not terminate the tenancy under the 1964 Act in such circumstances.
- The pro-forma docket to the 1964 Act should be updated to take account of the changes in 2010 in relation to the suggested wording for the transferee.

Deemed crofts

- The approach set out above in terms of intestate estates to permit an application to the Commission could also apply to deemed crofts consisting of stand-alone grazing rights or apportionments.
- We recognise the potential administrative burden associated with a transfer of title to a grazing share. This is a matter which requires to be considered in the context of succession law generally and may merit further consultation.
- We recommend that steps are taken to generate greater awareness among practitioners of the issues surrounding stand-alone grazing rights.

Purposeful use

- Procedures relating to croft succession should be set out in such a way as to encourage the croft being put to purposeful use and not be unnecessarily complicated.
- In light of *Malone v Pattinson*⁵, a clear statutory definition of "misuse or neglect" should be provided.

Practical matters

⁵ *Peter Malone (Applicant) v Mark Pattinson (Respondent)* SLC 39/17

- Guidance and awareness raising campaigns on the requirements and arrangements for testamentary writings and estate administration in connection with crofts would be merited so as to aid public and agent understanding. We consider that the Commission should play a key role in this work together with other stakeholders.

2. Owner occupier status

Owner occupier crofter or landlord of a vacant croft?

- An application process should be introduced to allow an individual to apply to the Commission to obtain owner-occupier crofter status. This is likely to be of particular relevance to appropriate pre-1955 Act crofts and to situations where an individual has purchased part of a croft/an owner-occupied croft has not been transferred in full.
 - It should be for the Commission to exercise discretion as to whether to grant any such application.
 - To accommodate this, we suggest that section 19B(1) be amended to provide that either “all the conditions in subsections (2) to (4) are satisfied” or the person is otherwise approved as an owner-occupier crofter by the Crofting Commission.
 - It would be appropriate for such application process to be subject to a right of appeal. We suggest that it would be appropriate for this to be to the Land Court.
- The condition relating to letting in section 19B(4) should be amended - at the end of the subsection, the following should be added: “unless it was subsequently renounced or otherwise terminated by operation of law”.
- As referred to above, section 19B appears to prevent someone who has acquired a landlord’s interest in a croft from becoming an owner-occupier crofter. If this is an unintended consequence of the legislation, we consider that this should be amended, recognising that section 19B aims to prevent those who are landlords (whether traditional crofting estate owners or those who have deliberately set up a landlord/tenant relationship) from becoming owner-occupier crofters.

Removing owner-occupier status

- We do not consider it appropriate for us to make recommendations in relation to the possible removal of owner-occupier status.

Natural/legal persons

- Legislation should be amended to clearly state the types of persons who may be owner-occupier crofters. Consideration should be given to the possibility of limiting owner-occupier crofter status to natural persons (not necessarily a single natural person).

Removal of land from crofting tenure

- We do not consider it appropriate for us to make recommendations in relation to the possible removal of land from crofting tenure. As this would be a significant policy change, we suggest that this would require full consultation and careful consideration of the approach proposed.

3. Statutory conditions of tenure

The duties should be consolidated and restated clearly in legislation. We recognise the policy aim that tenants and owner occupier crofters should be subject to the same duties and support the proposition from the Sump Report in this regard⁶.

We make the following proposals:

- The 32km residence duty should be fully considered by Scottish Government and consulted upon with crofters and other stakeholders.
- Crofters and stakeholders have identified a lack of clarity in relation to defining and identifying 'neglect' and 'purposeful use'. Purposeful use is defined in section 5C(8) of the 1993 Act. However, we consider that it would be of assistance for examples to be provided in relation to neglect and purposeful use. It is likely most appropriate that the Commission provide these. A statutory definition of "misuse or neglect" would also be useful.
- The wording in section 5C(2) should be revised to reflect that family members or hired labour can assist with working the croft – either by altering the wording to reflect that the "crofter must ensure that the croft is cultivated or put to another purposeful use..." or by inserting the previous wording of paragraph 3 of schedule 2 that the crofter must "by himself or his family, with or without hired labour...".
- The wording of the condition in paragraph 4 of schedule 2 should be amended to refer to cultivation of the croft or another purposeful use, to ensure the conditions are in line with section 5C.
- In relation to bankruptcy (paragraph 10 of schedule 2), there is a question as to whether this condition should remain, and we suggest it would be appropriate to review the existence of the condition. If the condition is to remain, the wording should be amended to reflect that a crofter may become apparently insolvent by the actions of another, for example, by way of an application by a creditor for sequestration - the wording should be amended to read: "the crofter shall not become apparently insolvent...".
- We do not make any substantive recommendations in relation to the matters in paragraph 11 of schedule 2 but suggest these conditions should be fully considered by Scottish Government in light of their policies on environmental protection, and social and economic sustainability.
- We note the importance of sufficient resources for the Commission to enable enforcement of the conditions. Formal enforcement should, however, be a last resort – crofters should be encouraged and supported to comply with their duties. Recognising that enforcement may be required in some cases, we suggest that consideration be given as to whether powers should be given to the Commission to recover costs for enforcement of crofting duties. We would suggest that the Commission be consulted on this matter, should the government wish to take it forward.

⁶ Final Report on the Crofting Law Sump, paragraph 2.3 - "Everyone who is entitled to occupy a croft will be subject to the same statutory duties and, unlike the present, these duties will be located in one prominent place in the Act. Every subtenant (of a tenant crofter) and tenant of a short lease (of an owner-occupier crofter) must obey be expected to the same statutory duties."

4. Definition of ‘crofting community’

We recognise that the desired definition and approach may differ depending on the matter to which the definition applies. For example, it may be appropriate for one approach to be taken in the context of regulatory aspects of crofting law, roles and responsibilities (as relevant in the context of the 1993 Act) and a different approach to promoting the interests of crofting. It may be challenging to reflect these differences with sufficient clarity within legislation. We recognise the importance of the definition supporting the future of crofting by seeking to maintain and preserve crofting activity in Scotland. In addition, we note that due to the diversification across those areas within the crofting counties, it is challenging to achieve one solution which is suitable for all.

In the context of crofting law, if a narrow approach is desired, it may be appropriate to define a crofting community as:

“crofting community” means a community which consists of two or more persons who (either or both)—

- (a) occupy crofts within a township which consists of two or more crofts registered with the Crofting Commission;
- (b) hold shares in a common grazing associated with a township which consists of two or more crofts registered with the Crofting Commission.

- We consider that the use of the word “persons” would allow sufficient scope for natural and legal persons to be included. We consider it would be appropriate for the legislation to clarify that for the purposes of the definition, a “person” includes a subtenant or short lease tenant.
- An alternative approach would be to use the phrase “are crofters within a township” which we consider would restrict the definition to those who are tenant crofters or owner occupier crofters under condition (a) and those holding shares in a common grazing under condition (b).

A wider approach may help to promote the interests of crofting more generally and would allow non-crofters to be included, reflecting the social aspects of crofting in Scotland. However, there is a risk with a wide approach that crofters could be outnumbered or overpowered by non-crofters which may be considered undesirable, particularly in the context of regulatory matters.

If a wider approach is desired, a crofting community could be defined as:

“crofting community” means a community which consists of two or more persons who reside in a township or other area where crofting is carried on.

As highlighted by the court in *Eunson*, there is a lack of clarity as to whether the use of phrases “such as “in the locality of the croft” (secs 5A(1), 20(1), (1AA) and (1AC), 25(1)(a), (1A), (1B) and (8), 26G(2)); “in the area affected by the development” (sec 19A(2)(c), 3(b) and (11)); “in the district in which the croft is situated” (sec 25(2)); and “in the locality of that land” (sec 58A(4) and (7))” are to be interpreted more widely than the definition of ‘crofting community’ set out in section 61(1) of the Act.

If a wider approach than that provided in the definition of ‘crofting community’ (or any similarly scoped definition to be enacted in future) is desired in respect of any or all of these matters, then these matters require to be specifically carved out of the scope of the general definition of ‘crofting community’ provided in the legislation. Alternatively, if a narrower approach to the definition of ‘crofting community’ is envisaged, this should be specified in the legislation.

The current wording in section 25(2) creates practical problems. If the desired approach is to reflect taking account of the general interest of crofting within a “district”, we suggest that this could be resolved by removing the word “community” from the subsection which would then provide that the Commission “shall have regard to the general interest of ...crofting...in the district in which the croft is situated”.

In addition, the use of the variety of terms “locality”, “area” and “district” lacks clarity and consistency. The legislation should be amended either to use the same term or for terms to be clearly defined and how any such definition relates to the primary definition of crofting community.

Other matters

While the scope of this project was limited to the matters addressed above, a number of other matters relating to crofting law arose during work on the project. These include:

- The 1993 Act contains various references to a person’s “wife or husband” which have not been updated to include civil partners, presumably through oversight (for example, sections 17 and 36). All such references throughout the Crofting Acts should be appropriately amended. Similarly, there are references to the Secretary of State.
- We suggest that consideration should be given to how the provisions of section 5(3)-(6) of the 1993 Act are being used, both by the Land Court and by crofters and landlords, to determine whether any amendment should be made to the provisions.
- Section 10(1)(b) of the 1993 Act should be reviewed to ascertain its use and whether any changes to the law would be merited.
- Consideration could be given to clarifying whether joint tenancies could be created in respect of crofts, after consideration of the relevant law and policy and consultation, including with the Commission.

For further information, please contact:

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

AlisonMcNab@lawscot.org.uk