



Law Society
of Scotland

Consultation Response

Small Landholdings Modernisation

January 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Rural Affairs sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation on *Small Landholdings Modernisation*¹. We have the following comments to put forward for consideration.

General remarks

The small landholdings regime has been somewhat 'frozen' in time with holdings created between 1911 and 1955 which have not been caught within other land tenure regimes, such as holdings within the crofting counties which became crofts under the 1955 Act. We note that there is a low number of small landholdings in Scotland (approximately 59 as highlighted in the consultation) and it may be considered unusual and inconsistent to have a separate system of legislation in place for so few holdings.

We are of the view that the small landholdings legislation can usefully be improved by a number of the proposals set out in this consultation, such as the introduction of a right to buy. We consider that there are useful simplifications that could be made to the law in this area – for example, having to go to the Scottish Land Court for approval of administrative matters is cumbersome compared to the process for crofting law via the Crofting Commission. This could usefully be reserved for a smaller number of approvals such as resumption. We note that the issue relating to resumption considered in the case of *The Trustees of Miss J M H Gibsone of Pentland's Trust v James Telfer*², which held that a small landholding cannot be resumed for purposes in the public interest, has not been addressed in the proposals set out in the consultation. We suggest this may merit consideration.

In the longer term, we suggest that it may be appropriate to consider converting all of the existing small holdings to crofts in the interests of simplicity in the law. Crofting law is considered to be a complex and difficult area of the law with stakeholders calling for a number of changes to be made, both to simplify and restate the existing law and make changes³. Given the significant need for widespread crofting law reform,

¹ <https://consult.gov.scot/agriculture-and-rural-economy/small-landholdings-modernisation/>

² Case reference SLC/86/17, accessible at <http://www.scottish-land-court.org.uk/decisions/SLC.86.17.html>

³ See our proposals here: <https://www.lawscot.org.uk/media/369709/20-10-20-croft-final-paper.pdf>

we consider that improvements could usefully be made to the small landholdings legislation as a temporary measure, with a longer-term view to integrate this regime with crofting law once it becomes fit for purpose. We set out further thoughts on this approach in the following paragraphs.

Some areas of land outwith the crofting counties have been designated as crofting areas by virtue of section 3A of the Crofters (Scotland) Act 1993, such as Arran, Moray and Nairn. If small landholdings that are in parts of Scotland already designated as crofting areas were taken out of scope of the small landholdings regime and into scope of crofting, we anticipate that there would be few areas left containing small landholdings, for example, the Scottish Borders.

It may be an option to use secondary legislation to designate the whole of Scotland as suitable for crofting to allow the conversion of small landholdings to crofts. We suggest that this would be best done as an interim measure to allow the conversation of these tenures, rather than a substantive change to the law of crofting which could cause a number of unintended consequences.

This approach may enable the law affecting these holdings to be better developed, rather than risk the law on small holdings being 'left behind' when changes to larger-scale landholding legislation (crofting and agricultural tenancies) are made. We do appreciate that there could be some odd consequences of taking this approach, for example, requiring to add holdings to a constituency for Crofting Commission elections.

Consultation response

1. Right to buy

A. Do you agree that providing small landholders with the right to buy the land under their homes and their gardens could give small landholders greater security and allow them to invest into their small landholding and business with confidence?

- **Agree**

Please give reasons for your answer

We agree that such a right to buy should be available, however, we consider that it would be helpful if the right to buy in connection with small landholdings was the same as the right-to-buy under crofting law i.e. went further than what is proposed.

A particular challenge in connection with the introduction of a right to buy is how this might be recorded to enable people to check if a right to buy exists. The approach under the Land Reform (Scotland) Act 2016 to remove the requirement for a tenant farmer to register their pre-emptive right to buy makes it difficult for full information about land to be obtained.

We note that consideration may usefully be given to the situation for those smallholdings that are outwith the crofting counties but are in designated crofting areas (see our general comments above). Such landholders could choose to convert their landholding to a croft, and therefore benefit from the right to buy provisions within the crofting law regime, but could choose not to do so and if a right to buy were introduced under the small landholdings legislation, it would be open to them to use this new regime. There is a risk that this could exacerbate existing uncertainties as to which regime landholders are operating under. Given the valuation proposals made in the consultation, there may be an incentive for small landholders in such areas to convert their holding to a croft so as to benefit from lower right to buy costs. One option to resolve this uncertainty would be to time-limit the right to convert a landholding to a croft under the relevant crofting law provisions.

B. Do you agree that giving small landholders the right to buy the land under their homes and garden could be beneficial in reducing rural depopulation for the communities with small landholdings in them?

- **Neither**

Please give reasons for your answer

While there may be some benefits in this regard, we consider that a right to buy could cause additional challenges in terms of rural depopulation. It is likely to be easier for people to use a property as a short-term let/other rental property if it is purchased and taken out of scope of the small landholdings legislation which in-turn, could impact negatively on rural depopulation with fewer affordable properties for long-term rental.

C. Do you agree that small landholders should have the opportunity to purchase their small landholding if their landlord gives notice or takes action to transfer the land containing the small landholding for sale or transfer to another company or trust?

- **Agree**

Please give reasons for your answer

Please see our comments at question A.

D. Do you agree that a clawback provision should be introduced to ensure fairness for the landlord if a small landholder who previously purchased the land under their home and garden or their small landholding and subsequently sells either of these within a specific timeframe?

- **Neither**



We consider that a clawback provision may be appropriate but whether this is justified would appear to depend on how the price is calculated. If the valuation is based on the market value (discounted in some manner to account for the tenancy), then there may not be a need for a clawback provision.

E. How do you think this clawback should be calculated and what length of time should the clawback apply to?

Please give reasons for your answer

If a clawback provision is made, we suggest such a period might be aligned with that under crofting law.

F. Do you agree that the most appropriate and fair valuation for the right to buy the land under the home and garden should be decided by a valuer appointed in agreement by both the small landholder and their landlord, or failing both of them agreeing a valuer, one would be independently appointed? The small landholder will be legally required to meet the cost of the valuation.

- **Agree**

Please give reasons for your answer

While we broadly agree with this in principle, we do note some potential challenges when compared with other regimes. We refer to our comments at question A more generally.

Under crofting law, valuation is undertaken as such time as the crofter sells on to a third party, for the purposes of assessing the clawback. We note that each croft is entitled to one house free of any clawback. As the purchase price is based on annual rent, it means that valuation at the time of purchase is not required. Requiring a valuation is likely to make the right to buy process expensive for the tenant which contrasts sharply with the position under the crofting law regime.

G. How should the valuation of the right to buy the land under the home and the garden site be calculated to provide fairness for both the small landholder and their landlord?

Please give reasons for your answer.

We have no comment.



2. Diversification

H. Do you agree that small landholders should be able to diversify their activities on their landholdings?

- **Agree**

Please give reasons for your answer

We are in agreement with the principle of permitting diversification for small landholders. We consider that replicating the existing model under crofting law may be appropriate to better help achievement of climate and biodiversity aims, by extending the activities which can be undertaken under the concept of 'cultivation' to allow some degree of flexibility and introducing diversification for more substantial changes in activities.

I. Should small landholders require their landlord's permission in advance of diversifying their activities?

- **Yes**

If yes, should that permission have a set timescale that a landlord is required to meet?

Please give reasons for your answer.

We agree that permission should be required from the landlord for diversification, subject to our comments at question H. We consider that a set timescale should be provided.

J. Do you agree that if the landlord does not consent to the small landholder's diversification the small landholder should have to go to the land court?

- **Disagree**

If you disagree what alternative do you propose?

Please give reasons for your answer.

We suggest that it would be appropriate for a small holder to go to the Scottish Land Commission in the event that the landlord does not consent. We suggest that going to the Land Court should be a last resort as in the interests of justice, we consider it crucial that there is an ability to resolve disputes via a court.

That said, we also strongly support the provision of alternative dispute resolution as an option for parties. Experience from other civil justice areas suggests that alternative dispute resolution can offer quicker and more cost-effective outcomes than court resolution, a higher degree of satisfaction in the process for the parties involved and higher likelihood of successful enforcement of any outcome reached. However, it may

not be suitable, or the most appropriate approach for all cases and therefore should be an option for parties, rather than a mandatory step.

3. Assignment and succession

K. Do you agree that the legislation setting out who can be assigned or succeed a small landholding should be updated to have similar succession and assignment rights as tenant farmers with secure 1991 Act tenancies?

- **Agree**

Please give reasons for your answer.

We consider that this is an area where the law requires to be clarified. We consider it would be most appropriate to align with the law in relation to secure 1991 Act tenancies in this regard. The arrangements for secure 1991 Act tenancies in connection with succession and assignment generally work well and as the classes of possible beneficiaries have been widened for 1991 Act tenancies, it would be sensible to make similar provision for small landholders.

L. Do you agree that a landlord should be able to object to the person the small landholder wishes to be assigned the small landholding or to succeed it? If so what should those objection grounds be?

- **Agree**

Please give reasons for your answer.

We consider that there should be grounds for landlord objection and that these grounds should be on a similar basis to secure 1991 Act tenancies.

4. Access to an umbrella body

M. Do you agree that small landholders and their landlords should have access to a public body (in a similar way that tenant farmers and their landlords have for agricultural tenancies)?

- **Agree**

Please give reasons for your answer:

We are supportive of small landholders and their landlords having access to a public body. We suggest that it would be most appropriate for the Tenant Farming Commissioner's remit with the Scottish Land Commission to be extended to enable the TFC to lead the work in this area – perhaps newly named as the Tenant Commissioner or similar. We consider that this would best suit the Tenant Farming Commissioner's distinct role in the Land Commission rather than the function sitting with the Commission more generally.

N. If a small landholder and their landlord have a disagreement should the body be able to mediate?

- Agree

Please give reasons for your answer:

As referred to above, we strongly support the provision of alternative dispute resolution, including mediation, as an option for parties, and consider that the body could play a useful role in providing this service.

5. Additional considerations

O. Is there anything else you think should be changed in the current small landholding legislation to modernise small landholdings, so they can play their part helping to tackle the climate and biodiversity crises and for Scotland to reach Net Zero by 2045?

If yes, please use this text box to provide reasoning for your answer.

We have no further suggestions to changes in the law in this regard, beyond noting that greater freedom around diversification may be of assistance to small landholders in seeking to achieve climate and biodiversity goals. By their nature, such landholdings are small, and often have limited resources to enable development.

Assessing the Impact

P. Are you aware of any potential costs and burdens that you think may arise as a result of the proposals within this consultation paper?

- No



Q. Are you aware of any examples of potential impacts, either positive or negative, that you consider that any of the proposals in this consultation paper may have on the environment?

- No

R. Are you aware of any examples of particular current or future impacts, positive or negative, on young people, of any aspect of the proposals in this consultation paper?

- No

S. Could any improvements be made from a young person's perspective?

- Don't know

T. Are you aware of any impacts, positive or negative, of the proposals in this consultation paper on data protection or privacy?

- No

U. Are you aware of any examples of how the proposals in this consultation paper may impact, either positively or negatively, on those with protected characteristics (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation)?

- No

V. Are you aware of any examples of how the proposals in this consultation paper might have particular positive or negative impacts on groups or areas experiencing socioeconomic disadvantage?

- No

W. Please note these could be households with low incomes or few resources; families struggling to make ends meet; people who experienced poverty while growing up; or areas with few resources or opportunities compared with others.

- No

X. Are you aware of any examples of how the proposals in this consultation paper might impact, positively or negatively, on island communities in a way that is different from the impact on mainland areas?

- No



For further information, please contact:

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

policy@lawscot.org.uk