

Crofting Consultation 2017

A consultation on the future of crofting law

August 2017



Scottish Government
Riaghaltas na h-Alba
gov.scot

Ministerial Foreword



Crofting occupies a unique place in the cultural heritage of Scotland. It is woven into our history and tells a story of who we are and where we have come from. We are aware of its past, but what will be its future? The Scottish Government understands that crofters and solicitors have long argued that crofting legislation is overly complicated and outdated, and what we now need is a transparent framework that is, understandable and workable in practice. Legislation that complements the future of crofting.

Crofting makes a vital contribution to the economy, environment and sustainability of communities in Scotland's remote rural areas. To put crofting into

context, there are over 20,000 crofts with around 33,000 people living in crofting households. In addition, there are over 1,000 common grazings covering over 550,000 ha across Scotland. In 2016 alone, the sector generated an estimated revenue of £85.8 million.

Much has changed since crofting law first came into force. Legislation has been updated, of course, but it is still based on the principles underpinning the Crofters' Holdings (Scotland) Act 1886, which was introduced following the report of the Napier Commission to Parliament in 1884. The Scottish Government is committed to examining the modernisation of crofting law within this Parliamentary session.

In recent months, my officials have held a number of engagement events across the Highlands and Islands in order to hear the views of those with a crofting interest. I am extremely grateful to those who have taken part in these events, as the contributions that participants have made helped form the basis for this consultation. I am also grateful to the REC Committee for its early engagement work and to others such as the Crofting Law Group. I am equally thankful to have had access to such documents as the Crofting Law Sump, and the Shucksmith Report.

I want crofting to have a positive future, one that secures its place at the heart of rural communities and the rural economy. The Act of 1886 secured rights for crofters and legislation has since preserved those rights and developed responsibilities associated with them. Rights and responsibilities remain important today, but as we look forward, we must see how crofting best contributes to the rural economy and how it can help in re-peopling Scotland's rural areas.

There are undoubtedly challenges ahead, such as those that are likely to come from leaving the European Union. We need to ensure that we meet those challenges. Having an environment that encourages optimism and allows those associated with crofting the opportunity to develop businesses and manage the landscape for the benefit of all is key.

Accordingly, I believe it is sensible to approach crofting reform from an open perspective as the legislation can take many different forms. That means we may be looking at a range of options, from a tidy-up or a consolidation exercise through to a clean sheet approach. I have also noted there have been recommendations on non-legislative aspects of crofting policy that I think should also be recognised. I welcome this, as legislation is not always the best way to make improvements.

I encourage everyone to participate in this consultation. Decision making is central to government and one that is best achieved through listening to viewpoints and in the sharing of ideas. I look forward to seeing the responses to this consultation.

A handwritten signature in black ink that reads "Fergus Ewing". The signature is written in a cursive style with a large loop under the 'F' and another under the 'E'.

FERGUS EWING MSP
Cabinet Secretary for the Rural Economy and Connectivity

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About

Responding to the consultation

We are inviting responses to this consultation by 20 November 2017. Please respond to this consultation online at: <http://consult.scotland.gov.uk/agriculture-and-rural-communities/crofting-consultation-2017>

You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date.

If you are unable to respond online, please complete the Respondent Information Form (see 'Handling your Response' below) and send it with your written response to:

The Scottish Government
Crofting Bill Team
D Spur
Saughton House
Broomhouse Drive
Edinburgh
EH11 3XG

Handling your response

If you respond using Citizen Space, you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form attached to the end of this document as this will ensure that we treat your response appropriately. If you ask for your response not to be published, we will regard it as confidential and will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the said Act for information relating to responses made to this consultation exercise.

Next steps in the process

After the consultation has closed, we will analyse the responses received and these will inform the decision making process for how the crofting Bill will operate. Where respondents have given permission for their response to be made public, we will publish these responses and, thereafter, publish a report of the analysis of the consultation responses.

If you have any questions please contact: croftingconsultation@gov.scot

Aim of this consultation

This consultation is split into three sections.

The sections will ask the respondent a number of questions on matters relating to the type of legislation that may be brought forward and priorities for crofting legislation. The questions are designed to give the Scottish Government an indication of the change that is wanted.

Section 1 explains the background of crofting, why this consultation exists and the current Scottish Government policy position on crofting as a whole. The aim is to find out what respondents think of current Scottish Government crofting policy.

Section 2 sets out the different types of legislation that the Scottish Government can take forward for crofting within this Parliamentary session. By showing what options are available, the aim is for respondents to consider what is needed from legislation in order to make the changes they wish to see for the future of crofting.

Section 3 presents a number of issues for crofting that might be addressed as part of legislative reform. These have been identified from several sources, including the Rural Economy and Connectivity Committee's 2017 report '*Review of Priorities for Crofting Law Reform*'¹, the *Crofting Law Sump*², 'The Final Report of the Committee of Enquiry into Crofting' (the Shucksmith Report)³ and the early engagement work carried out by the Scottish Government across the crofting areas.

The aim is for respondents to focus on what changes to crofting legislation are required to make crofting fit for the 21st century. Some changes that may be identified might be better pursued through non-legislative means (for example, the altering of crofting policy). Others may require to be looked at in terms of wider agricultural policy and regulations, or even wider Scottish Government policy areas.

In recognition of the complex nature of crofting legislation and the way that matters are entwined, it is not considered practical to set out in this consultation all of the topics of discussion that have been raised. Instead, we have set out the general context for the issue concerned and given some broad examples of the issues reported. The questions in section 3 seek views and opinions as to the priorities for crofting legislation.

However, given the importance of wider crofting issues, these have been set out in summary form in **Annex A**. This provides information on the wider policy context for crofting and discusses the non-legislative work that is being undertaken in partnership with the Crofting Stakeholder Forum. Many of the matters that are discussed in this annex have been raised in relation to crofting law, but in fact may not require changes to crofting law in order to be dealt with. So, whilst important, these issues need to be looked at separately from change to crofting legislation.

Section 1 – Introduction

Crofting has a unique role in the communities of the Highlands and Islands. The Scottish Government recognises the need for crofting to continue delivering valuable, local benefits to rural communities, sustaining agricultural activity, supporting the rural economy, enhancing wildlife and the natural environment, and retaining young people in our remote, rural and island communities.

The Programme for Government⁴ 2016-17 sets out a commitment for a Crofting Bill planned for later in this Parliamentary session (the current session runs from May 2016 to May 2021). The work on the planned Bill will also take into account other work on-going in wider crofting policy, including the National Development Plan for crofting (for which a public consultation is planned for in the near future) as part of a sustainable rural economy.

Responses to this consultation will primarily inform the Bill work, but may also input into the National Development Plan should anything be identified that does not require new legislation to implement. This consultation seeks views on the type of legislation that may be developed and particular priorities it should address.

What is crofting?

A croft is a small agricultural land unit, situated in the crofting counties (the former counties of Argyll, Caithness, Inverness, Orkney and Shetland, Ross & Cromarty, Sutherland), and are subject to provisions stipulated in the various Crofting Acts.

A crofter is the person who occupies and works on a croft. They are normally a tenant of the croft, paying rent to a landlord. Since the Crofting Reform (Scotland) Act 1976⁵, however, numerous people have purchased their crofts, and have become what is termed “owner-occupier crofters”. (Definitions sourced from Scottish Crofting Federation.)⁶

There are currently around 20,500 crofts across the crofting counties (15,000 tenanted crofts and 5,500 owned). Crofters make up around 10% of the Highlands and Islands population, with over 33,000 people live in crofting households. Crofts are regulated by the Crofting Commission⁷. This has a Board of 9 Commissioners, 6 elected by crofters and 3 appointed by Scottish Ministers.

The average size of a croft is around 5 hectares (ha), but some are only 0.5 ha while a few extend to more than 50 ha of land. Crofts also often have a share in hill grazing, which is held in common with other crofters in a township. As most crofts cannot support a family or provide full-time employment, crofters usually have other occupations as their primary source of income. For example, many have diversified into small-scale tourism and others often have roles within the local community (both in the public and private sectors).

Crofting therefore provides a platform from which families can support themselves, with crofts and croft houses providing a base from which to operate, and income from crofting providing a helpful contribution to family income. This, in turn, helps sustain rural and remote communities.

Why is there a need for new crofting legislation?

Crofters in Scotland were first given legal recognition in law with the creation of the Crofters Holdings (Scotland) Act 1886⁸. Before this, it was legal to evict any crofter at the landlord's convenience; an event that was widespread during the period known as the Highland Clearances. This Act granted various rights to crofters, including security of tenure, fair rent, the assignation of crofts to descendants, the right to be paid for land improvements and the establishment of the very first Crofters Commission.

There have been many Crofting Acts enacted since then, each making additions or changes to the fundamental principles set out in 1886. The last consolidation of crofting law occurred in 1993 (Crofters (Scotland) Act 1993)⁹, although there have been several other Acts passed since then. The latest two (the Crofting Reform etc. Act 2007¹⁰, and the Crofting Reform (Scotland) Act 2010)¹¹ again made several substantial changes to the law, and was followed by an amendment¹² in 2013. In early 2017, aligned to the Programme for Government 2016-17 commitment, the Scottish Government's Crofting Bill Team met with a wide variety of people across the Highlands and Islands with an interest in crofting (crofters, landlords, unions, businesses, young crofters, etc.). Everyone that participated was asked to consider the following three questions.

- What are we trying to achieve through crofting?
- Why do we need crofting legislation, and changes made to that legislation?
- How might we go about delivering the changes that are identified? (There may be, for example, alternative avenues to resolving issues to legislation.).

It was clear from those discussions that there was general consensus as to what crofting is about, and what it sets out to achieve, but there is limited consensus as to what new legislation should look like or deliver. There was, however, almost universal agreement that the current law is no longer fit for purpose, either in terms of complexity or what it allows crofting to be.

It has also been said that crofting legislation is too complex. Sometimes the complexity arises from unclear or inconsistent drafting in past Acts, and this could demonstrate a case for reform. In other instances, however, the complexity arises because crofting law aims to balance the historic land rights of different parties. In such matters, simplifying the framework may prove more challenging to achieve.

Crofting Policy

The early engagement by the Bill Team with stakeholders identified the following broad, interrelated aims for crofting:

- to encourage stable and flourishing communities;
- to assist in delivering thriving and resilient local, rural economies;
- to assist in delivering maintained and balanced land usage and management, including sustainable small-scale agriculture; and,
- to encourage fair and equitable relationships between all crofting stakeholders.

These aims are set against recognition that having a croft provides the crofter with certain rights (such as security of tenure, fair rents and right to buy) and also requires crofters to meet certain responsibilities.

Current Scottish Government crofting policy may be stated as:

“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.” (**Annex A** provides some wider context on crofting policy.)

“The Scottish Government is committed to reforming crofting to secure its future, bring new blood into crofting communities, and ensure it can continue to contribute to the development of a thriving rural Scotland.

This policy is reflected in the current legislative framework which places a number of duties on crofters, including the duty to reside within 32 km of the croft; cultivate the croft, or put the croft to another purposeful use; and not misuse or neglect the croft. These duties serve to maintain the integrity of rural communities in the Highlands and Islands.” (<http://www.gov.scot/Topics/farmingrural/Rural/crofting-policy>)

The Scottish Government’s general policy on crofting is still considered to be relevant and is generally consistent with the aims of stakeholders, although some stakeholder’s views on the aims and purpose of crofting differ. The remainder of this consultation document has been drafted on the basis of this policy statement and seeks views on the legislation in that context.

Question 1

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

Yes/No

Please explain your answer.

Section 2 - Options for legislative change

Legislative change can be made in a number of different forms. In terms of reforming crofting legislation, the pre-consultation discussions suggested a number of approaches may be appropriate. Each option brings its own advantages and disadvantages and these need to be clearly understood before deciding on the preferred approach to crofting law reform. This is not just about the resources of government or a question of form: it takes time and effort for everyone involved to build consensus and take legislation through Parliament.

Much work has been done to identify contradictions and problems with crofting law, most notably through the production of the Crofting Law Sump Report by the Crofting Law Group. The Shucksmith Report also contained recommendations that had implications for crofting law. These points have been taken into account when considering the options below.

The options range from bringing all crofting legislation since 1993 into one place without changing its effect - “consolidation” - to a completely clean sheet approach.

This chapter of the consultation seeks views on the approaches to the reform of crofting legislation. The following options have been identified as potential approaches to take. Respondents may also think of other options, including a non-legislative approach to change, and Question 2 allows respondents to offer suggestions.

Some stakeholders have suggested that one of the main challenges with crofting legislation is that it is difficult for crofters to understand, and if this could be addressed, there may be a lesser need for legislative change. One suggestion to address this would be the provision of comprehensive guidance on issues crofters face at specific points in the lifetime of a crofter (such as when being assigned a croft, becoming an owner occupier or registering a croft).

The Scottish Government and Crofting Commission are currently engaged in discussion about reviewing and updating the guidance that is already produced by the Commission, how it may be made more comprehensive and how this may be made more readily accessible. This guidance could be updated as necessary to reflect changes in crofting law, including any transitional arrangements that may be required if the existing legislation is amended.

Option 1 – Consolidation Bill

A consolidation Bill brings together several pieces of legislation on an area of law into one Act. It is a way of tidying up the legislation on that topic and making it easier for people to access the legislation. Doing so helps the understanding of the law on that topic by making it possible to find it all in one place, without the need to consider amendments to the legislation or understand how different pieces of legislation interact.

The parliamentary process for consolidation Bills does not permit substantive changes or additions to the law.

Section 52 of the Crofting Reform (Scotland) Act 2010 provides a legislative mechanism (an Order) to permit some modification of legislation to facilitate the consolidation of crofting law. This is designed to allow for the amendment of existing crofting legislation to deal with any inconsistencies or defects that must be resolved in order for consolidation to be able to proceed. This Order can be made only once a Bill consolidating crofting legislation has been introduced in the Parliament and there are limits on the kinds of changes that the power can make.

Pros:

- Would bring in all crofting law into one Act, making it more accessible.
- There may be some limited potential to fix some inconsistencies or defects within current legislation.
- This option, when accompanied by updated guidance for crofters and landlords, may result in a better understanding of crofting law and how it applies.

Cons:

- Experience suggests that consolidation Bills do not always deliver what is wanted, as the limited scope to make changes to the existing legislation means that there are often issues which everyone would like to be resolved but which are simply repeated.
- Issues such as those identified by the Crofting Law Sump would remain largely unresolved.
- Does not allow for the possibility of legislation being made more flexible.

Option 2 – Bill amending existing legislation / Pre-Consolidation Bill

This option would require a two Bill approach to be fully implemented. A pre-consolidation or amending crofting Bill would be developed containing amendments to existing crofting law, but would not bring all crofting law together into one piece of legislation. Such a crofting Bill could make amendments to a wide variety of issues relating to crofting law. For example, it might deal with some of the issues identified in the Shucksmith report or Crofting Law Sump.

This Bill could be a forerunner to a second piece of legislation, a consolidation Bill (as in Option 1). Having made several of the desired changes to existing legislation in the pre-consolidation Bill, a second Bill could then be brought forward to consolidate all relevant crofting legislation, meaning all crofting legislation would be in one place. However, it would not be possible to pass both the pre-consolidation Bill and the consolidation Bill within the current parliamentary session (ending in 2021). This would mean consolidation would have to happen at a later date, which would be a decision for a future Scottish Government administration.

That said, taking forward legislation of this nature now, even without consolidation, offers the potential to address more issues than would be possible under a consolidation Bill (option 1).

Pros:

- Legislation can target stakeholders' priority issues, provided there is consensus on what these are and how they should be resolved.
- Potential to simplify some aspects of crofting law, depending on the amendments made.
- Potential to address some of the issues/concerns raised by stakeholders.

Cons:

- Unlikely to address all issues presented by stakeholders and, if so, the desire for further legislative change may remain.
- Unlikely to fully address the call for simplification of crofting law.
- Many layers to revised crofting law would still exist until legislation was consolidated (in the next Parliamentary period, at the earliest).

Option 3 – Bill amending existing legislation and restating crofting law

Under this option, a Crofting Bill would be brought forward that would include some substantive changes to crofting law and restate some or all of the existing law. This would result in fewer pieces of crofting legislation, possibly just one. This approach would attempt to reduce the number of pieces of crofting legislation at the same time as making amendments to them. This approach may reduce the opportunity to include as much change to the content of legislation as may be possible in option 2. It would therefore be important to have a reasonable degree of consensus over the priorities for reform before the crofting Bill could be prepared.

Pros:

- This approach allows the potential for a balance to be struck around making some of the main reforms and bringing together all crofting law in one place within this Parliamentary session.
- It gives greater opportunity to address issues around the drafting and complexity of the existing law, as the strict rules about consolidation do not apply.
- It could, in theory, address many of the issues raised relating to the current legislation, but it would require some consensus amongst stakeholders as to what the key issues are and how best to resolve them.

Cons:

- Developing this form of Bill may take a considerable length of time depending on the issues to be addressed and whether there is consensus on the ways in which these should be resolved.
- There would likely be areas of existing legislation that are not changed, and so the desire for further legislative change may remain (for example, it may still not address fully the call for simplification of crofting law).
- New legislation may still not offer the flexibility desired by some.

Option 4 – Bill setting out ‘new’ crofting law

Some stakeholders have argued for a “clean-sheet” approach, introducing completely new legislation. Unlike restatement, where much of the existing law would be preserved in some form, this option would allow for an entirely new approach to crofting legislation to be developed. A “clean sheet Bill” would set out crofting law as it is to apply in the future and repeal any law that is no longer needed. Under this option, the recommendations in, for example, the Crofting Law Sump, may be superseded (although these could still inform the development of the new legislation).

This option offers a range of opportunities around the form and detail of crofting law. At the extremes, it could result in either very detailed legislation or high-level principle based legislation (with the rest covered by a mix of guidance and regulations). Of course, there are a range of positions in between as well.

Preparing a new detailed piece of legislation has the potential to provide a comprehensive and definitive statement of crofting law. It would give an opportunity to find innovative solutions to existing problems and modernise the legal framework in a way that suits modern crofting. This would require consensus on the new approach to be built over a period of time and then agreement over what is required to be put in law to be reached.

This approach also offers the greatest potential for crofting legislation to be written in a way to best deal with future challenges that crofting may face. However, this is likely to take a considerable length of time to undertake.

Pros:

- Has the potential to develop entirely new crofting legislation to meet the challenges for the future.
- Offers potential to introduce a simpler and flexible approach to crofting law, if a new approach can be identified.
- May mean no further reform of crofting law is required for some time.

Cons:

- Consensus over the new content of legislation may be difficult to reach.
- Reaching the consensus required and developing the Bill itself may take a considerable length of time.
- The greater the extent of change, the longer it may take for crofters and the crofting community to adapt to and develop an understanding of the new law.

Other approaches

Legislative approaches to reforming crofting legislation may not be limited to the options outlined in this consultation. Respondents may also believe that there is no requirement to change current crofting legislation, and that crofting can be improved via other means (e.g. improved guidance, a National Development Plan for crofting, introducing new support schemes and so on).

Should there be alternative suggestions to these approaches, including making no changes to the legislation, these may be described when answering Question 2.

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.

Section 3 – Specific legislative priorities

Having considered the legislative options in the previous section, this chapter examines issues that are specifically related to crofting legislation and how it might be improved to help crofting thrive.

It is important to recognise that the ideas presented in this chapter relate to either what is in current legislation (and can be reviewed) or what can be dealt with through a new Bill. It does not include issues that, while possibly of equal or greater importance to those in crofting communities, are non-legislative in nature.

Following the early engagement meetings between the Scottish Government's Crofting Bill Team and those that hold an interest in crofting, it became clear that there are many views across crofting areas as to what the priorities should be for crofting legislation in the 21st century. The intention of this chapter, therefore, is to highlight the main issues raised and to ask respondents to indicate where the priorities should be for future crofting law.

These priorities need to be considered in the context of any challenges are likely to arise in terms of the Scottish Government's wider aims for crofting (such as encouraging economic development or encouraging population growth in crofting areas). Other considerations, such as the UK leaving the European Union, might also need to be taken into account. Change for the wider agricultural sector, as well as crofting, will occur and there may be significant implications for future agricultural and crofting policy. Such developments would have an impact on the route that legislative change may take and in the priorities for crofting legislation.

The priorities set out have been chosen as the most commonly-raised issues in various forums and numerous documentation. This includes the REC Committee's report '*Review of Priorities for Crofting Law Reform*', the *Crofting Law Group 2014 Sump Report*, the Shucksmith report of 2008, and the early stakeholder engagement sessions held by the Crofting Bill Team.

Please note that the following are listed in alphabetical order, and not in any order of perceived importance or priority. Furthermore, the examples listed in each section are a selection of some of the responses the Bill Team received during its early engagement work. They are not meant to represent a complete list of all matters raised for each issue, nor what only could (or would) be looked at as part of any Bill. As there may be terms or areas of crofting not all respondents may be regularly involved with, a glossary giving definition of the most common terms is included in this consultation for reference purposes.

i. Absenteeism, Misuse and Neglect

Context

Current crofting legislation contains duties that crofters need to comply with in relation to residency, use, misuse and neglect of crofts. Crofters must:

- be ordinarily resident on, or live within 32 kilometres of, the croft;
- not misuse or neglect the croft; and,
- cultivate the croft, or put it to another purposeful use.

The aim of these requirements is to assist in retaining population in crofting areas as well as ensuring that croft land is actively managed. To support this, current legislation requires crofters to report on their crofts annually through the Crofting Census, and imposes duties on the Commission to take action wherever there are breaches of duty.

To date, the desired increase in enforcement of duties by the Commission has not yet occurred, although the Act continues to require it and the Commission continues to highlight this as a priority in their published plans.

The Crofting Commission's Annual Report and Accounts¹³ 2015-16 reported, for example, that of the 12,900 Crofting Census forms submitted, 91.5% stated that they were resident on their croft and 94.6% stated that they cultivated and maintained their croft or put it to purposeful use. The report also stated that in that year the Commission received five reports of potential breach of duties and, as a result, it issued two breach of duty notices.

Examples

Please note that the examples given below are illustrative only. They are not meant to represent a complete list of all matters raised for each issue.

A number of views regarding absenteeism and neglect have been raised with Scottish Government officials. One view expressed was that absenteeism has led to neglect of croft land, reducing the viability of crofting in areas affected. Some suggested that absenteeism should only be seen as a problem where it leads to neglect, while others argued that absenteeism, even when land is managed through informal or more formal tenancy arrangements, prevents crofts being made available for new entrants.

Some stakeholders argued that the benefits from crofting come from active management of the land. In this case, the response may be to encourage activity through the most appropriate means and not to tightly enforce regulations on absenteeism and neglect.

Others argued the benefits come from having active, locally resident crofters. In this case the response may be to remove a croft from the absentee crofter or crofter who is responsible for the neglect. This would allow a new entrant or local resident to take over and contribute more effectively to the sustainability of the crofting community.

There may be a mixed approach to dealing with absenteeism or neglect depending on local circumstances, and that may require different approaches to legislative change, regulation or both. It may be that reduced or less vigorous application of legislation would be more appropriate in some areas compared to tighter and/or more rigorously applied legislation in others.

Question 3

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 (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 Absenteeism, Misuse and Neglect could be addressed?

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

ii. Assignment and Succession

Context

Legislation on assignment and succession provides essential protection to crofters, allowing crofts to be transferred or inherited.

Assignment legislation governs the process by which a crofter transfers the tenancy of a croft either to another crofter or new crofter of their choice.

Succession legislation covers two circumstances relating to a deceased person:

- testate succession, whereby a crofter makes a will that names the person(s) they wish to leave the tenancy and/or common grazing shares to; or,
- intestate succession, describing the succession to a deceased person's estate in the absence of a will or a will that cannot be given effect to.

Examples

Please note that the examples given below are illustrative only. They are not meant to represent a complete list of all matters raised for each issue.

While early engagement sessions organised by the Scottish Government raised relatively few issues relating to assignation or succession, the Crofting Law Sump Report raised a number of more technical issues. The need for good succession planning was highlighted, as was the critical importance of making a will so as to avoid the often complex administrative process associated with intestate succession.

An issue was raised in that when a crofter dies intestate, the executor is to give notice of transfer of the tenancy within 24 months of the crofter's death (or relevant date). Some crofters thought this period was unduly short and saw no reason why it should not be extended. The effect of not transferring the tenancy within 24 months is that the landlord can take steps to terminate the tenancy.

In addition, others felt that there was an inconsistency between intestate succession rules and those for assigning a new croft to a new entrant crofter. Intestate regulations allow the executor or landlord to transfer a tenancy to an individual of their choosing without the need for the new crofter to demonstrate that they are able or intend to comply with all the statutory rules required to become a crofter. This is a less onerous requirement than during an assignation, where one of the factors to be considered is whether the proposed new tenant will be able to demonstrate this.

Question 4

A) What do you think are the main opportunities for change relating to Assignation and Succession?

B) What specific parts of the current legislation that you are aware of regarding Assignation and Succession could be changed to help address these issues?

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 Assignation and Succession could be addressed?

Please provide any other comments you may have on Assignation and Succession.

iii. Common Grazings

Context

There are around 1,000 Common Grazings in crofting areas. These are traditionally areas of land that crofters have shares in that allow them to graze livestock on. The grazings are owned by a landlord but the landlord has limited rights over this land as it is securely linked to crofts (and cannot be readily removed from crofting).

Common Grazings are usually managed by Grazings Committees, approximately half of which currently have committees in office. Grazings Committees make regulations to control their use and assist in their management. The 1993 Act contains provisions on the appointment and operation of Grazing Committees. Around half of all Common Grazings have a Grazing Committee.

Crofters who hold interests in Common Grazings are shareholders in those Grazings, giving them certain rights and responsibilities set out in legislation over their use.

Examples

Please note that the examples given below are illustrative only. They are not meant to represent a complete list of all matters raised for each issue.

Issues raised over common grazings are varied and are too numerous to describe in this consultation alone. Some of the issues raised relate to concerns about:

- lack of clarity in the legal form which a Grazings Committee has (one suggestion is that the Bill should allow a choice of legal form, ranging from a traditional Committee with limited powers to a more formally structured organisation with a wider range of powers and responsibilities);
- uncertainty around what non-agricultural activities may be undertaken on Common Grazings (and who may benefit from them);
- promotion of participation in Committees and/or the use of the Common Grazings themselves (including the improvement of their economic viability);
- the management and/or use of Committee funds for purposes other than the development or maintenance of the land for grazing purposes;
- the involvement of the wider local community, and the ability for someone other than the Committees to manage common grazings;
- who possesses the responsibility for reallocating unused grazing shares;
- roles and responsibilities of active versus inactive shareholders, and the relationship between the two;
- contentions around the Grazings Committee duty to report;
- issues around the separation of Grazings Shares from the croft and the creation of deemed crofts; and,
- the appointment, role and removal of Grazings Constables.

Common Grazings are a significant asset to crofting, crofters and crofting communities. There is a strong desire within these groups to ensure that grazings are managed in a way that delivers economic, environmental and other community benefits.

Question 5

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.

iv. Crofting Commission Regulatory Functions and Processes

Context

The Crofting Commission is a Non-Departmental Public Body (NDPB) responsible for regulating crofting. Its constitution, powers and duties are fully set out in the Crofters (Scotland) Act 1993, as amended by the Crofting Reform (Scotland) Act 2007, the Crofting Reform (Scotland) Act 2010 and the Crofting (Amendment) (Scotland) Act 2013. Further detail on these Acts, and resultant framework, are available from the [Crofting Commission](#).

The Crofting Commission's general functions are to regulate and reorganise crofting, and to promote the interest of crofting whilst keeping crofting matters under review.

The Commission's Board is currently made up of 6 Crofting Commissioners elected from geographical crofting areas and 3 Commissioners appointed by Scottish Ministers. They are chaired by a Convenor, who is selected by Scottish Ministers (though the decision can be made to delegate this to the Commissioners). The Commission is supported by approximately 60 staff, led by a Chief Executive, and is based in Inverness.

As the Commission operates within the framework of crofting legislation, there is potential for a future Bill to amend the legislation relating to the operation of the Commission and its Board, as well as the requirements placed on it. It should be recognised, however, that many of the operational procedures of the Commission are not set out in legislation.

The Crofting Commission has been working on positive ways to improve its operations and has introduced a number of actions that should, in time, bring about necessary improvements. Examples here include the introduction and expansion of delegated decision making from the Board to Crofting Commission staff, and its recent stakeholder engagement on improving how Common Grazing regulations operate. In particular, the Commission has now streamlined its approach to non-contested and non-controversial applications, so that these can be decided upon as quickly as possible.

Examples

Please note that the examples given below are illustrative only. They are not meant to represent a complete list of all matters raised for each issue.

Crofters and crofting communities have raised a number of matters relating to the Crofting Commission, such as:

- the length of time taken to conclude certain regulatory processes. Some of the delays experienced by crofters and croft landlords may rest with the Crofting Commission and, on the other hand, some of the regulatory application delays may result from legislative requirements, constraints and timescales;
- crofting Commission processes to be simplified where possible, and for accessible guidance about them;
- how Crofting Commission's regulatory decisions can balance the need for consistency with sensitivity to local circumstances and diversity of crofting communities in different areas; and,
- whether the number of elected and appointed Commissioners should increase or decrease.

Question 6

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.

v. Crofting Registration

Context

The 2010 Act introduced the requirement for the Keeper of the Registers of Scotland to establish and maintain a public Crofting Register¹⁴ of crofts, common grazings and land held runrig. The register shows the extent of the land and property relating to a croft on an Ordnance Survey map.

The Register of Crofts enables the ready identification of property rights and boundaries to provide certainty over the areas of land associated with a croft. This will ease the administration of land transactions in the future and may assist in reducing disputes over boundaries. Well documented croft boundaries would also be necessary to enable the issuing of standard securities on tenanted croft land (discussed in sub-section vii below) and housing sites.

The Crofting Registration process has involved a high number of cases in the Land Court, especially when documents from the past contain different evidence about where boundaries lie. Ideally, all such uncertainties should be resolved by the registration process, but there are practical limitations on how far this can be achieved.

Since November 2012, the Crofting Register has been open for voluntary registrations. Since November 2013, registration also became compulsory on the occurrence of certain events such as assigning crofts, subletting or decrofting land. So far 4,000 out of approximately 16,000 crofts have been registered.

As part of this process the applicant must, on receipt of the certificate of registration, give public notice of the registration by placing an advertisement, for two consecutive weeks, in a local newspaper and affixing a notice to the croft.

Within 9 months of notification, entries to the register may be challenged by applying to the Scottish Land Court.¹⁵

Examples

Please note that the examples given below are illustrative only. They are not meant to represent a complete list of all matters raised for each issue.

During the early engagement work undertaken by the Scottish Government, a number of concerns were raised by crofters who found the registration process onerous and costly. A number of stakeholders have questioned the need to go to the time, trouble and expense of advertising in a local newspaper and have suggested that other, more cost effective, means should be used instead (e.g. posting on the Crofting Commission website).

In addition, there is evidence relating to boundary disputes that arise during the croft registration process that are often frustrating and potentially costly for the parties involved to resolve.

Question 7

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.

vi. Owner-occupied crofts

Context

Traditionally, crofters were the tenant of the croft, paying rent to the landlord (who owned the land). Since the coming into force of the Crofting Reform (Scotland) Act 1976, crofters have been able to purchase their crofts for 15 times the annual rent, becoming the landowner whilst also being able to croft the land. The term 'owner-occupier crofter' was first defined in the Crofting Reform (Scotland) Act 2010.

There are other issues about owner occupier crofters and their place within the crofting system. The current intention is that both croft tenants and owner occupiers should have an equivalent balance of rights and responsibilities within the crofting system, in relation to the rights of crofting communities and future entrants to crofting. The current legislation largely reflects this principle of equivalence, but changes could be made to either strengthen it or depart from it.

Stakeholders have expressed concern about a technical loophole in the current law has been identified whereby some owner occupiers do not have the status of 'owner occupier crofters'. The Bill could provide an opportunity to rectify this, if considered appropriate.

Examples

Please note that the examples given below are illustrative only. They are not meant to represent a complete list of all matters raised for each issue.

It has been suggested that the issues regarding owner-occupiers should be examined as part of the review of legislation. For example, the Crofting Law Group Sump Report of November 2014 recommended that the status of owner-occupier crofters needs to be clarified within crofting legislation, and that there should be less of a distinction between owner-occupiers and tenants in law. In essence, anyone who occupies a croft should be subject to the same regulations.

The REC Committee report concluded that “options for the treatment of owner occupiers within the crofting environment should be examined in detail as part of the Scottish Government’s consultation.”

Conversely, during the early engagement events, the point was raised that as the original 1886 Act gave crofters rights in law as tenants, only tenanted crofts should be covered by crofting law. Consequently, the purchase by a crofter of his or her croft should result in either the croft being removed from crofting tenure or certain rights and access to schemes currently designated for crofting tenants being removed from the purchaser of a croft.

Question 8

A) What do you think are the main opportunities for change relating to Owner Occupier crofts?

B) What specific parts of the current legislation that you are aware of regarding Owners 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 (e.g. 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.

vii. Standard Securities

Context

Tenant crofters have raised the issue of being unable to secure funding for housing or business development. This is a key issue in crofting communities, and is vital to increasing the population of remote, rural areas and strengthening the rural economy. Lack of secure funding leads to difficulties for crofters in raising the necessary finance to develop croft housing, which is a necessity in developing and sustaining crofting communities throughout the crofting areas.

One of the main reasons for the inability to secure funding is that tenant crofters are unable under the current law to have a standard security issued over their tenancies. Crofters are usually required to exercise their right to buy the croft under section 12 of the 1993 Act, so they then can obtain a standard security over their ownership of the croft holding.

In order to make the secured asset more attractive to lenders, the property usually needs to be de-crofted so that it is not subject to 1993 Act regulation. Enabling banks to offer financial products to crofters could create a new market and opportunity for banks to expand their business in the crofting areas.

During the development of the 2010 Act it was intended for the legislation to introduce the ability for standard securities to be raised over crofting tenancies. This proved complex, however, and the provisions were removed late on in the passage of the Bill through the Scottish Parliament. Subsequently, the Scottish Government has received a number of calls to reintroduce legislation in relation this matter.

Question 9

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.

viii. Ordering of priorities

The previous sections outline the major crofting issues that have been raised with the Scottish Government relating to legislation. Of the issues identified, please list in your answer to Question 10 those which you think should be a priority for Crofting Bill reform to address, in order of 'highest priority' first to 'lowest priority' last.

If there are any other issues relating to crofting legislation or crofting more widely that you feel are missing, please provide the information you wish to include by answering Question 11.

Question 10

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; Assignation and Succession; Common Grazings; Crofting Commission Regulatory Functions and Processes; Crofting Registration; Owner-occupier Crofts; Standard Securities)

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.

Annex A – The Wider Context

Many of the matters in this annex have been raised in relation to crofting law, but in reality they need not require changes to crofting law to deal with them. So whilst important, some of these issues need to be looked at separately from legislative change.

The Scottish Government has committed to continue to provide public support for crofting and to secure thriving crofting communities. To this end it identified the following crofting priorities:

- **Introduce a new entrant scheme**
- **Explore the creation of new woodland crofts**
- **Publish a National Development Plan for crofting**
- **Target croft house support at those most in need**
- **Re-introduce a croft house loan scheme**
- **Modernise crofting law**

“A Plan for Scotland 2016-17”¹⁶, Scotland’s Programme for Government, published in September 2016, made clear that the Scottish Government would engage with crofting stakeholders in drafting a National Development Plan (NDP) for crofting. The NDP will focus on what we want from crofting in the future rather than what has gone in the past.

Stakeholder Involvement and identification of priorities

The Scottish Government has continued to engage with stakeholders through the Crofting Stakeholder Forum, where its members have been considering what recommendations they wish to make to the Scottish Government for inclusion in the NDP. The top priorities identified by the Forum are:

- **Increase Affordable Housing**
It has been identified there is a lack of affordable housing in rural and island communities, which may prevent people from staying or being attracted to these areas. There is also thought to be a lack of commercial financing available to enable crofters to build new houses or renovate existing houses.
- **Development of Crofting**
It has been suggested that there should be a lead body on crofting that would serve both the wider crofting community and support individual crofters.
- **New Entrants**
It has been identified there are a number of barriers preventing new entrants from obtaining croft tenancies, and that action requires to be undertaken to overcome these barriers for the future sustainability of crofting.

- **Financial Incentives**

It has been suggested there is a need to maintain appropriate levels of financial support, with targeted incentives to ensure crofting is able to continue as a viable and sustainable system.

- **Common Grazing**

It is suggested that common grazings are a huge potential resource for crofting communities, which need effective management to fully realise their economic potential.

- **Simplify Crofting Legislation**

It has been recognised current crofting legislation is overly complicated and outdated, requiring modernising to make it more transparent, understandable and workable in practice.

A number of papers have been drafted in relation to the stakeholder priorities, together with a high level consolidated paper. Copies of these can be obtained from the related documents section, or upon request when obtaining a paper copy of the consultation.

The combined Scottish Government and Stakeholder priorities, many of which are directly linked, will form the basis to develop a NDP for crofting.

Glossary

Assignment - the term used to describe the transfer with Crofting Commission consent of a croft tenancy from the crofter” to a person of their choice.

Common grazings - Areas of grazing land used by a number of crofters and others who hold a right to graze on that land.

- **Grazing Committee** – a committee set up to manage the common grazings. They are elected by the crofters who use the land and to be regulated (protected by law) the committee must be recorded with the Crofting Commission
- **Grazing Constable** – a person appointed by the Crofting Commission in the absence of a Grazings Committee who has similar powers and duties as a Grazing Committee
- **Grazing Share** – a right to graze stock on a specific Common Grazing.

Crofting Census - a form issued annually by the Crofting Commission to a tenant or owner-occupier crofter to ascertain if they are complying with their duties. (Also known as an “Annual notice”)

Crofters Duties - Both tenant and owner-occupier crofters have a duty to be resident on, or within 32 kilometres of their croft; not to misuse or neglect the croft; and cultivate and maintain the croft or put the croft to another purposeful use.

- **Absenteeism** - when a crofter does not reside on or within 32 kilometres of a croft without prior agreement of the Crofting Commission.
- **Misuse** - when a croft is being used for something which is not considered as cultivation. Tenants require the consent of their landlord or, failing that, the Crofting Commission if they wish to put their croft to another purposeful use.
- **Neglect** - This refers to the management of the croft which should meet the standards of Good Agricultural and Environmental Condition (GAEC).
- **Cultivate** - This refers to the croft being used for cultivation or put to another purposeful use. This includes horticulture, keeping livestock including poultry and bees, growing of crops and the planting of trees
- **Maintain** - This refers to the maintenance of the croft; to enable the croft to be cultivated it must be maintained in a fit state except where another purposeful use is incompatible with the croft being kept in such state.
- **Purposeful use** – This refers to any planned and managed use which does not adversely affect the croft, the public interest, the interests of the landlord, or the use of adjacent land

Decrofting - The term used when land is removed from crofting tenure by a direction of the Crofting Commission.

Deemed Croft - When a crofter purchases their croft land and the grazings shares pertaining to that croft remain held in tenancy they are “deemed” to be a separate and distinct croft in their own right. As such these “deemed crofts” are given an individual entry in the Commission’s Register of Crofts

Intestate Succession - When the executor of a deceased crofter notifies the landlord of the croft of the details of the person who has succeeded to the tenancy: in the case when a crofter dies without making a Will, or does not state in their Will who they wish to succeed to the tenancy of the croft, or where a bequest has failed.

Letting – The agreement between the landlord and tenant of a croft.

- **Short Term Let** - a period not exceeding 10 years where an owner-occupier crofter may, with Crofting Commission consent, let their croft to a tenant under a short term lease.

Standard Security - a document which gives a mortgage provider certain rights over the mortgaged property

Subletting - Where a croft tenant with the consent of the Crofting Commission allows another person (known as the subtenant) to work all, or any part, of their croft and/or the shares in a common grazing for a fixed period of time.

REC Committee – Scottish Parliament Rural Economy and Connectivity Committee

Testate succession - When a crofter makes a Will and they name the person(s) they wish to succeed to the croft tenancy following their death.

Link References

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This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78851-154-4 (web only)

Published by The Scottish Government, August 2017

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS272126 (08/17)

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