

Scottish Government Crofting Consultation 2017

Response by the Crofting Commission

Introduction

1. The Crofting Commission is the statutory regulator for crofting, established in 2012 as the successor to the Crofters Commission. We are therefore a creature of statute, and of course committed to acting in accordance with statute both now and in future, taking on board changes to the legislation as they are implemented. We are also committed to treating all crofters and crofting stakeholders fairly, in all their dealings with us, irrespective of their views on the system of crofting legislation.
2. We also have a statutory duty to advise the Scottish Ministers on any matter related to crofts and crofting conditions. Moreover, six out of nine members of our Board are directly elected by crofters across the crofting counties, and this gives the Board a particular mandate to advise Government on the future of the system. Both our Commissioners and our staff have a unique perspective on current crofting legislation from the roles they play within it, which for some staff has extended over many years. We therefore believe that the Commission is in a good position to contribute to the debate about the forthcoming Crofting Bill, and we welcome the opportunity to submit this consultation response.

Format of this response

3. The Commission believes that the questions outlined in the SG consultation document address the fundamentals of crofting, and the main part of this submission gives our views on each of those questions.
4. The Commission recognises that there are regional differences across the crofting counties. However, the views in this response are the collective views of the Commission as a whole. In many instances, especially on matters such as the constitution of grazings committees or the content of the Crofting Register, our response outlines a direction of travel rather than a fully worked-out proposal. The Commission is willing to work with the Scottish Government and stakeholders to follow through these ideas and produce more specific proposals.
5. Alongside our views on these matters, we also wish to submit our observations about some defects we perceive in the current Act, which could be corrected by a new Bill. The Crofting Law Group has already provided a substantial such list in the Crofting Law Sump. Our points are attached as Annex A, and we hope these will supplement the observations from others, in the Sump and elsewhere.

Crofting Policy

Question 1 – Yes

6. The Crofting Commission supports the Government’s policy on crofting as stated in the consultation document, viz:

“The Scottish Government values crofting as a form of land tenure and recognises the added contribution that crofting communities make to the rural economy and the sustainability of rural and remote rural communities.

“The Scottish Government is committed to reforming crofting to secure its future, bringing new blood¹ into crofting communities, and ensuring that it can continue to contribute to the development of a thriving rural Scotland.”

7. This policy encapsulates 3 key objectives which may need to be a focus for the Bill and which are reflected in the various sections of our response:

- Enabling crofters and crofting communities to maintain and enhance their contribution to the rural economy;
- Protecting remote communities from threats of decline and depopulation;
- Reducing the barriers that make it hard for new entrants to crofting.

8. The Highlands and Islands have benefited from support and investment by a range of public bodies. The Commission believes that the crofting system has complemented these in bringing many benefits to rural Scotland over the years. Among these, we suggest that the three most significant benefits directly supported by the crofting system, have been the following:

- Retention of a numerous and diverse population, in remote areas where there might otherwise have been substantial population loss or stratification
- Productive use of marginal land, for a range of beneficial purposes including small-scale agriculture, the sustaining of crofting landscapes and protection of biodiversity
- Preservation and evolution of a way of life, supporting a system within which both established and incoming crofters find a base for enterprise, culture and community.

We suggest that proposed changes to legislation should be considered against whether they will continue to enhance these key benefits of crofting.

Options for legislative changes

Question 2 – Option 2 is preferred

9. The Crofting Commission has followed closely, and taken part in, debate with crofters, crofting stakeholders, crofting lawyers and others about the desire for changes to crofting legislation. From these debates, it is possible to draw two clear observations/conclusions:

- 9.1 Although there are some observers who have argued that Government should start again with a clean slate, there is no sign of any consensus as to what, if

¹ We prefer the standard term, ‘new entrants’ to ‘new blood’; also in our paragraph 50.

any, new structure should be created. Until there is such a consensus, the 'clean slate' approach (option 4) may be unworkable.

- 9.2 There is a need for a number of changes to crofting law. This has already been pointed out by the Crofting Law Group in the Sump; and our Annex A, based on our own experience, confirms this. We expect that the various responses to this current consultation will confirm to the Scottish Government that the need for change is broad and pressing.
10. We therefore believe that the best use of this current legislative opportunity is the option which gives most scope for considered, meaningful change within the current Scottish Parliamentary term. That points decisively in favour of option 2. While consolidation (option 1) or part consolidation (option 3) is undoubtedly also desirable, at the present time we believe it is more important to allow time for plenty of substantive change, than to tidy up the legislation by bringing it together. In any case, consolidation is less important than it once was, because modern technology already gives ready access to up to date versions of the 1993 Act. The Commission's own website contains a version which incorporates the changes made in subsequent Acts.

Question 3 – Absenteeism, misuse and neglect

11. The Commission believes that protecting the population of remote rural communities is now one of the main objectives – if not the main objective – of the crofting system, notwithstanding the crucial role that crofting has in the sustainable management of the land and conservation of many important habitats. We believe that crofting has contributed substantially to this over the years, as evidenced by the relatively strong populations in crofting areas across the islands and the west Highlands in particular. However, today, many of these populations are finding it difficult to retain young people, through the disadvantages of remoteness, the costs of starting up a crofting business, and/or the overpricing of land and housing in highly desirable, pressured areas. Responding to these challenges is a theme running through our response.
12. The Commission has broad powers to ensure that people live near their crofts and put them to good use. We believe these powers are a necessary and proportionate tool to support crofting and to help achieve the Government's aims – and indeed in some cases such as small inhabited offshore islands there may be a case for a more stringent residency duty than the current 32km limit. But we also believe these powers must be used flexibly, with sensitivity to the various different situations which can give rise to absenteeism or neglect. The current legislation provides some of the necessary flexibility but this should be enhanced.
13. The Commission is well aware that the extent to which we have enforced crofters' duties, in recent years, has fallen short of the expectations of Parliament, Government and several crofting stakeholders. As the consultation document observes: *"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 current Board of the Commission, supported by the Commission's senior management and assisted by additional funding from the Scottish Government, is taking steps to increase the pace of enforcement. However, even with this increase, it is inevitable that the amount of resource that the Commission is able to give to enforcement will continue to seem small in comparison to the extent of the issue.
14. Without reducing in any way our responsibility for and commitment to tackling these issues, we wish to highlight three factors which exacerbate the challenge:

- 14.1 The extent of the task: the number of crofts, particularly in some parts of the crofting counties, where there are absentees or where the croft is not being put to purposeful use;
- 14.2 The cumbersome and inflexible nature of the duties enforcement provisions in the 1993 Act, particularly since the changes in the 2010 Act, which inhibit the Commission from taking action more quickly and flexibly. This includes a range of inflexible deadlines within each part of each process, which jointly slow down Commission action. There are also aspects where the action required of the Commission is over-specified, leaving no room for judgement or sensitivity to the particulars of a case;
- 14.3 The (small p) political difficulty of using enforcement powers which, although backed by the authority of Parliament and supported by many crofters, are often not felt to be fair by those they apply to.
15. It is striking that, in contrast to other holders of land rights, crofters have a duty to cultivate their land or put it to another purposeful use – and yet they are often the ones holding the least productive land!
16. The Commission can and does adopt policies which take an understanding approach. We seek to allow crofters to rectify their own situations before employing enforcement sanctions, and we provide advice to those who may not know what to do for the best. We wish to apply flexibility, sensitivity and discretion in our enforcement action.
17. In recent times, the most productive period of enforcement of duties came in the later stages of the Crofters Commission and the initial two years of the Crofting Commission, when it adopted a simple and direct focus on rectification of absentee cases over 10 years' duration. There may have been many reasons for this, but we believe that one reason was the *specific and relatively narrow focus*. Unless there were to be a very substantial increase in resources for enforcement, we believe it will be necessary to consider carefully how best to focus this endeavour. The idealistic, blanket provisions inserted into the legislation by the 2010 Act do not provide this focus.
18. The Commission recognises that the neglect of croft land and common grazing land is a serious issue that requires attention, and is a matter of concern within many crofting communities. However, it is difficult logistically for the Commission to take action in respect of neglect as it has to accumulate substantial evidence on the ground through site visits before taking any action. We believe that it is more practical for enforcement action by the Commission to focus primarily on absenteeism rather than misuse and neglect. Addressing absenteeism directly contributes to the retention of strong, diverse populations in the crofting counties.
19. We therefore suggest that the Bill could consider focusing the enforcement duty principally on issues of absenteeism, while retaining discretionary powers for the Commission to address neglect – particularly, but not only, in cases where the neglect of the croft is impacting negatively upon a neighbouring croft (for instance, failure to maintain drains or the spread of invasive species). There could also be clauses enabling changes to be made to the enforcement provisions through secondary legislation, rather than having all the detail enshrined in the Act.
20. Alongside this, consideration should be given to other ways to support or incentivise active use of croft land. The latter could be in tandem with the thinking of the Land Commission, who are considering how best to encourage productivity in all land use across Scotland. It may also be able to be based more on financial incentives, if the Scottish Government gets the opportunity to reshape the subsidy regime following the expected UK exit from the European Union.

Question 3A/B – Continue the provisions on absenteeism, with increased flexibility for the Commission and minor corrections as in Annex A; consider making the provisions on misuse and neglect more discretionary.

Question 3C – It would simplify the task for the Commission and for crofting communities, and should lead to greater reductions in absenteeism than we have seen under the current regime.

Question 3D – A 21st century approach to encouraging people to make productive use of marginal land should probably be based on financial incentives through support mechanisms, more than on the ‘last resort’ threat of loss of the croft.

Question 4 – Assignment and succession

21. We address below (under question 6) whether the current right of the Commission to veto a proposed assignment should be removed, where we note the advantages and disadvantages of such a shift.
22. In other respects we believe the current legislation on assignment and succession are broadly fit for purpose, and require only fine tuning. The Commission’s interest is to ensure that after the departure elsewhere or the death of a crofter, the croft is transferred to a new crofter without undue delay: this is in everyone’s interest, including the landowner’s and the township’s. The Commission therefore needs to be able to intervene effectively in cases where succession is unclear or disputed, and we believe the current legislation broadly allows for this. The Commission recognises that the primary responsibility for succession to crofts lies with individual crofters and their executors and landlords, and realistic timescales should be provided for executors to deal with often complicated successions. In this regard, we consider 24 months in the case of intestacy to be an appropriate timescale. We would suggest a number of fairly minor technical changes to the law, as outlined in Annex A.

Question 4A/B – Fine tuning only.

Question 4C – N/A, see Annex A

Question 4D – The existing legislation gives the Commission an appropriate range of powers to intervene to resolve unclear and disputed successions. The Commission’s policy approach to these questions is therefore central, including how we work with landlords, executors and others to resolve cases efficiently.

Question 5 – Common Grazings

23. At their best, Common Grazings Committees are at the heart of their communities, overseeing the productive use of common land assets, driving community enterprise and shared wealth creation, and maintaining a strong community ethos to balance and complement the growing individualism of today’s society. The Commission believes it is an opportune time to take stock of the roles played by Grazings Committees and to ensure that the legislation will enable them to contribute to the maximum.

24. One of the Scottish Government's ambitions for the way land is used in Scotland is to make it easier for different people to have rights to benefit from the same piece of land. The code of access for recreational use of land is an obvious example. The crofting system has been balancing the rights of multiple users of land since its inception, for example through its careful balance between the rights of tenant crofters and landowners. In common grazings, there is still greater complexity of ensuring that rights are appropriately balanced, because of the multiplicity of holders of rights: the landlord; the grazings committee; the individual shareholders; any public interest (for example through environmental designations); and the general public (for example through access rights).
25. Many of the more complex disputes that the Commission has been asked to address relate to disputes within townships over how the rights of individual shareholders dovetail with the authority of the elected grazings committee to manage the common grazings. To a large extent these are questions best addressed by townships themselves, on the basis of their regulations, and with the support and guidance of the Commission. However, the Commission needs to be able to give authoritative steers in cases of dispute, and this needs to be based on a clear and comprehensible basic framework set out in legislation.
26. It appears that some of the more active grazings committees have outgrown the legislation, and are now wanting to take on roles and functions, and financial commitments, that were not envisaged when this legislation was created. Legislative change is therefore needed to clarify the powers of existing grazings committees, such as to apply for certain types of support funding or to enter an animal health scheme for a period of time. There may also be a case for a duty for a Grazings Committee to make reasonable efforts to support the use of the common grazings for livestock; and/or for a wider range of discretionary powers for the Commission to ensure that grazings committees and shareholders are acting in accordance with the legislation and with their township's regulations.
27. If such an expansion of grazings committee powers were deemed to be incompatible with the traditional committee's lack of distinct legal personality, then we would be attracted to the suggestion that townships should have a choice, whether to elect a traditionally-constituted grazings committee with a limited range of powers and duties; or an enhanced grazings organisation (perhaps modelled on Community Interest Companies or SCIOs) with its own legal personality and unequivocal rights to raise and use funds, etc (and also clear rules as to how such funds are to be managed), which would be able, for instance, to apply for grants and subsidies and to apply to use common grazings for other purposes. However, more thought needs to be given to how the latter structure would function in practice, and critically how it would affect the rights of shareholders. For example, if it were made possible for a grazings committee to register as a Company Limited by Guarantee (CLBG), what land rights would be vested in the CLBG and how would these complement those of the shareholders and those of the landlord (which may be a community landlord)?
28. The Commission believes that providing the option for a grazings committee to adopt a modern constitution similar to a CLBG would be a positive step that, in time, could lead to the creation of local organisations able to play a stronger part in driving forward developments in their area. A successful new model could substantially boost the vitality and enterprise of crofting communities and could indeed be of value to communities elsewhere in Scotland, not currently associated with crofting.

Question 5A – Opportunity to clarify the powers of a grazings committee and, perhaps, to provide a new option for grazings committees to take on a clear legal form which would bring with it a wider range of powers.

Question 5B – Revisions to common grazings legislation should provide a more intuitive solution to the problem of ‘deemed crofts’. It should also include section 50B because there is currently a lack of clarity over the types of ‘alternative uses’ that grazings committees can propose, and over the processes which both the Committee as applicants and the Commission as regulator are required to comply with in progressing the application.

Question 5C – It should empower grazings committees to take a stronger leading role in promoting positive change within their communities.

Question 5D – The Commission is already working with crofting stakeholders to promote adoption by townships of clearer grazings regulations, which we believe should help to clarify a number of the areas of dissent which are currently troubling some common grazings. Improved legislation will facilitate this.

Question 6 – Crofting Commission regulatory functions and processes

29. The regulatory processes involved in crofting are often straightforward but at times are sensitive and complex. It is for this reason that a Regulator – the Commission – is needed. Our approach is to streamline processes so that there can be quick decisions in straightforward, uncontested cases; while involving the Commissioners (most of whom were elected by crofters) to decide the more complex cases on the basis of evidence, as required by the Act. We are committed to efficient, light-touch processes to decide straightforward applications, while allowing time for proper consideration of more complex or contested cases.
30. The Commission believes that the Act should allow some flexibility for Commissioners to decide cases on their individual merits. For example, a part-croft decrofting may be beneficial if it promotes diversification and enterprise, or harmful if it will merely erode the amount of land in crofting tenure, with negative consequences for population retention. Judgement is often needed on individual applications.
31. Equally, discretion for the Commission can allow for some differentiation between the very different types of crofting found in the different geographical areas. We believe it would be difficult to justify having different rules for different areas, but a Commission which fairly reflects all parts of the crofting counties can and does take account of the different characteristics of an area in order to decide each individual case in its proper context.
32. It is often said that crofting law and crofting regulation are too complex, and should be simplified. In principle, the Commission shares that view. Unnecessary or over-complex regulation carries its own costs, for crofters, for landlords, and for public agencies such as ourselves¹. It is desirable for crofting regulation to be as light touch as possible, so long as it is also fit for purpose and works to achieve the aims set out in paragraphs 7 and 8 above. It is therefore important to consider what purposes are

¹ In 2017 we have substantially extended the delegation of regulatory decision making to officials, so that for the most part, Commissioners are only involved in controversial or disputed decisions. We believe this has already enhanced the efficiency of our regulatory processes and will continue to do so.

served by the Commission's regulatory activity and to adjust the legislation to focus more directly on clearly identified purposes.

33. At risk of over simplifying, the Commission's regulatory activity has five main themes:
- 33.1 It incorporates an *administrative* function, whereby the Commission maintains records (and the Register of Crofts) which show changes that have been made to crofting holdings and an up-to-date record of crofters and their specific land rights.
 - 33.2 The Commission regulates changes to the footprint of *land in crofting tenure*, through decisions on decrofting applications (for house site and garden ground, part croft or whole croft), divisions of crofts, enlargements, creation of crofts and apportionments.
 - 33.3 The Commission regulates *transfers of crofting rights* from one person to another, through assignation, re-letting (including the letting of crofts where there has been a failure to transfer a croft through succession), subletting and consenting to short leases.
 - 33.4 A wider range of activities relating to *resolving absenteeism, misuse and neglect*, which overlaps with some of the functions in 33.3 above.
 - 33.5 Regulatory activity relating to *common grazings*, to ensure the correct functioning of grazings committees and the rights and duties of shareholders in relation to their common grazings.
34. Of these, the activity under 33.2 and 33.4 is directly focused on the achievement of the Government's aims for crofting communities, and should continue. The administrative functions also need to continue (until or unless taken over by Registers of Scotland) even if there is a reduction in regulatory decision-making by the Commission. And as noted under question 5 above, we believe there is a need for a continuing regulatory role to oversee the joint use of common grazings.
35. The area where there may be a case for simplifying crofting regulation is probably the area covered by 33.3. We are aware that some have questioned whether to retain the requirement to obtain the Commission's consent to a proposed assignation¹, given that few such applications are actually rejected by the Commission. Moreover, at times, the ability of the Commission to make such decisions has *increased* discord in crofting townships rather than reduced it, because the Commission's decision can itself become a focus for strife between rival factions. However, in our view it remains important that there are mechanisms which facilitate access to crofts by those who aspire to the crofting lifestyle, including people of limited means from crofting areas. In our view the Commission's oversight of assignations has provided protection for the sustainable development of crofting communities, as well as for landlords, because the Commission can refuse an assignation to an unsuitable assignee.
36. The controls exercised by the Commission on assignations may also contribute to limiting the harmful effects of speculation, which can prevent many people from accessing crofts. We say more about this aspect in our response to question 9.
37. There may be some functions where legislation could remove the Commission's duty to make decisions, while still giving the Commission the function of recording that a change has taken place. Examples could include the creation of new crofts, and

¹ Any such change would mirror a change introduced by the 2010 Act, which removed the requirement to obtain Commission consent to the transfer of a croft tenancy *by an executor*.

enlargement of existing crofts or common grazings. Equally, where the interests of the long term sustainability of the crofting community and crofting have to be balanced against the rights of an individual crofter in the context of a particular application, it is appropriate for such applications to be subject to Commission consent. It is particularly important to maintain a balance between the long term sustainability of the crofting community and the interests of the crofter in such applications as decrofting, apportionment, division and letting.

38. We are aware that a number of stakeholders have expressed interest in the Commission again being given a responsibility for the development of crofting, and we are open to resuming this kind of activity, formerly carried out by our predecessor body, the Crofters Commission. In practice, there is often a narrow gap between our work as a regulator and the development of townships, because both are focused on empowering the crofters and the community to make progress, while resolving any conflicts.

Question 6A – Consider whether it is possible to pare back any aspects of Crofting Commission regulation which contribute little to the Government’s overall aims for crofting, and/or to give the Commission discretion to intervene in such aspects of regulation in the interests of the crofting community.

At the same time revise aspects of the legislation relating to duties actions which make current regulatory processes unnecessarily complicated, longwinded or inflexible.

Potentially renew the Commission’s former duty to support and develop crofting and crofting communities.

Question 6B – See above and Annex A.

Question 6C – It would free up Commission resources to concentrate on activities of greater benefit to the crofting system, and simplify some procedures for crofters and crofting lawyers subject to adequate protection being given to the long term sustainability of the crofting community, for instance by discretionary Commission intervention.

Question 6D – The Commission will continue to take responsibility to deliver its range of duties responsively and effectively. In particular, our approach to deciding decrofting applications will continue to be guided by the legislation enacted by Parliament and interpreted by the Land Court. We would however wish the law relating to decrofting to be amended in order to remove some of the anomalies and loopholes identified by the Land Court. As resumption of croft land can be authorised only for reasonable purposes, we consider that decrofting should similarly be granted only for reasonable purposes.

Question 7 – Crofting Registration

39. Legislation currently requires two registers for crofting: s41 of the 1993 Act gives the Commission a duty “to compile and maintain the [administrative] Register known as the Register of Crofts”, while s3 of the 2010 Act requires the Keeper of the Registers of Scotland to “establish and maintain a public register ... to be known as the Crofting Register”.

40. Currently the two registers partly overlap but partly complement each other. The Crofting Register (CR) is a map-based register, while the Register of Crofts (ROC) contains more detail of the history of regulatory changes, which have affected each croft over time, as well as for associated administrative information. In its day to day regulatory work, the Commission uses the Register of Crofts, and also uses the Crofting Register if the croft or common grazings is registered. The Commission and Registers of Scotland collaborate together to share updates to the information held in their respective registers.
41. The Commission believes that the long-term aim should be for the Crofting Register to become **a complete register of crofting land rights**. To achieve this, it will be necessary to expand the content of the Crofting Register to include some information currently held by the Commission, such as soumings for grazings shareholders. (It would also be advisable for there to be adequate powers to change the content of the Crofting Register through secondary legislation when necessary.) On completion, the CR would then hold all the information needed by a crofter, a landlord a solicitor, or any other party wishing to check land rights. The Commission could then cease to update the rights information in the Register of Crofts, while continuing to hold its historical information. At that time, the Commission would probably wish to hold administrative data (eg on crofters' dates of birth) and this type of information would need to be linked to the CR through an efficient, electronic reference system.
42. Equally, the list of trigger events (which require a CR registration to be made or updated) needs to be expanded so that it covers all types of events which will generate a change in crofting land rights. For example, the purchase of croft land by a tenant, and the issuing of an Order bringing decrofted land back into crofting following a breach of the condition(s), should become trigger events for the CR. Even with this change, additional administrative action may be needed in due course to achieve an earlier completion of the Crofting Register, as under the current system it may take a generation for all crofts to encounter a trigger event. There may also be a case for reducing the cost burden on crofters and landlords, if possible.
43. We would also recommend changes to some of the specified processes for adding to and updating the Crofting Register. Croft registration applications and payment should be sent direct to Registers of Scotland, as there is nothing gained by routing these through the Commission. First registration of crofts should require to be notified to the landlord in advance, so that many disagreements about croft boundaries can be resolved prior to registration, though we recognise that where such disagreements cannot be resolved, they will ultimately need to be for the Land Court to decide. To supplement applications by the Commission, it should be open to a landlord, with the explicit agreement of a grazings committee where there is one, to make an application to register a common grazings. And where Registers of Scotland become aware of an inaccuracy in the register, it should be open to the Keeper to rectify it.
44. Finally, no-one should underestimate the importance, or the challenge, of drawing up definitive maps of all crofts and common grazings, for the first time. In many cases, the records available from the past conflict with each other or with local consensus about where boundaries lie. Ironing all this out will be of great benefit for future generations of crofters and landlords, but the task of doing it is inherently imperfect and prone to doubt. It is therefore important to think through the legal implications of this. When an error in the Crofting Register comes to light, it is important to be clear (i) whether and how it can be corrected, and (ii) the status of any transactions which have taken place on the basis of erroneous information in the meantime. If the Bill can give guidance on these points, we believe that will be of value to the Land Court, the Commission, and others who will inevitably be involved in resolving such cases in future.

Question 7A – To move towards a future unified register for crofting. Meantime, to simplify and streamline the current processes which underpin the workings of the Keeper’s Crofting Register and the Commission’s Register of Crofts.

Question 7B – The content of the Crofting Register, and the processes for applications and rectifications

Question 7C – It would increase the efficiency and the credibility of processes which support the Crofting Register. It would in due course allow the Commission’s Register of Crofts to be downgraded to become an administrative dataset linked electronically to the Crofting Register.

Question 7D – The Commission and RoS will continue to work together to avoid duplication in updating information on their respective registers.

Question 8 – Owner-occupied crofts

45. We are aware of concerns that owner-occupied crofts do not ‘fit’ into the current crofting system, and two opposing ‘solutions’ that have sometimes been put forward: abolish the right to buy; or allow immediate decrofting of all owner-occupied crofts.
46. The Commission believes that the approach taken by the 2010 Act is sound in principle – to make the legislation for owner-occupied crofts mirror as closely as possible the arrangements for tenanted crofts – but allowing discretion for the Commission to decide cases on their merits.
47. It must be remembered that crofting legislation since 1886 has always recognised crofts to be a resource in respect of which the crofting community has a legitimate interest. Most owner-occupied crofts were purchased by their sitting tenants not for a market value but for a highly discounted value, and purchasers of crofts have always been aware that the Commission was provided with the discretionary power to let owner-occupied crofts (for instance where the owner-occupier has abandoned and/or neglected the croft). Whatever the current market value of crofts, it is the Commission’s view that it is in the public interest to regulate owner-occupied crofts in order to achieve an important balance between the long term interests of the crofting community and the interests of the individual. In order to meet ECHR obligations, such regulation should be proportionate and focused on delivering the public benefits associated with sustaining the crofting community.
48. It is sometimes suggested that it should be made easier to decroft croft land. However, in our view it is correct that the reasonableness of the purpose for decrofting should be balanced against the long-term interests of the crofting community. When a croft is decrofted, there are then no controls to prevent the former croft land from being amalgamated into a larger farming unit, thereby reducing the opportunities for new entrants to crofting and potentially interfering with the sustainable development of the crofting community and the population retention of that community.
49. On the other hand, we are aware of some apparently unintentional inconsistencies and illogicalities in the legislation about owner-occupied crofts, which have the result of excluding certain people who own and occupy crofts from being “owner-occupier crofters”. These need to be rectified in order that all crofts are subject to a similar scheme of regulation (and also so that the occupiers of crofts enjoy a similar range of

rights and ability to apply for grants and subsidies, etc.). Such rectifications should also confirm that owner-occupied crofts can indeed 'fit' as a normal and mainstream part of the crofting system, and this will enable a better public narrative about owner-occupied crofts and owner-occupier crofters.

Question 8A – To review the provisions relating to owner-occupied crofts, to further harmonise them with those for tenanted crofts, except when there is a reason to treat them differently.

Question 8B – See Annex A

Question 8C – It would ensure that owner-occupied crofts continue to function and be accepted as part of the crofting system.

Question 8D – N/A

Question 9 – Standard Securities

50. As noted above, we welcome the Scottish Government's policy position on crofting, and in particular that "the Scottish Government is committed to reforming crofting to secure its future, *bringing new blood into crofting communities*, and ensuring that it can continue to contribute to the development of a thriving rural Scotland." (our italics)
51. However, there the current financial arrangements for crofting make it difficult for people to enter crofting. Perhaps the key issue which has been facing crofting for over a decade, is one of economics. When crofts are assigned for a price, by a crofter outside his/her family, should the price be constrained?
52. Professor Jim Hunter expressed the problem in his 2006 submission¹ to the Scottish Parliament at Stage 1 of what became the 2007 Act:

"What's altered recently, because of the economic upturn [across the Highlands & Islands] is the value of crofts. Rather like rural homes, they now fetch prices so steep as to preclude their acquisition by whole categories of rural residents. In principle, it would certainly be possible to take legislative steps to reduce those prices. However, this would not be painless. It would entail a reduction in the longstanding rights of crofters. It would also leave outgoing crofters (by no means all of them wealthy speculators) worse off financially."
53. Professor Hunter proposed radical reforms² that could reduce the price of assignments but he also suggested that the democratic acceptability of his ideas should be explicitly tested before they were implemented. The following year, the Shucksmith Report³ proposed a broader combination of measures to address the economic problem. These were intended both to prevent loss of croft land to holiday homes, and at the same time to provide better financial support for incoming crofters. Their recommendations included:

¹ <http://archive.scottish.parliament.uk/business/committees/environment/papers-06/rap06-12.pdf?page=50>

² Eliminating all absenteeism and most if not all holdings of multiple crofts, automatically by legislation rather than cautiously by Commission enforcement action which looks at each case on its merits.

³ <http://www.crofting inquiry.org/Documents/final-report.html>

- 53.1 A presumption against building homes on inbye land, other than in exceptional cases.
- 53.2 Measures to assist new entrants to crofting to be emphasised in the allocation of future subsidies.
- 53.3 All croft houses should be tied to residency through a real burden, which would run with the land in perpetuity even if the house site were separate from the croft land and/or decrofted, and which would be 'rigorously enforced' by the crofting regulator.
- 53.4 To facilitate crofters' ability to obtain loan finance without the necessity of decrofting, an amendment to the Registration of Leases (Scotland) Act 1857 to make a crofting lease registrable and hence eligible for standard securities.
54. The financial crash of 2008 may have lessened the urgency of taking action to resolve the problem of highly inflated croft prices, but only for a time. The issue is back in force and continues to be a major threat to the future of crofting, and to the diversity of the rural population in general.
55. The Commission believes it is highly desirable that those aspiring to the crofting lifestyle should be able to access crofts. If this is to be achieved, there needs to be a strategic decision at Government level, as to whether the solution is to be:-
- very radical action to suppress croft prices, in the spirit of Professor Hunter's 2006 proposals; or
 - a significant expansion of financial support for entrants to crofting, in cash or in kind; or
 - a balanced combination of the two, in the spirit of the Shucksmith proposals.
56. Especially if one of the latter two strategic approaches is chosen, it is likely that legislation and/or other action to enable lenders to hold standard securities over crofts would be a desirable part of the solution. The challenge may be to make sufficient change to convince commercial lenders that a croft is an asset that can be realised on the open market in the event of a default by the borrower. We hope this can be achieved by a combination of legislation and direct discussions with lenders, though we recognise that it may be easier to achieve this in the case of an owner-occupied croft than a tenanted one.

Question 9A/B – It would open a new source of funding for incoming crofters, making it easier for them to access crofts without substantial loss of value for the outgoing crofter. However, in the long run, as with any market system, there would be some upward effect on prices, so this measure might need to be complemented by other measures to restrain the price of assignments.

Question 9C – We believe that discussions with lenders will also be necessary to ensure that options for lending based on crofting assets are developed. See also comments on decrofting in section 6, above. Current crofting legislation is already believed to depress croft values to some extent, compared with the price they would attract if decrofted. Evidence for this is a number of decrofting applications which seem to be purely designed to increase the value of the asset on sale. The current legislation gives the Commission discretion to reject such applications, in the interests of maintaining land in crofting tenure and strong crofting communities. Widespread decrofting would likely lead to crofts becoming less, rather than more, accessible to new entrants to crofting as well as leading to greater amalgamation of croft holdings by fewer individuals.

Question 10 – Ordering of priorities

57. We believe that the two highest priority issues are Absenteeism, Misuse and Neglect; and Common Grazings, because action in these areas could address real current challenges for the crofting system. Changes to Crofting Registration are our next priority, because getting the CR in shape now is necessary to set a course for an efficient registration system in future. A resolution to allow borrowing against crofting assets is our fourth priority.
58. There are opportunities for simplification and clarification in both our next two priorities – Crofting Commission regulatory functions and processes, and owner-occupied crofts. Our lowest priority is Assignment and Succession, because we think few changes are needed here (and we have dealt with the issue of whether assignments should be regulated under Crofting Commission regulatory functions and processes).

Highest priority	Absenteeism, misuse and neglect – An enhanced focus for the Commission’s enforcement powers would do much to build the viability, clarity and credibility of the crofting system.
2 nd	Common Grazings – The forthcoming Bill provides an opportunity to revitalise Grazings Committees by clarifying and strengthening their powers.
3 rd	Crofting Registration – The relationship between the two registers needs to be resolved but in our view this is not particularly urgent, in comparison with the other issues raised in the consultation. Some issues can be resolved through changed practices and secondary legislation.
4 th	Standard Securities – A resolution of the financial issues for new entrant crofters is likely to require non-legislative change as well as anything in the forthcoming Bill.
5 th	Crofting Commission regulatory functions and processes – We believe there are some limited opportunities to make some reductions in the extent of the Commission’s regulatory duties by requiring notification only and/or providing a discretionary power to intervene only where it is in the interests of the crofting community to do so.
6 th	Owner-occupied crofts – There is scope to clarify and simplify the status of owner-occupier crofters.
Lowest priority	Assignment and succession – In our view there are few legislative changes needed here.

Question 11 – Miscellaneous

Question 11A – other priorities for crofting, not covered above?

59. Annex A lists a number of detailed improvements which could be made to the current legislation. It is considered that substantial improvements could be made to the workability and effectiveness of crofting law through relatively minor changes to the existing body of law. The benefits of targeted changes in problem areas that have been identified should not be underestimated.

Question 11B – thoughts about unintended consequences of crofting legislation reform?

60. There will always be the possibility for unintended consequences, but this should not prevent the Government from making gradual or more substantial changes when necessary. The status quo is not easily sustainable, and change is needed.

Question 11 (third part) – any other thoughts about crofting legislation reform?

61. The Commission would be happy to continue to engage with Government on all these issues.

Question 11 (fourth part) – any comments on non-legislative aspects of crofting?

Land use and land taxation

63. The Commission is aware that the Land Commission has begun to consider measures to promote the productivity, diversity and accountability related to the use of land in Scotland. We believe that the experience and example of crofting can contribute substantially to this debate, and arguably the development over time of the crofting system has provided one set of answers to these questions, albeit in a particular historical and geographical context.
64. The Commission has noted that the Land Commission may consider a system of land taxation. If so, the land tax arrangements for croft land will need to be very carefully chosen, because neither the landlord, nor the tenant crofter, nor indeed the owner-occupier crofter, has the same freedom as another landowner to choose how to use the land. The option of exempting croft land from any land tax would have many advantages, not least as an incentive for the continuation and expansion of the crofting tenure. Such a policy would provide a disincentive to those who seek to decroft or resume croft land or common grazing land, thereby encouraging more land to be kept within crofting tenure. Any economic development on croft land or common grazing land (for instance, in the form of renewable energy developments) would be subject to various existing forms of taxation.

Support for crofters and crofting communities

65. Crofters and crofting communities have continued, over many years, to make major contributions to the Government's objectives for the Highlands & Islands. To quote again Professor Jim Hunter's evidence in 2006:

"Today ... rural policy, in Scotland and more generally, aims: (a) to create highly diversified rural economies supporting worthwhile populations; and (b) to foster environmentally attractive landscapes. In this new era, crofting or something like it has a huge amount to offer – not just in existing crofting areas but in the many other localities, inside and outside the Highlands & Islands, where hill-farming is failing and where alternatives like plantation forestry cannot, in the crofting manner, provide a countryside which is simultaneously thickly populated and highly appealing."

66. However the crofting lifestyle is not easy. It commonly involves small-scale agriculture combined with other sources of employment or self-employment and in many cases an active commitment to a local community. Many of today's crofters are committed to the

lifestyle out of personal ideology or because it is their heritage. But Scotland needs more people to choose to take up this lifestyle and the challenges and rewards that it brings. We are aware that many people of all ages aspire to become crofters.

67. Crofting legislation reform can help achieve this but will not be sufficient. Direct support for crofters and crofting communities, especially new entrant crofters, will continue to be necessary to secure the future of this way of life. The future of agricultural subsidies post-Brexit, the roll-out of Broadband in remote areas, and support for economic development, can all contribute to this. As noted above, indirect support in the form of exemption from any future taxes, such as a land based tax, could help to sustain crofting.

Housing and Planning

68. Our comments under section 9 above, consider how the crofting system should respond to the economic challenge which is in large part driven by the high demand for housing and house sites in the Highlands & Islands. These issues also need to be addressed from a complementary standpoint, i.e. housing policy.
69. The Commission welcomes the Scottish Government's drive to expand the rate of new housebuilding, especially of social and affordable housing, across Scotland. However, the interaction between housing, land use and community interests in remote areas is complex. In the crofting areas particularly, a drive for new housing needs to be complemented by a clear view on the types of housing required (with limits to the numbers of second/holiday homes) and by comprehensive spatial planning – so that the best land for crofting, environmental or landscape purposes is not chosen for housing developments. The Commission will liaise with planning authorities across the crofting counties and with agencies such as SNH in pursuit of these aims. It is the Commission's view that housing should be for the benefit of crofting communities (and the wider rural community). Too often it has been perceived to be the other way round, and croft land has been used inappropriately for housing, often in the form of second/holiday homes which can price members of the crofting community (and the wider rural community) out of the market, and diminish future opportunities for crofting.

Crofting Commission
20 November 2017

ANNEX A

Priorities for changes to crofting law – specific proposals

These proposals for legislative change are structured into 6 different areas, namely:

- Croft registration;
- Crofting duties;
- Crofting definitions (crofter, owner-occupier crofter, etc.);
- Decrofting of crofts;
- Common grazings;
- Miscellaneous.

Croft Registration

2010 Act		
Section 4(4)	Trigger events	Purchase (or part purchase) of a croft from a landlord should be a trigger event. Amongst the practical consequences of this omission is that the purchase of a croft usually results in the creation of a deemed croft comprising a right to graze in the common grazings. This information may not, however, be captured in the common grazings registration schedule.
Section 4(4)(l)	Trigger events	Registration of crofts comprising so-called section 17 and section 18 (of the 1955 Act) feus serves no public policy purpose. These very small sites consist of croft house sites only, which on decrofting are removed from crofting tenure.
Section 12(8)	Advertisement of applications	<p>Section 12(8)(a) requires an applicant, on receipt of a registration certificate relating to a first registration, to give public notice of the registration of the croft by placing an advertisement for two consecutive weeks in a local newspaper.</p> <p>Although the Land Court requires an applicant seeking to resume croft land to advertise the application twice (where advertisement is required), it is considered that this requirement is excessive and a single advertisement, or advertisement on the Crofting Commission's website, would be sufficient.</p>
Section 7(1)	Registration Applications	<p>Currently an applicant requires to submit the fee for registration to the Commission. The Commission must forward this fee to the Keeper.</p> <p>It is understood that Audit Scotland have reservations about the Commission holding cheques on behalf of Registers of Scotland that cannot be banked. It is suggested that the Keeper assumes responsibility for fee collection when the Commission submits validated applications. This would resolve some issues related to case batching, and should avoid cumbersome cross-organisation fee reconciliations.</p>
Section 11	Registration schedule	Consideration should be given to making the Crofting Register a more comprehensive register of crofting interests. For instance, the Land Register contains not just ownership boundaries but servitude rights and real burdens, which are an integral part of a property register.

		Consideration should be given, for instance, to requiring any agreements made under section 5(3) of the 1993 Act to be noted in the registration schedule. Approved grazings regulations could also be annexed to the common grazings registration schedule.
Section 11/ Schedule 3, part 4(b)(bb)	Registration schedule	Consideration should be given to requiring the name and designation of any tenant/ owner-occupier crofter to be inserted into the common grazing registration schedule whether or not the croft is registered.
Section 16	Rectification	<p>Section 16(2) to section 16(4) allow only the original applicant or the Commission (only where it is the applicant) or the Keeper to apply to (or in the Keeper's case simply to) rectify mistakes.</p> <p>It is considered that it would be much more conducive to accuracy of the Crofting Register to permit the Keeper to rectify the register where there is a "material inaccuracy". Section 80 of the Land Registration (Scotland) Act 2012 requires the Keeper to rectify the Land Register where she becomes aware of a manifest inaccuracy in a title sheet or the cadastral map; and where what is needed to rectify is also manifest. Where the inaccuracy is not manifest, a judicial determination could be sought from the Land Court.</p>
1993 Act		
Section 52(5B)	Apportionment	<p>Subsection (5B) of section 52 of the 1993 Act appears to be contradictory in that it is not clear whether the apportionment comes into effect when (i) the Commission apportions under subsection (4) or (ii) the apportionment is registered.</p> <p>It is suggested that subsections (4) and (5B) of the 1993 Act are amended to clarify that it is the approval of the Commission of the apportionment application that expires, rather than the apportionment itself (as this is not logically consistent with the apportionment coming into effect on the date of registration). Consideration should be given to whether applications for approval of an apportionment application should be subject to similar provisions in the general consent/ approval regime set out in section 58A of the 1993 Act.</p>
Section 11	Intestacy	<p>It is not clear legally whether the tenancy of the croft passes to the tenant in intestacy on (i) compliance with the requirements of section 16 of the Succession (Scotland) Act 1964 or (ii) on registration, in terms of section 11(1A) of the 1993 Act.</p> <p>It is suggested that section 16 of the 1964 Act is amended to clarify that the transfer of the tenancy becomes effective only on the date of registration. It is also considered unusual that there is no time period within which an application to register the croft must be made pursuant to the transfer of a croft tenancy in intestacy.</p>

1993 Act

Crofting Duties

Section 29	Sublets and duty compliance	Consideration should be given to amending section 29 of the 1993 Act to require the subtenant to ensure compliance with the crofter's statutory duties and to enable the Commission to review and bring to an end a sublet where the subtenant is not providing compliance with the statutory duties. The reason for this is to ensure that the Commission can take effective duties action, where appropriate, in respect of all tenanted crofts and to bring consistency with the statutory conditions. This contrasts with the position under section 29A, which enables the Commission to terminate a short lease.
Sections 26B to 26K (inclusive)	Crofter's and owner-occupier crofter's duties	It is suggested that sections 26B to 26K (inclusive) should be repealed in order to simplify crofting legislation applying to the statutory duties. Consideration should be given to making provision in a new section 26B to empower the Commission to (i) propose to terminate a croft tenancy or let an owner-occupied croft and (ii) terminate a croft tenancy following upon investigation or to let an owner-occupied croft, initially by the owner-occupier crofter within a set timescale, failing which by the Commission. It is suggested that the tenant, landlord and owner-occupier crofter as appropriate are provided with a 28 day period to make representations to the Commission following upon a proposal. It is suggested that there is a right of appeal to the Land Court in respect of any decision to terminate or let.
Section 26J(3)	Proposals to let	<p>Although proposals to let are subject to Commission approval, they are not subject to the general provisions of section 58A (which apply to most applications for approval or consent) because the timescales and factors set out in section 58A are inconsistent with the provisions of section 26J.</p> <p>Consideration could be given to amending section 26J to require the Commission to serve a notice on the owner-occupier crofter requiring him or her to submit a letting application in terms similar to section 23(5) of the 1993 Act (vacant crofts). Such applications would be subject to section 58A of the 1993 Act and one letting application only could be made.</p>

Crofting definitions

Section 19B(2)	Owner-occupier crofter	Is it intended that crofts that are owned and occupied are nevertheless not "owner-occupied crofts" because the owner-occupiers do not own the whole of the croft? It is suggested that where a croft is owned by a multiplicity of owners, the owners individually or collectively could apply to the Commission to obtain owner-occupier crofter status. Where there are multiple owners of different parts of a croft, the Commission will decide whether to exercise
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		its discretion to create what will be new crofts through de facto division of the original croft.
Section 19B(3)(b)	Nominee purchaser	There is an apparent oversight in section 19B(3)(b) in not providing that the croft tenancy must be renounced. It is suggested that section 19B(3)(b) is amended to provide that in addition to acquiring title to the croft as the crofter's nominee, the crofter has renounced the tenancy of the croft. Currently, it would appear that a person can have owner-occupier crofter status notwithstanding that the croft is tenanted. Section 19B(4) could be amended to include "...unless the tenancy had subsequently been renounced."
Section 19B(3)	Executors	Where an executor acquires title to the croft (perhaps for subsequent transmission), it would appear that the executor cannot be an owner-occupier crofter. It is suggested that such a person should be entitled to apply to the Commission to obtain owner-occupier crofter status.
Section 19B(4)	Owner-occupier crofter	Where a croft has been purchased and thereafter re-let, it would not appear to be possible for the original purchaser to obtain owner-occupier crofter status where the croft tenancy is renounced. It is suggested that such a person should be entitled to apply to the Commission to obtain owner-occupier crofter status.
Section 19B(6)	Constituting landlord	Where a person who constitutes land as a croft intends to occupy and use the croft as an owner-occupier crofter, he or she should be entitled to apply to the Commission to obtain owner-occupier crofter status.
Section 61(1)	Interpretation – crofting community	As the Land Court noted in <i>Eunson v Crofting Commission</i> : "as a definition of a crofting community it is more problematic. It is narrow: it does not extend beyond a single township. 'Township' is not defined ... We find it a strange definition." It is suggested that the definition of crofting community is not confined to a single township and that a meaningful definition of crofting community encompassing the diversity of meaningful crofting activity is substituted in its place.

Decrofting of crofts

Sections 24(3), 24A and 24B(1) and (2)	Decrofting	<p>It is suggested that these subsections are repealed and section 25 is amended as appropriate. It is suggested that decrofting applications can be made by a landlord or owner-occupier crofter (or tenant in advance of purchase) only where the applicant is applying to decroft for a reasonable purpose in relation to the factors set out in section 25(1)(a). Section 25(1)(a) would have to be amended to remove the reference to section 24(3) of the 1993 Act. Subsections (3A) to (3C) of section 24 and subsection (3) of section 24B would become part of section 25.</p> <p>It is not understood why a decrofting application should be competent where the applicant is unable to establish that the croft (or part thereof) is to be used for or in</p>
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		<p>connection with a reasonable purpose. Ironically, applications which are not made for a reasonable purpose are not subject to section 25 of the 1993 Act, which would appear to be contrary to the intention of parliament. As the Land Court noted in <i>Eunson v Crofting Commission</i>:</p> <p>“it is extremely odd that in exercising its discretion under that provision (which does not require reasonable purpose in relation to the matters listed in sec 25(1)(a) to be established) the Commission is not entitled to look at these wider considerations and reach its decision accordingly ...that is a very surprising result, which, if not intended, should be cured by legislation at the first opportunity.”</p> <p>Suggested repeal of section 25(2) of the 1993 Act as the interests of the crofting community are already captured in section 25(1)(a) of the 1993 Act. This would mean that the focus in decrofting shifts towards the reasonableness of the purpose and how it relates to the factors set out in section 25(1)(a). However, it is considered that the (future) sustainability of the crofting community should be an important consideration and one of the factors for consideration set out in section 25(1)(a).</p>
Section 25(4A)	Decrofting - access	It would be useful if the requirement that any decrofted site does not impede access to another part of the croft could apply to all part croft decrofting applications.
Section 25(6) and section 25(7A)	Decrofting - advertisement	Decrofting applications are one of the few applications that the Commission must advertise (at its own cost). It is suggested that the onus for advertising decrofting applications should be on the applicant, who should make and pay for the advertisement in terms of a form of advertisement approved by the Commission.

Common Grazings

Section 47(3) etc	Constable	It is suggested that the term “constable” is old-fashioned and has unhelpful connotations and a term such as “grazings administrator” would more accurately reflect the role of a person appointed by the Commission to manage and administer the common grazings.
Section 48(4A)	Proposals	Partial repeal of section 48(4A), as it refers to subsection (9) of section 50B, which was repealed by the Crofting Reform (Scotland) Act 2010. Use of a common grazings in connection with any “proposal” may well require consents or approvals other than that provided by the Commission, which is inconsistent with the terms of subsection (4A). It is suggested that subsection (4A) is amended to provide that where subsection (6) of section 50B approval is obtained, the grazings committee may use the relevant part of the common grazings “in connection with any proposal approved under section 50B(6)” (replacing the existing “for the purpose of

		implementing any proposal approved under section 50B(11)").
Section 48(6A)	Borrowing	Subsection (6A) refers to subsection (11) of section 50B, which has been repealed. It is suggested that this is amended to refer to subsection (6) of section 50B, which makes provision for Commission approval. It is suggested that where the grazings committee intend (on the proposal of a crofter) to use the common grazings for purposes other than maintenance or improvement, it should be clear that the committee can raise money for such a purpose. At present the reference to a part of the 2007 Act that has been repealed casts doubt on the extent to which a committee can rely on this subsection.
Section 49(2)(a)	Recovery of monies	The reference to section 50B(11) in section 49(2)(a) should be amended to refer to section 50B(6).
Section 49A	Duty to report	Suggested repeal . It is understood that very few grazings committees have reported. A corresponding change would need to be made to section 26A(1) of the 1993 Act.
Section 50B(2)	Other purposes	<u>EITHER</u> suggested amendment of subsection (2) to add the words "in the Commission's determination" between the words "would" and "be" OR repeal , with section 58A(7) applying to such applications. The second option could be perceived to involve a dilution of the owner's rights in the common grazing
Section 50B(4)(a)(ii)	Advertisement	Repeal of section 50B(4)(a)(ii) as the application to the Commission is to be publicly notified.
Section 50B(6)	Approval	It is suggested that the words "for its implementation" are deleted as implementation may require other consents and approvals.
Section 51	Enlargement	Provide for the avoidance of doubt that only the crofters agreeing in terms of section 51(1)(b) shall be granted rights in the grazing land.
Section 52(4)	Apportionments	It is suggested that the words "and, where the Commission considers it appropriate, some or all of the crofters sharing in the common grazings" are added after the words "grazings committee". Land Court authority provides that the Commission must take account of the interests of other shareholders when deciding whether to approve an apportionment application. Accordingly, it would be appropriate for the Commission to be able (but not obliged) to consult with the crofters sharing in the common grazings where it considers it fit to do so.

Miscellaneous

Section 2C(2)	Plan	It is suggested that the period set out in section 2C(2) is 9 months.
Section 4A(1)(c)	Exchange	It is not uncommon for the in-bye crofts to be owned by the same landlord, but for parts of the common grazing to be owned by third parties (including, for instance, statutory undertakers). It is not understood why there is any need for the whole of the common grazings to be owned by the same person who is landlord of the in-bye crofts. Suggested repeal of section 4A(1)(c).

Section 5(5)	Section 5(3) agreements	It is suggested that agreements made under section 5(3) of the 1993 Act (which is binding on successors) is a trigger event for registration in the Crofting Register and should be noted appropriately in the registration schedule.
Section 10(1)(b)	Bequest	It is suggested that section 10(1)(b) is repealed . The risk of such a bequest falling into intestacy is high, and as a result it is not thought that this provision has ever been used by a crofter or practitioner.
Section 9	Division	There should be a requirement that any application to purchase part of a tenanted croft should require the Commission's consent to divide the croft (except where it relates to a site which is the subject of an advance of purchase decrofting direction). This would mirror section 19D in relation to owner-occupied croft and help prevent the fragmentation of crofts outwith the regulatory control of the Commission.
Section 11(5)(c)	Termination	It is not known how the Commission could ever be satisfied that a person is entitled to succeed to the deceased's estate following the expiry of the 24 month period referred to in subsection (2). Suggested repeal .
Section 20(1)	Resumption	It is suggested that the words "and that the extent of the land to which the application relates is not excessive in relation to that purpose" is added to the end of subsection (1). This would create parity between resumption and decrofting, both of which relate to reasonable purposes and both of which have the effect of irrevocably removing land from crofting tenure.
Section 20(5C)	Commission letting	A landlord may wish to modify a tenant's rights and conditions of tenure in terms of section 5(3) of the 1993 Act, but this is possible only if the crofter and the landlord agree. Other than rent, the terms and conditions of tenure are set out in the statutory conditions and the 1993 Act and there is little, if anything, that it is possible to consult on. It is considered that the words "on what terms and conditions" are removed and the words "the rent for the croft" are substituted.
Section 32	Assessment of compensation	Amend section 32 to add how compensation is to be assessed when the Commission lets an owner-occupied croft under the compulsory letting procedure. Alternatively a new section 32A could deal with this issue (which would have to set out the basis of the compensation, who would assess it and appeal provisions to the Land Court in the event that there is no agreement).
Section 40A(5)	Annual notice	It is suggested that "1 year period" is replaced with "3 year period" (at least), in order to reduce the administrative costs associated with issuing an annual notice. It is suggested that where a croft is not registered in the Crofting Register, the crofter supplies information regarding the current extent of the croft, preferably by reference to a plan. This will enable the Commission more easily to cross-check its records when it receives an application for first registration of a croft.

Section 55A	Public notification	It is suggested that public notification could be given by means to be more particularly set out in secondary legislation.
Schedule 1, part 16(2)	Convener must chair meetings	Repeal, especially the words “and any of their Committees”, which make it harder to have an independent chair of the Audit and Finance Committee.
Schedule 1, part 16	Assessors	It is suggested that the term “local assessors” is replaced with a more modern and meaningful term in order to reflect the current and future role of assessors.
Statutory Conditions, Schedule 2 Part 11	Reserved rights	It is suggested that the reserved rights are updated to reflect modern requirements. In particular, landlords may require to lay pipes and cables on or under land in respect of, for instance, renewable energy or other developments on croft or common grazing land.
Statutory Conditions, Schedule 2 Part 12	Intoxicating liquors	It is suggested that this part is repealed. The relevant Local Authority licensing authority should be able to decide whether or not it is appropriate to grant a liquor licence in the circumstances (which can include temporary and occasional licences). Examples could include music festivals and craft beer tastings, which could bring useful income to rural economies but could be caught by this condition depending on the meaning of the word “house”.
Schedule 3	Permanent Improvements	It is suggested that that the list of permanent improvements is updated to reflect the fact that a croft may be used for conservation purposes or purposeful uses in terms of modern crofting legislation.

<Ends>