

# CROFTING COMMISSION POLICY PLAN 2017 CONSULTATION DOCUMENT

## INTRODUCTION

The Crofting Reform (Scotland) Act 2010 introduced a requirement for the Crofting Commission to submit a plan to the Scottish Ministers within six months of the first elections to the Crofting Commission and after each subsequent election. Having recently completed the second elections to the Crofting Commission on 17 March 2017, a plan must now be submitted by 17 September 2017. In this plan, the Commission must set out its policy on how it proposes to exercise its functions. The Commission is required to consult with each local authority in the area in which there are crofts; Highlands & Islands Enterprise and any other persons or bodies that the Commission considers appropriate, before preparing the plan. In exercising its functions, the Commission must have regard to this plan.

The current Commission Policy Plan of November 2015, the third iteration since 2012, will remain in place until the new Commission Plan is submitted and approved by the Scottish Ministers.

The 2010 Act was itself the culmination of a lengthy period of debate over the state of crofting and its future direction. The contentious issue of market forces within crofting resulted in difficulties with parts of the Bill, and their resultant removal, prior to passing the Crofting Reform etc. Act 2007. This in turn led to the Scottish Government establishing a Committee of Inquiry on Crofting under the leadership of Dr Mark Shucksmith. “The Shucksmith Report” of 2008, regarded as the largest ever consultation of crofting and crofting community opinion, provided the initial basis for the draft Bill and consultation that eventually resulted in the Crofting Reform (Scotland) Act 2010.

The 2010 Crofting Act established a Crofting Commission, with two thirds of its membership elected, to concentrate on the regulation of crofting. It provided for the establishment of a map-based Crofting Register. It also enhanced the powers for the Commission to deal with croft neglect and absenteeism, introducing duties for croft residency and for the cultivation and management of crofts. The duties are to apply equally to crofter and owner-occupier crofters; with the latter now defined in legislation. It further sought to provide additional powers to prevent the removal of land from crofting tenure and to discourage speculative development on croft land.

In commending the finalised Bill to Parliament in 2010, the then Minister for the Environment, Roseanna Cunningham, recognised that legislation by itself could not solve all the challenges facing crofting but stated:

*What the legislation will do is ensure that we have a governance structure for the Crofting Commission that reflects and responds to the people whom it regulates. It will ensure that we have a proper and comprehensive register of land held in crofting tenure, which will remove doubt over the boundaries of croft land and the interests in that land. It will require decisive action to be taken to address the blight of widespread absenteeism, neglect and misuse, and it will curb the speculation that threatens the very sustainability of crofting. The combination of those provisions sets a framework for crofting to prosper and to provide a model for sustainable rural development. (Official Report of Scottish Parliament, 1 July 2010, column 28182)*

It is in this context that the Crofting Commission took office in April 2012. While the Commission's responsibilities are wider than the amendments introduced by the 2010 Act, these provide important reference points for consideration. In the first version of its plan, the Commission recognised more specifically the ideals of the 2010 Act, but by the third iteration had refined these more towards what the Act stated, rather than necessarily reflecting some of the rationale behind the legislation.

While the Minister at that time advised that the Crofting Bill of 2010 was the culmination of almost 10 years of consultation on crofting, there continue to be issues with crofting legislation. This has necessitated emergency legislation in 2013, seen the production of a "crofting law sump" in 2014 with recommendations for 57 amendments to current legislation, and Scottish Government commitment to introduce a new Crofting Bill within the lifetime of this parliament. Nevertheless, it is within the current legislation that the Crofting Commission must operate.

In that context, the Commission has a policy plan that has been refined over a period of time and experience to reflect how it operates in line with current legislation. That provides the Commission with a base for considering how it exercises its functions over the next few years. The question is whether the current plan provides a good starting point for the Crofting Commission.

## **Question**

- 1. Does the current Commission Policy Plan (November 2015) provide a suitable basis on which to develop this plan? The formula has been to explain the main regulatory processes, setting out the requirements of the Act, and the Commission's policy position on each. Is this format helpful?**

The Commission recognises that there may be little option as to how it deals with some of its regulatory functions, as these are prescribed by legislation. However, there are a number of issues that the Commission considers worthy of further consideration and would welcome the views of others. In this context, it is worth recalling some of the concerns that provided the backdrop to the eventual 2010 Act:

*"There is widespread concern that crofting is in decline as a consequence of persistently high levels of absenteeism, growing levels of neglect and the continuing removal and development of land from crofting tenure. Many have argued that the existing governance arrangements and regulatory framework have failed to address this decline."* **(Crofting Reform (Scotland) Bill, Policy Memorandum, 9<sup>th</sup> December 2009)**

Accordingly, it is in this context, we assess some of these areas that Parliament decided in 2010 should be further reinforced by legislation. We look, in particular, at whether legislation has assisted crofting in this regard in the first five years of the Crofting Commission and how the Commission might deliver this legislation over the coming five year period.

## **DECROFTING (REMOVAL OF LAND FROM CROFTING TENURE)**

The Commission has responsibility for considering applications for decrofting directions, which enables croft land to be removed from crofting tenure. This can be a contentious area for the Commission, particularly as there may be a presumption of consent where a reasonable purpose for decrofting has been established. In the current Policy Plan, the Commission advises of the general principles with which it considers such applications. The Commission has to balance the legitimate interests of the applicant with the legislative factors to which it must have regard. These legislative factors include having regard to the general interests of the crofting community in the district and, in particular the demand, if any, for a tenancy of the croft, from persons who might reasonably be expected to obtain such a tenancy, if the croft were offered for letting on the open market on the date when the Commission is considering the application.

The stated intent for introducing new legislation on decrofting in the 2010 Act was *“to tackle the speculation on the development value of croft land through strengthening the grounds under which the Commission may reject an application to decroft. At present, the Commission regards itself as obliged to approve applications to decroft where outline planning consent has been granted.”* **(Crofting Reform (Scotland) Bill, Policy Memorandum, 9<sup>th</sup> December, 2009)**

The revised crofting legislation introduced additional factors that the Crofting Commission may take into consideration where a decrofting direction has been sought for a reasonable purpose or where planning permission has been already been granted. In summary, this entails that the Commission may take account of the effect of a proposal on the sustainability of crofting, the crofting community, the landscape and the environment within that locality or area. Furthermore, the Act also requires that the Commission has regard to the impact of changes to the overall area of land held in crofting tenure and on the sustainability of crofting, when exercising its functions.

As indicated, these additional considerations were added to the legislation as the Crofters Commission had previously taken the view that where planning permission had been granted, it was obliged, because of previous Land Court decisions, to provide a decrofting direction for a reasonable purpose application. However, a decrofting application for 10 house sites on croft land with planning consent, considered under the previous legislation because of legal delays, was refused at a much later date by the Crofting Commission. The Land Court, on appeal, upheld the Commission’s refusal of the application. The case had to be considered in terms of the legislation pertaining at the time of the application, which prevented use of the additional considerations introduced by the 2010 Act. This decision would indicate that some of the previously perceived legislative shortcomings may not have been as influential as had been argued.

One particular anomaly in crofting legislation is that there are fewer legislative considerations for applications to decroft land for which no purpose is cited than there are when a reasonable purpose is provided, as in the above example. They may not have the same expectancy of approval as that of a reasonable purpose application but they only have to be considered in terms of the general interest of the crofting community in the district and the demand, if any, for the tenancy of the croft. Indeed, the current Commission Plan states that where applications are made only for the reason of taking the croft, or part of the croft, out of crofting tenure, they are unlikely to be approved. **(Crofting Commission Policy Plan, Paragraph 63)**

Therefore, while the Crofting Commission has refused a decrofting application where there has been a recognised reasonable purpose but objections from the crofting community in the example provided above, it has more recently approved decrofting directions where no reasonable purpose has been provided. In such instances it has given decrofting directions where there has been no specified purpose for decrofting applications other than effectively to remove the land from the control of crofting legislation. In December 2016, the Crofting Commission was unable to determine that a croft on mainland Orkney, comprising 23 hectares, formed part of a crofting community and granted a decrofting direction. While it could accept that a croft of 20 hectares on the Black Isle was part of a crofting community, it also approved a decrofting direction. In both instances these crofts were operated in conjunction with other farmland, and there were no objections or direct expressions of interest in the croft tenancy. However, in the region of 43 hectares of quality croft land were removed from crofting tenure. The anomalies within crofting legislation notwithstanding, it could be concluded that land under crofting tenure was considered to be of less significance in some areas than in others. In both the areas concerned, croft land is generally of better quality but it might be concluded that decisions taken indicate that it is not considered to be of the same significance in crofting terms. This gives rise to the question of whether there are areas where the crofting system of tenure, irrespective of the quality of land, may be of less significance than it is in other areas.

## Questions

2. **Should the Commission continue with a policy that states it is unlikely to approve applications made solely with the intent of removing land from crofting tenure?**
- 2a. **Should perhaps the Commission consider that crofting tenure is of less significance in some areas and, as such, retaining land within crofting is of less importance in such areas? The question then is how would such a policy be consistent with legislation applying to all crofting counties, in respect of which there are rights of appeals to the Scottish Land Court? Might it be considered that existing crofting legislation requires the Commission to consider the general interest of the crofting community and thus affords the Commission sufficient flexibility to determine how different crofting communities' interests may be affected by any application?**

## CROFTING DUTIES

To address concerns regarding absenteeism and neglect – considered to be major problems for crofting – the 2010 Act introduced crofting duties. Until then, the Commission had discretionary powers to address absenteeism and, since 2007, with the approval of the landlord, could apply to the Land Court to terminate a tenancy in the case of misuse or neglect of a croft. The new legislation made it a duty for a crofter to ordinarily reside within 32 kilometres of the croft, to cultivate and manage the croft, or put it to another purposeful use, and not to neglect or misuse the croft. The duties refer equally to crofters and owner-occupier crofters. In return, the Crofting Commission has a duty to investigate reports of alleged breaches of duty made by a member of that crofting community, a grazings committee or a Commission Assessor.

It was envisaged that this would become routine regulatory work for the Commission rather than subject to periodic initiatives. It was accepted that processing other regulatory applications was necessary, but it was the Ministerial view that the Commission could make its greatest contribution to the Government's purpose by ensuring that crofters meet their obligations to live on the land and work it. **(Official Report of Scottish Parliament, 13 May 2010)**

There was acknowledgement in the Scottish Parliament that problems of neglect and absenteeism could not be addressed overnight. However, there was expectation that it would be an important component of the Commission regulatory activity. The Commission itself recognised this within its plan by including statements on the regulation of crofter residency and land use within its section on strategic objectives. These set out the benefits to be derived from ensuring compliance with the relevant duties.

The Crofting Commission inherited one of those periodic initiatives to address absenteeism, based on the length of time a crofter had been ordinarily resident away from the croft. The Commission continued this initiative until into 2014 and reported that it had concluded 588 cases, and 415 crofts that had an absent tenant for more than 10 years were now occupied. In addition, 192 new entrants obtained croft tenancies as a result.

As indicated in the current Policy Plan, the Commission looked to crofters to address their own situation in the first instance: *The Commission will encourage crofters to be pro-active in addressing any breaches of duty. Where a crofter is unable to comply with a duty, there are a number of options available to the crofter such as to apply for a sublet or a 'short lease' and, if consented to, ensure that the duty is complied with for the duration of the sublet or 'short lease'.* **(Crofting Commission Policy Plan, paragraph 42)**

With the introduction of an annual crofting census, the Commission further encouraged crofters to “self-regulate”. What that meant was that crofters would themselves ensure that they became compliant with their crofting duties, in advance of the Commission being required to take any enforcement action. In addition, the Commission would look at specific areas where its limited resources could make a bigger impact. It was anticipated that census returns would indicate areas where the Commission’s limited resources might have greater impact. The Commission would look at operating these “geo-pilots” in line with other partner bodies and agencies, as indicated in the current Commission Plan at paragraph 113.

The Commission has at this point completed a census return for the years 2014 and 2015. The return period for 2016 has just concluded. The figures for 2014 indicate that of 16,591 census forms sent out, 14,022 were returned; a rate of 84.5%. Of these, 87% advised that they were ordinarily resident within the required distance, and 97% advised that the croft was cultivated and maintained.

The following year, 2015, 17,596 forms were issued and 12,894 returned, a reduced rate of 73%. A higher percentage (91.5%) of those returning a census form advised that they were ordinarily resident, while a slightly smaller percentage (94.6%) indicated that the croft was cultivated and maintained. An immediate conclusion might be that there has been a reduction in absenteeism, but the reduction may be in what is being reported. The non-returns and the year-on increase of these may, in fact, be disguising higher levels.

In its 2015-2016 Annual Report, the Commission stated that it wanted: *“to ensure crofters understand their responsibilities and encourage them to self-regulate. Self-Regulation means crofters stay in control over what happens to their croft, choosing options, so that they can contribute to the future of the croft, the township and the whole system of crofting.”*

While the figures for these periods indicate that there has been some increase in the options that can enable compliance, this has not been of major significance. Between the two most recent reporting years, applications for consent to be absent increased from 13 to 55, applications to sub-let increased from 77 to 111, assignation applications increased by 5 to 226. Apart from consent to be absent applications, the other figures cited are not necessarily confined to those in breach of crofting duties.

On this basis the “self-regulation” process could be prolonged and not necessarily productive if there is also continued slippage in the self-reporting element. The Commission has also adopted a more flexible approach to how it considers applications from those applying for sublets than that indicated in the first Commission Plan. It is no longer stipulated that those potentially in breach of the residency duty will have any specified time limitation for the duration of a sub-let, other than the 10 years maximum, permitted by the Act.

While the Commission has advanced the concept of geo-pilots, which entails concentrating its activity within a defined area, it has not been able to undertake any of these to date. It is also not entirely clear how a uniform “self-regulation” approach would deliver outcomes within a shorter timeframe within these specific geographic areas.

With regard to the legislation on crofting duties, the Commission has advised the Rural Economy and Connectivity Committee that it has begun the process of considering crofting law reform that *“the underlying principles and policy are quite simple, but the process set out in legislation is anything but.”* As such, the Commission has had difficulty implementing the process on any significant scale, other than that of investigating some individual reports.

In response to questions at the Rural Economy and Connectivity Committee, the Cabinet Secretary, Fergus Ewing, accepted that *“some regard the process for dealing with a breach of a crofter’s duty on an ad hoc basis as cumbersome and long and believe that it does not necessarily improve the overall situation in an individual community.”* (**Rural Economy and Enterprise Committee, Official Report, 23<sup>rd</sup> November 2016, Column 22**)

## Questions

3. **Do you consider the Commission approach to encouraging “self-regulation” to comply with crofting duties to be the most practical or do you think there is a need for the Commission to be more proactive?**
- 3a. **Do you consider that the Commission needs to take a wider approach to duty enforcement or should it pursue the concept of geographic initiatives in order to concentrate resources where they are most needed?**

## NEITHER CROFTER NOR OWNER-OCCUPIER CROFTER

An important element of the 2010 Act was to ensure that croft tenants and owners had equal responsibilities to crofting. It was for this reason that the legislation introduced the status of owner-occupier crofter. Unfortunately, this did not cover all the permutations of croft ownership and left some categories of croft owners outwith the legal definition of owner-occupier crofter. Consequently, the annual census requirements or that of duties enforcement do not apply to this category of croft holder. While such anomalies require rectification in future legislation, it has essentially left individuals currently outwith mainstream crofting regulation.

As indicated, such croft owners are not subject to the duties enforcement legislation. However, the Commission does have the right to ask for letting proposals for what are essentially vacant crofts. As such, the Commission could, where the circumstances are appropriate, ask for letting proposals for such crofts. Where these are not provided or are unsuitable, the Commission itself could take on the letting of the croft. The Commission had in recent years taken on the re-letting of a number of crofts whose tenancies had been previously terminated. As this process had proven demanding on resources, a streamlined system has been introduced. This entails a simple sift of those expressing demand and those qualifying then being chosen at random.

## Questions

4. **Should the Commission address situations where croft owners who are not owner-occupier crofters and are not resident or do not cultivate and maintain their crofts by requiring letting proposals for their crofts?**

## COMMON GRAZINGS

The current Commission Plan specifically features regulation of common grazings in its strategic objectives section. It mentions that common grazings provide benefits through shared management, and lists the benefits that can ensue from the regulation of grazings and support for grazings committees.

Unfortunately, in some situations the potential benefits outlined have not been so readily realised in some well documented cases concerning the Commission and grazings committees. This has resulted in a destabilising period for some grazings committees leading to uncertainty as to what can be undertaken by grazings committees upon their common grazings. The Crofting Act states what must be included within grazings regulations with regards to the maintenance and improvement of grazings. However, there are no specifics beyond this, although it is possible to apply to use part of the grazings for purposes other than grazings or woodland. Currently some schemes may provide more for habitat management or environmental improvement and these may not be so readily identified within the basic requirements of the Act. However, the Scottish Government has advised that there is nothing to prevent grazings committees from applying for funding through the Scottish Rural Development Programme. In the longer term there may be a requirement for greater legislative clarity, and there has been recent recognition of this by the Cabinet Secretary, Fergus Ewing, in answer to the Rural Economy and Connectivity Committee.

*Grazings Committees are very much creatures of their time. They were prescribed as an appropriate method of ensuring that the common elements of crofting were properly organised where crofting was the norm – indeed the fundamental way of life and existence. As Mr Manson pointed out, things have changed substantially since then, but the role, definition, duties, function and organisation of grazings committees have not been updated alongside them. (Rural Economy & Connectivity Committee, Official Report, 23 November 2016, Column 25)*

In the meantime, the Commission must carry out its role within the parameters of the existing legislation. That role includes confirming or amending grazings regulations and enabling the continuing use of common grazings within a regulated framework. That may necessitate ensuring adherence to the grazings regulations by both members of the grazings committee and crofters sharing in the grazings.

Matters not covered by the grazings regulations are outwith the Commission's jurisdiction and indeed, some matters that may be included within regulations may be more appropriately handled by other authorities. In this context, the Commission has previously advised that complaints relating to financial matters should be reported to the appropriate authority. Where a grazings committee acquires assistance through some form of support scheme, this will generally be governed by the specific rules of the funding provider. The particular requirements of some schemes may necessitate changes to the regulations, but that does not entail that entry to such schemes is not itself possible.

The Commission remains committed to ensuring that crofting common grazings can be effectively managed through local grazings committees. It will continue to work to ensure that this is possible. It is currently working with other interested bodies, and some members of its Assessors' panel, to provide a revised grazings regulations template for all committees. It seeks to ensure that grazings committees are in a position to carry out their responsibilities, in the interests of the crofters sharing in the common grazings.

## **Questions**

- 5. Do you have any view on the Commission approach to common grazings and their committees, and how this should be reflected in the Commission Policy Plan?**

## **OTHER GENERAL FUNCTIONS OF THE CROFTING COMMISSION**

As a regulator, the Crofting Commission Policy Plan is primarily focused on the general function of regulating crofting. The Commission's general functions also include the reorganising of crofting. This has generally been considered within the limited context of provisions within the Act for the reorganisation of crofting townships. This itself can be a complex and convoluted process. However, reorganising crofting need not necessarily be confined to the Reorganisation Schemes set out in the Act and could be interpreted as reorganising in a more general way. In addition, there is a general function to promote the interests of crofting, and one to keep under review matters relating to crofting.

The Commission is currently part of the Crofting Stakeholders Forum, which is considering in detail matters such as the role of crofting development, new entrants to crofting and housing in crofting. The Commission will also advise on the revision of crofting legislation and the National Development Plan for crofting. It also inputs to consultations relevant to crofting and land use and has planning responsibilities as a key agency and statutory consultee. The capacity for Commission development of its other functions is obviously limited by the resources available, but it would welcome the views of others as to how these might best be delivered.

**Question**

- 6. Do you have any suggestions as to how the Commission might deliver these other functions?**

**If there are any additional comments you wish to make about areas of Crofting Commission policy, please feel free to include these.**

**It would be appreciated if you could complete responses to the questions as numbered, and return these to the Crofting Commission by Friday, 21 July 2017.**