Crofting law reform

Paper by Law Society of Scotland

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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Each year we undertake new proactive public policy projects to address areas of the law that have failed to meet the needs of our modern society and keep up with technological developments. This year, we have committed to consider the reform of aspects of crofting law.

Project objective

The objective of the project is to propose legislative change in relation to aspects of crofting law and to highlight the need for reform of the law in this area.

Crofting law has developed over time in a piecemeal fashion. It is generally considered to be a complex and difficult area of the law, made particularly so by the combination of the law relating to property and that relating to landlord and tenant matters. Crofting law may now be considered to be out-dated in many aspects and in need of reform.

A limited number of specific aspects of the law relating to crofting were identified by the project working group for consideration:

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

The purpose of the project is to make proposals to improve the existing legislation, building on work done to date in respect of crofting law, rather than seek to change policy relating to crofting.

Context

Crofting law started in the 1880s with the passing of the Crofters' Holdings (Scotland) Act 1886. The Act was centred on the policy of providing security of tenure to categories of tenants in certain parts of the Highlands and Islands, together with certain important rights such as the right to fix a fair rent, compensation for improvements and the enlargement of holdings. The initial focus was largely on the landlord/tenant relationship. Subsequent legislative reform has been carried out by the passing of a number of Acts. The Crofters (Scotland) Act 1993 consolidated much of the earlier legislation and subsequent reform has been made by the Crofting Reform etc. Act 2007, Crofting Reform (Scotland) Act 2010 and Crofting (Amendment) (Scotland) Act 2013.

Modern crofting policy appears to have drifted away from a focus on the tenancy and towards a greater focus on an identifiable unit of land that can be registered, mapped, and purchased and in respect of which certain people have rights as well as duties.

Crofting remains of significant importance to the rural economy and living in Scotland. As at the 2017 Census, there were 20,777 crofts registered with the Crofting Commission (the Commission)[1].

It is important to recognise the considerable work already undertaken by crofters and other stakeholders in relation to the reform of crofting law.

In 2013, the Crofting Law Group[2] established the “Crofting Law Sump”, which was set up to assist the Scottish Government in identifying and considering appropriate methods for dealing with outstanding legal issues relating to crofting law. The Group undertook significant consultation on the contents of the Sump and the Final Report on the Crofting Law Sump was published in November 2014[3].

In 2017, the Scottish Government consulted on “the future of crofting law”[4]. In April 2018, Fergus Ewing MSP, Cabinet Secretary for Rural Economy and Connectivity, commenting on the analysis of the consultation responses, announced an intention for a “two-phase approach to legislative reform, with a first phase in the shorter term, leading to a Bill in this parliamentary session.”[5] Phase one work was expected to focus on changes that carry widespread support. The second phase was intended to be a longer-term piece of work to deal with some of “the more complex and challenging issues facing crofting”. It was not expected that phase two would be dealt with in the current Parliamentary session.

In our response to the 2017 consultation, we favoured a Crofting Bill that would include some substantive changes to crofting law and restate some or all of the existing law in this area. We considered that that would

[1] Crofting Statistics 2017-18, https://www.crofting.scotland.gov.uk/userfiles/file/annual_report_and_accounts/crofting_statistics/Crofting-Statistics-2017-18.pdf
[2] Membership of the Crofting Law Group is open to anyone who has an interest in the subject of Crofting Law. More information about the Group is available on its website: http://www.croftinglawgroup.org/
[3] https://www.crofting.org/uploads/news/CLGreport.pdf
[4] https://consult.gov.scot/agriculture-and-rural-communities/crofting-consultation-2017/
[5] https://blogs.gov.scot/rural-environment/2018/04/12/crofting-update/

be the most suitable way of providing a clear restatement of the law while offering the flexibility to make changes where required.

Further to the 2017 consultation, work was taken forward by a Bill Group to frame legislative proposals.

In September 2019, Fergus Ewing announced: "I have…asked officials to work with stakeholders to identify five to 10 priority changes that they would like to see in legislation. Members and stakeholders alike can be reassured of my commitment to crofting legislative reform. I look forward to our continuing combined efforts to achieve that aim. Given the uncertainties around Brexit and the impact that it might have on resources and parliamentary time, I am not in a position to commit to the introduction of legislation during the current parliamentary session, but the approach that I have outlined will ensure that I will be in a position to do so if the opportunity arises."[6]

The Bill Group has subsequently been disbanded for now and it is not clear when legislative change will be effected in this area. Stakeholders have expressed disappointment about the lack of firm commitment from the Scottish Government to bring forward legislation in the current parliamentary session[7].

Following the start of our work, the Court of Session made an important decision in respect of section 50B of the Crofters (Scotland) Act 1993 and whether crofters can develop their own wind farm without landlord consent[8]. The Inner House indicated that section 50B(2)(b) would have to be repealed if crofters were to be able to pursue such developments without landlord consent. We do not make any comment on the repeal of section 50B(2)(b) in this paper.

[6] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12240&mode=pdf
[7] For example: https://www.crofting.org/uploads/news/Crofting%20law%20deemed%20less%20important%20by%20Scottish%20Government.pdf and https://www.rhodagrant.org.uk/2019/10/15/anger-at-crofting-bill-being-shelved/
[8] *Crofters having rights in the common grazings of: Sandwickhill North Street, Melbost and Branahuie; Sandwick and Sandiwck East Steet; and Aignish* v *Crofting Commission and The Stornoway Trust* [2020] CSIH 49

Project work

It is clear that widespread reform of the law of crofting is required, both in terms of simplifying and restating the existing law and making some changes, and we consider that this merits prompt action by the Scottish Government. As referred to above, stakeholders have expressed disappointment at the lack of a firm commitment to the introduction of legislation in the current parliamentary session. While recognising the lack of consensus on some aspects of the Scottish Government's 2017 consultation[9], it is clear from crofters and other stakeholders that legislative change is desired and considered by many to be long overdue.

Our consideration of crofting law in this project has been limited to the following matters:

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

These matetrs were identified as areas of crofting law which merit reform and are largely legal in nature.

Call for views and related discussions

We issued a call for views in relation to these matters which ran from 3 February 2020, initially with a closing date of 30 March 2020, which was extended to 11 May 2020 due to COVID-19. The call for views was promoted on our own website and social media channels, via the Journal magazine, and directly via email and letter to solicitors and solicitor firms working in the relevant field. We are grateful to those organisations who promoted the call for views to their own members.

The call for views sought input on any or all of the four topics in a free-text format. 13 responses were received. Of those, 6 responses were from organisations (46%), 3 responses were from crofters (23%), 3 responses were from solicitors and/or solicitor's firms (23%), and one response was from a member of the public (8%).

We were also pleased to engage in discussion with a range of stakeholder organisations in relation to the topics identified. This gave us the opportunity to explore the topics and possible solutions in some depth.

We are grateful to all those who responded to the call for views and/or engaged in discussion with us throughout this project. The written responses and discussions with stakeholders have aided our understanding of the relevant issues and possible solutions.

[9] https://consult.gov.scot/agriculture-and-rural-communities/crofting-consultation-2017/results/croftingconsultation2017analysis.pdf

Other research

As referred to above, crofters and other stakeholders have already engaged to a significant extent with the reform of crofting law. We therefore took the opportunity to consider material already available.

We considered the analysis of the 2017 Scottish Government consultation, as well as reviewing a selection of the individual responses to that consultation[10]. While the scope of the consultation was much wider than the matters considered by this project, some of the issues addressed in this project had been considered in that consultation.

We also considered the extensive work carried out and reported by the Crofting Law Sump[11].

[10] https://consult.gov.scot/agriculture-and-rural-communities/crofting-consultation-2017/
[11] https://www.crofting.org/uploads/news/CLGreport.pdf

Issues arising and proposed solutions

This section of the paper discusses the issues arising in respect of the four aspects of the project, and proposals solutions. In reaching our proposed solutions, we have taken account of the results of our own call for views and discussions with stakeholders as well as other sources of research referred to throughout this paper and the knowledge and experiences of those involved in the working group.

We recognise that the matters covered by these proposals are limited and do not extend to a full review of crofting law. We consider widespread reform of the law of crofting is required and there would be merit in undertaking such a task as part of a single package of work so as to avoid further piecemeal development in the law and reduce the possibility of unintended consequences arising by making legislative change in respect of some matters but not others.

1. Aspects of succession

Succession matters relating to crofting tenancies are covered by section 16 of the Succession (Scotland) Act 1964 and by the provisions of sections 10 and 11 of the Crofters (Scotland) Act 1993. The law in this area is complex and would merit simplification and greater clarity in order to benefit all parties involved.

Intestate estates – issues arising

The law is in some respects unclear in circumstances where there is no transfer of the tenant's interest within 24 months of the "relevant date" as set out in section 11(2) of the 1993 Act. The "relevant date" is defined in subsection (3) as principally being either the date (no later than 2 months after the date of death of the deceased crofter) on which the Commission receive notification of the death or, where no such notification is received, the date of death of the deceased crofter.

Section 16(3) of the 1964 Act provides that either the landlord or the executor may terminate the lease where the interest is not disposed of within a period of 24 months from the date of death, or such longer period as may be fixed by agreement between the landlord and the executor or, failing agreement, by the relevant court on the application of the executor.

The 1993 Act sets out that where the executor has not given notice of a transfer of interest to the landlord at the expiry of the 24-month period from the relevant date, the landlord shall notify the Commission (section 11(2)). At the expiry of the period, the Commission shall, if satisfied that notice has not been given to the landlord, give notice that they propose to terminate the tenancy and declare the croft vacant (section 11(4)). The following subsections provide details as to the procedure to be followed by the Commission in such circumstances.

It is considered that the law lacks clarity and certainty as to whether parties are entitled to reach agreement after the expiry of the 24-month period to extend the period under section 16 of the 1964 Act and transfer the tenancy. Situations sometimes arise where a croft tenancy has not been transferred within the required 24-month period, indeed, in some cases, the transfer is attempted many years later. In such cases there is

uncertainty for the parties involved and for the Commission as to the appropriate approach to be taken. The law is not clear as to whether a transfer in such circumstances is competent. Broadly it appears that the approach taken by the Commission has been to permit such transfers subject to the agreement of the relevant landlord. The uncertainty in such cases could result in significant efforts, and perhaps costs, being incurred by an executor to little value if the transfer is not permitted. It is unlikely that this matter could be resolved easily without a third party applying to the ordinary courts for a determination.

Further difficulties arise with regard to the law on this matter.

It appears that if no executor is appointed, the landlord cannot serve notice to end the tenancy. In such circumstances, the Commission could seek to terminate the tenancy (after 24 months of the relevant date and subject to the relevant requirements having been carried out). However, the Crofting Commission may be not aware of the circumstances in any given case.

Section 11(2) of the 1993 Act requires the landlord to notify the Commission if they have not received notice of a transfer on intestacy within 24 months of the "relevant date". The landlord may not be aware the crofter has died or the date of their death. In addition, the "relevant date" depends on if, and when, the executor notified the Commission of the death - the landlord may not know if, and when, that has happened. Further, there could be two slightly different periods running – 24 months from the date of death under section 16 of the 1964 Act and 24 months from the relevant date under section 11 of the 1993 Act.

Intestate estates – proposed solutions

In the interests of clarity in the law, we suggest that the relevant sections of the 1964 Act be re-framed to set out the differing rules applying to agricultural tenancies and croft tenancies clearly.

We recognise the challenges facing executors, landlords, and potential beneficiaries to carry out the necessary administration within a fixed 24-month timeframe. As we refer to above, the need for clarity in the law and the policy aim of having croft land in use requires to be balanced with the need for flexibility and a sufficient clarity in the law as to how to deal with tenancies which have not been transferred within the required period.

We consider it appropriate that the 24-month period remains in place to encourage the timeous transfer of crofting tenancies, subject to the flexibility offered under section 16(3) of the 1964 for a longer period where a landlord and executor have agreed, or as granted on an application by an executor to the court. We suggest that consideration be given to bringing applications to the court under this section into the scope of the Land Court[12].

As we note above, section 11(2) of the 1993 Act requires the landlord to notify the Commission if they have not received notice of a transfer on intestacy within 24 months of the "relevant date". While we recognise that there are difficulties with such duties resting on the landlord given the potential that they may not be aware of the circumstances and/or have the necessary information to enable them to undertake the steps required, we

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

consider that landlords should be encouraged to be actively engaged in the administration of their croft and to intimate matters timeously to the Commission where appropriate and where they are able to do so. This would help to support the Commission's use of their powers under section 11(4).

The 24-month period from the "relevant date" differs with the 24-month period from the date of death set out in section 16 of the 1964 Act and we consider this adds further complexity to the law in this area. We suggest that the legislation be amended to provide for a single 24-month period from the date of death.

While we suggest that the 24-month period should remain as the primary position, it is clear that there is a need for clarity in the law as to the approach which should be taken where the tenancy has not been brought to an end under section 16(3) of the 1964 Act, no transfer has been undertaken within the required period (or such longer period otherwise fixed) and where the Commission has not already taken steps under section 11(4) of the 1993 Act.

In such circumstances, we consider that existing legislation should be amended to provide for a process whereby an executor, landlord or potential beneficiary may apply to the Commission for leave to transfer a tenancy outwith the 24-month period and in the absence of agreement or a court order. Such an application should be on a 'on cause shown' basis and it be within the discretion of the Commission as to whether to grant such an application. We suggest that the right of the landlord to serve a notice terminating the tenancy would be temporarily suspended pending the outcome of the application. There will be a number of relevant factors for the Commission to consider in reaching their decision, for example the underlying policy of having croft land in use, the reasons why the tenancy was not transferred timeously including any agreement or application to the court to extend the 24-month period, and the landlord's views on the intended transfer as well as the general interest of the crofting community. Any consent would not have the effect of transferring the tenancy or right (if it is a grazings share), as this would require confirmation, but would enable the executor to transfer the tenancy competently once he or she has obtained confirmation and has carried out the formalities of transfer. The process should be accessible and simple for applicants. By allowing a range of parties to apply to the Commission, this may avoid expenses being incurred, for example obtaining confirmation and a bond of caution, simply to allow a tenancy to be transferred before it is known whether consent to the transfer will be granted (although given the terms of section 11(5), we expect such situations would arise in limited cases only).

It would be appropriate for such application process to be subject to a right of appeal. We suggest that it would be appropriate for this to be to the Land Court.

We consider that the powers under section 11(4) and the subsequent subsections which allow the Commission to take steps to give notice and terminate a tenancy if they become aware that there is no agreement, should remain in place. These enable the Commission to take steps to terminate a tenancy where they became aware that no transfer had been carried out, thereby ensuring that action can be taken to return croft land to use where appropriate. In the event that the Commission takes steps under these powers and the Commission are satisfied that there is an intention for an Executor to transfer the tenancy (for example, has applied to do so under a new application process) but this has not been timeously done or there is a person is entitled to a transfer of the tenancy in or towards satisfaction of their claim to prior rights or entitlement to

succeed to the intestate estate, this is provided for under section 11(5) and the Commission are not to implement their proposal.

We consider that such an approach would help to achieve the balance of allowing flexibility while recognising the Commission's role to take proactive steps to resolve matters under section 11(4).

Testate estates – issues arising

In relation to testate estates, the law is somewhat clearer – section 10(3) of the 1993 Act provides that a bequest is null and void if the required steps to give notice to the landlord and send a copy of the notice to the Commission are not carried out before the end of the period of 12 months beginning with the death of the crofter.

There is a lack of clarity as to whether a croft tenancy can be carried under a residue clause in a will or other testamentary writing. The decision of Sheriff Principal Sir Stephen S T Young in the case of *Gardner* v *Curran*[13] suggests that a residue clause could be treated as a legacy of a croft tenancy in certain circumstances. To our knowledge, this has not been tested, and as an appeal to a Sheriff Principal, is only binding within the Sheriffdom for which the Sheriff Principal was responsible.

It appears that this is generally considered to be a sensible approach. We note, however, that it is not considered to be competent for an agricultural tenancy to be carried under a residue clause although the law on this point is unclear and may depend on whether there is an exclusion of assignees in the agricultural lease and a matter of construction of the will[14].

Testate estates – proposed solutions

The position as to whether a croft tenancy can legitimately pass under the residue clause of a will or testamentary writing needs to be clarified. As referred to above, we note the terms of the decision of Sheriff Principal Sir Stephen S T Young in the case of *Gardner* v *Curran*[15]. There appears to be general agreement that this is sensible approach. As referred to above, we recognise that a specific bequest is required in order for an agricultural tenancy to be transferred, though the matter may depend on the terms of the individual lease and the construction of the individual will. However, given the underlying purpose of a residue clause, it seems appropriate that a croft tenancy could pass under a residue clause.

We suggest that this could be resolved by the insertion of a statutory definition of 'bequest' into the 1993 Act as being either a specific legacy or a legacy of residue.

Transfer process – issues arising

The law allows for a tenancy to be transferred by way of a document transferring the interest[16]. Such a transfer is commonly carried out by docketing a will or grant of Confirmation.

[13] Wick 15th July 2008
[14] See Gill, *Agricultural Tenancies*, para 52-05 and obiter comments in the case of *Kennedy* v *Johnstone* 1956 SC 39 that a specific bequest is required to transfer the tenancy. This was followed by the Outer House in the case of *Reid's Trustees* v *Macpherson* 1975 SLT 101.
[15] Wick 15th July 2008
[16] *Marie Marion McGrath and Another* v *Thomas Lorne Nelson* [2010] CSOH 149

The underlying basis of the court's decision in *McGrath* v *Nelson*[17] and the terms of section 15 of the 1964 Act suggest that some act or deed of transfer is required to transfer a tenancy - intimation alone is insufficient. As noted above, this is commonly done by way of docketing a will or grant of Confirmation. In *McGrath*, Lady Dorrian, referring to docket transfer, notes "that is not the only method by which transfer can be achieved…"[18]. However, the law does not clearly set out the methods by which such a transfer can be achieved.

There appears to be a lack of clarity in respect of intestate estates where an executor has completed a transfer within 24 months from death of the crofter but does not notify the landlord timeously. Section 11(1) of the 1993 Act provides that an executor shall give notice of the transfer "as soon as may be" to the landlord but it appears under the 1964 Act that the landlord is only entitled to serve notice to terminate the tenancy where the tenancy has not be disposed of at expiry of 24 months from date of death (unless otherwise agreed or there having been an application to the Land Court). It appears that the remedy in such circumstances may be for the landlord to apply to the Commission to utilise their powers under section 11 of the 1993 Act. There would be merit in the law being clarified to confirm the position for a landlord in such circumstances.

In addition, the proforma docket found in Schedule 1 of the 1964 Act does not fit with the legislative changes which were made in 2010 in relation to the suggested wording for the transferee. This would merit updating for the sake of clarity.

Transfer process – proposed solutions

While a docket is a suitable means by which to transfer a croft tenancy, the law does not clearly set out the other methods by which such a transfer can be achieved. We consider there should be greater clarity in this regard and would favour a clear statement of the means by which a transfer may be effected. This should be set out in guidance or secondary legislation.

In addition, there would be merit in the law being clarified to confirm the position for a landlord where a transfer is carried out within the required 24-month period but is not notified to a landlord timeously. It appears that the landlord could not terminate the tenancy under the 1964 Act in such circumstances, but may be unaware that the tenancy has been transferred.

As referred to above, the pro-forma docket to the 1964 Act does not fit with the legislative changes which were made in 2010 in relation to the suggested wording for the transferee. This would merit updating for the sake of clarity and being made available online to facilitate access. This would be of assistance to practitioners and would provide reassurance that the terms of any docket could not be disputed by other parties.

Deemed crofts – issues arising

A number of crofters and stakeholders have identified concerns in relation to deemed crofts (i.e. grazing shares and apportionments which have been severed from a croft). These can present difficulties and issues may be complicated to deal with. We recognise that the issues associated with the transfer of deemed crofts do not only apply after death of the crofter.

[17] *Marie Marion McGrath and Another* v *Thomas Lorne Nelson* [2010] CSOH 149
[18] Paragraph 40

In some circumstances, an executor may not be aware of the existence of a grazing share in the deceased's estate and, therefore, fail to take action to effect any transfer of the asset. There is commonly confusion about a grazing right being a separate legal entity and not being a pertinent of a croft.

In circumstances where an executor has not been appointed and Confirmation not granted, it might be necessary for a beneficiary to carry out the necessary administrative processes in order to obtain title to the grazing share. This could involve applying for appointment as executor dative, obtaining a Bond of Caution, applying for Confirmation, and preparing and executing the relevant documents for transfer of the deemed croft including the notification form for the landlord and applying to register the deemed croft in the Crofting Register. This is an onerous process for what may be an asset of limited value.

We consider that the separation of grazings rights that are deemed by legislation to be separate crofts and the in-bye croft land causes many undesirable consequences (which were expressed by consultees). Bringing the grazing rights and a purchased croft back 'together' is a policy matter as well as a legal one, as it would involve interference with the rights of those who currently hold stand-alone grazing rights. This is beyond the scope of this current work.

Deemed crofts – proposed solutions

We consider that the approach set out above in terms of intestate estates to permit an application to the Commission after the 24 month period from the crofter's death to give leave for the transfer 'on cause shown' could also apply to deemed crofts consisting of stand-alone grazing rights or apportionments.

In relation to the administrative matters which may be associated with a transfer of title to a grazing share, we recognise the potential burden on parties involved. However, we consider that this is a matter which requires to be considered in the context of the law of succession generally and may merit further consultation.

Equally, it should be recognised that where a development takes place on a common grazings, a grazings share can become very valuable and the nature of future developments that might take place on common grazings cannot be predicted with any certainty. It should not therefore be assumed that grazing rights have little value.

This group recommends that stakeholders take steps to generate greater awareness among practitioners of the issues surrounding stand-along grazing rights and the necessity of dealing with them separately in succession.

Purposeful use – issues arising

Stakeholders recognise the importance of a croft being put to purposeful use and therefore the desire to have a croft in use where possible following the death of a crofter. At present, there are no statutory arrangements to allow a croft to be formally worked, for example, by a nominated or intended beneficiary before the transfer is completed.

Purposeful use – proposed solutions

The need for clarity in the law and the policy aim to have croft land in purposeful use requires to be balanced with the need for flexibility. In light of the feedback from crofters and other stakeholders, we consider it

important that procedures relating to croft succession are set out in such a way as to encourage the croft being put to purposeful use and are not unnecessarily complicated.

Where the succession is likely to take an extended time, parties should be encouraged to ensure that the croft is put to purposeful use. We would consider it appropriate to include whether the croft has been put to purposeful use as one of the factors that would be considered by the Commission in assessing an application to transfer outwith the 24-month period.

In light of the *Malone v Pattinson*[19] case, we would suggest that a clear statutory definition of "misuse or neglect" is provided.

Practical matters – issues arising

Crofters and stakeholders have noted concerns about the lack of awareness and clarity as to the requirements and arrangements for testamentary writings and estate administration in connection with crofts, as well as the importance of making a will which appropriately deals with crofting interests.

Practical matters – proposed solutions

We consider guidance and awareness raising campaigns on these matters would be merited so as to aid public and agent understanding. We consider that the Commission should play a key role in this work together with other stakeholders.

2. Owner occupier status

A number of issues pertain to owner occupier crofter status. The provisions were introduced by the 2010 Act, the policy being that the same rights and duties should apply to owner occupier crofters as to tenant crofters.

Owner occupier crofter or landlord of a vacant croft – issues arising

Perhaps the most difficult aspect concerns those who own and physically occupy a croft but do not meet the required conditions for an owner occupier crofter as set out in section 19B of the 1993 Act. The Crofting Commission estimates that such circumstances apply in respect of possibly several thousand crofts, but the reasons why section 19B does not apply are various. There may be a number of reasons for this including:

- some pre-1955 Act crofts[20] ;
- an individual purchases part of a croft or an owner-occupied croft has not been transferred in full. This could arise simply as a result of an error or where, for instance, there are two landlords of a croft and a purchase is completed from one landlord only. Section 19B(2) requires the individual to be the "owner of a croft" and this is generally interpreted as being an owner of the whole croft; or

[19] *Peter Malone* (Applicant) v *Mark Pattinson* (Respondent) SLC 39/17

[20] There may be differing views on this matter. We are approaching this on the basis that the condition under 19B(3) is met by crofts purchased between 1886 and 1911, but not met by crofts which acquired between 1911 and 1955. During that period, there was no legislative provision for crofts, and these were small landholdings dealt with under the Landholders Acts. Section 3 of the Crofters (Scotland) Act 1955 provides that as from commencement of the Act (1 October 1955), any holding within the crofting counties which was immediately before commencement, a holding to which the Landholders Acts applied, is a croft. This may be interpreted as meaning that these tenancies are to be regarded as a croft from commencement of the 1955 Act but not that the legal effect of the 1955 Act was to provide that small landholdings and small landholders between 1911 and 1955 did not exist.

- another of the conditions in section 19B is not met – for example, condition 19B(4) relating to letting is not met.

These difficulties may be of particular significance where a party has acquired a croft in good faith only to later find that one or more of the conditions are not met.

Difficulties arise in such scenarios as the croft is technically vacant and so the Commission could force letting proposals for the croft, the owner is not subject to crofting duties, and the individual may be ineligible for certain grants and funding schemes.

We note that section 19B appears to prevent someone who has acquired a landlord's interest in a croft (as opposed to having a tenancy transferred to them) from becoming an owner-occupier crofter. It is not clear if this is an unintended consequence of the legislation as section 19B attempts to provide restrictions on those who may be an owner-occupier crofter.

The condition in section 19B(2) to be the "owner of a croft" is not generally interpreted as requiring ownership of an associated grazing right or an apportionment. An owner-occupier crofter may also have grazing rights as part of his or her title, or the grazings rights may be held by another.

Owner occupier crofter or landlord of a vacant croft – proposed solutions

It is clear that a number of individuals have unintentionally, in some cases in good faith, fallen into the circumstances of being a landlord of a vacant croft rather than an owner occupier crofter. In some circumstances, the individual may be unaware of the situation.

We note that the Commission have previously stated the following, although we understand that the Commission is not currently calling for this:

> "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 its discretion to create what will be new crofts through de facto division of the original croft."[21]

A number of stakeholders have suggested a similar approach.

We suggest that a legislative provision be introduced to allow for an application to be made to the Commission to obtain owner-occupier crofter status. We consider that such a process should not be restricted only to circumstances where a croft is owned by multiple owners, so as to allow those in other circumstances, such as those detailed above, to apply. We consider that this process will be of particular relevance to some pre-1955 Act crofts and to situations where an individual has purchased part of a croft or an owner-occupied croft

[21] Crofting Commission response to the Scottish Government's 2017 consultation, 'Future of Crofting Law', accessed at https://consult.gov.scot/agriculture-and-rural-communities/crofting-consultation-2017/

has not been transferred in full, however, there may be other circumstances where the conditions under section 19B have not been met and an application may be merited. We consider that it should be for the Commission to exercise discretion as to whether to grant any such application.

To accommodate this, we suggest that section 19B(1) be amended to provide that either "all the conditions in subsections (2) to (4) are satisfied" or the person is otherwise approved as an owner-occupier crofter by the Crofting Commission.

It would be appropriate for such application process to be subject to a right of appeal. We suggest that it would be appropriate for this to be to the Land Court.

Another option could be to amend the section 19B definition so that a reference to a croft or crofter in section 19B includes a small landholding or statutory small tenancy within the crofting counties. We consider that this could have the effect of enabling holdings purchased between 1911 and 1955 to be regarded as owner-occupied crofts. However, this would not deal with those holdings purchased prior to 1886, but there is an argument that such holdings were never intended to be given the protections of the Crofters Acts, and in particular the 1886 Act.

We note that a further option could be to require that croft land could only be purchased if the buyer was purchasing the whole croft (unless there was an associated decrofting application). We do not favour this approach and consider that it would be too restrictive and also difficult to achieve. It would also create unsatisfactory situations where following a challenge to first registration, it transpires that a crofter did not in fact purchase the totality of the eligible croft land. Such an approach would only deal with matters prospectively.

In addition to the process set out above, we favour an amendment to the condition relating to letting set out in section 19B(4) of the 1993 Act. We suggest that at the end of the subsection (i.e. after the words "as mentioned in subsection (6)(a)") the following be added: "unless it was subsequently renounced or otherwise terminated by operation of law."

As referred to above, section 19B appears to prevent someone who has acquired a landlord's interest in a croft from becoming an owner-occupier crofter. If this is an unintended consequence of the legislation, we consider that this should be amended, recognising that section 19B aims to prevent those who are landlords (whether traditional crofting estate owners or those who have deliberately set up a landlord/tenant relationship) from becoming owner-occupier crofters.

Removing owner-occupier status – issues arising

Some stakeholders favour removal of the owner occupier status and a return to the strict landlord and tenant division. We are aware that there are mixed views among crofters and other stakeholders on such an approach.

It has been suggested that individuals who wish to own and occupy a croft could achieve this by letting to a family member or by setting up a limited company or other entity to act as the landlord and letting the croft to the individual. Such an approach would focus on regulating the relationship between a tenant and a landlord.

We note that while removing owner-occupier crofter status could be seen as inconsistent with the right to buy provisions, section 19B could be repealed and the right to buy provisions retained, with a purchasing crofter becoming a landlord and being under an obligation to let the croft.

Removing owner-occupier status – proposed solutions

As referred to above, some favour the removal of the owner occupier status. While we can see some benefit in this approach in that it returns matters to a landlord and tenant structure, it would be contrary to the policy intentions of the Crofting Reform (Scotland) Act 2010 which introduced the definition of owner occupier crofters and "ensures that owner occupier crofters who comply with the statutory duties of residence and working the land will enjoy the same security as tenant crofters."[22]

We do not consider it appropriate for us to make recommendations in relation to the possible removal of owner-occupier status. This would reflect a significant change from the policy of the 2010 Act. We also note that removal of this status could limit the right to buy for crofters in the sense that purchasing crofters would then have to let the croft to a crofter, but the crofter could for instance be a spouse or civil partner or a child, if the individual wishes to keep the croft within the family. We consider that any attempt to alter the status retrospectively is likely to cause further confusion. Additionally, there may be implications in terms of Protocol 1, Article 1 to the European Convention of Human Rights, although the right to buy eligible croft land from a landlord was presumably considered in 1976 to be compatible with any rights the landlord has under ECHR and any variation in rights could be considered to be in the public interest in terms of ECHR.

Natural/legal persons – issues arising

A number of crofters and other stakeholders have noted questions around the application of owner occupier status to legal persons (such as a limited company or partnership). The Commission has accepted applications to register a croft on the basis that legal persons may be an owner occupier crofter. We consider that the intention of the law on this matter is unclear.

There is a fundamental problem with applying crofting duties to legal persons, as the way in which the crofting duties have been drafted in legislation would appear to apply to natural persons. There may difficulties in terms of a legal person carrying out the crofting duties – for example, can a limited company or partnership be 'resident'? In addition, while some measures are in place, for example the register of People with Significant Control[23], and further measures anticipated[24], it may be difficult to establish the identity of the responsible person(s). Crofters and others have noted concerns about individuals 'buying up' crofts by outbidding other parties – essentially creating 'croft collectors'. We note that the Commission has no locus in respect of successors in title to a croft. This can be contrasted with other circumstances, for example, if a crofter wishes to assign, the assignor has to obtain Commission consent. It may be particularly difficult to monitor this in the case of a legal person as directors and/or shareholders may change at any time.

[22] Policy memorandum, paragraph 49.
[23] https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships
[24] For example, Register of persons holding a controlled interest in land. Information available here: https://www.gov.scot/policies/land-reform/register-of-controlling-interests/

The approach to legal persons may require to be considered alongside the approach to owner occupier crofter status more generally. If it was considered that legal persons should not be able to be owner occupier crofters (and potentially due to the same difficulties in terms of carrying out the crofting duties, tenant crofters), a legal person could be forced to let the croft to a tenant.

Natural/legal persons – proposed solutions

We consider that there requires to be clarity in relation to the intended policy on this matter. We recognise the approach taken by the Commission to date but also note the difficulties which arise in relation to implementation and enforcement of the crofting duties. We suggest that this requires to be considered alongside the policy relating to owner-occupier status more generally, including the possibility of joint tenancies. Consideration will be required as to those who are currently owner-occupiers. Legislation should be amended to clearly state the types of persons who may be owner-occupier crofters. We suggest that consideration should be given to the possibility of limiting owner-occupier crofter status to natural persons (not necessarily a single natural person).

Removal of land from crofting tenure – issues arising

Some stakeholders have suggested that removal of land from crofting tenure would resolve some of the challenges faced with owner occupier crofter status.

An option would be to permit owner-occupier crofters to apply for whole-croft decrofting. We are aware of mixed views in relation to this approach. Alternatively, any croft land over which a tenant had exercised their right to buy could be automatically removed from crofting tenure. This would have the effect of returning existing crofting holdings to an entirely landlord/tenant system.

There may be certain benefits to these approaches. For example, crofting law traditionally focussed on regulating the relationship between a tenant and a landlord however, since 1976 and particularly following reforms in 2010, also regulates the rights and obligations of croft owners. Removing land from croft tenure might allow owners to borrow against the land, to invest further in their units and to raise capital. It would allow owners to be comparable with owners of other non-croft holdings. Consideration would be required as the approach to be taken to grazing rights in such circumstances, which we note could be for tenanted grazings rights to continue as deemed crofts as at present. Some current owner occupiers of crofts might elect to put land back into crofting tenure by means of forming new crofts.

However, we recognise that such an approach could result in the loss of croft land for housing and other purposes. It could be seen as contrary to the approach of recent legislation, most recently the 2010 Act, which sought to put crofters and owner-occupier crofters on a more or less equal footing. Large scale decrofting of croft land could be seen as contrary to the medium to longer term interests of the crofting community, which has an interest in maintaining land within crofting tenure. It could also herald the end of the crofting system, which was established in some cases to break up existing farms and to prevent the accumulation of land by a small numbers of individuals. The importance of sustaining a resident and local crofting community (and population retention) is also recognised in legislation. At a time when the Scottish Land Commission is developing ideas around greater participation in land rights, it may seem at odds if the

crofting system (including tenants and owner-occupier crofters) were to be changed to remove controls that prevent crofts being subsumed into larger land-holding interests.

We recognise that these options would reflect a significant policy change. As such, we consider that full consultation would be necessary to consider all the issues, including local population retention, the aspirations of government to increase participation in land rights and the medium to longer term interests of crofting communities.

Removal of land from crofting tenure – proposed solutions

We do not consider it appropriate for us to make recommendations in relation to the possible removal of land from crofting tenure. As this would be a significant policy change, we suggest that this would require full consultation and careful consideration of the approach proposed by certain persons in line with crofting law and policy, particularly the sustainable development of crofting and the value of population retention in remote areas.

3. Statutory conditions of tenure

Issues arising

The statutory conditions of tenure for crofters were initially set out in schedule 2 to the 1993 Act which have since been amended by both the 2007 and 2010 Acts. As a result, conditions of tenure are now spread across the 1993 Act, with a number of matters still addressed in schedule 2 and other matters being addressed within the body of the Act – for example, the residency duty (section 5AA and 19C) and the duty to cultivate and maintain the croft (section 5C and 19C). There is some duplication in the provisions, for example paragraph 7 of schedule 2 provides a condition relating to dividing of a croft, but the detail of this is contained elsewhere in the 1993 Act. The statutory conditions of tenure set out in schedule 2 have not been updated in light of other changes to the 1993 Act.

The same duties apply to tenant crofters as to owner occupier crofters. The Sump Report highlighted: “The imposition of the same statutory duties for tenant crofters and owner occupier crofters is a matter of policy but they are to be found in two places in the Act. Several issues have arisen regarding their applicability to ‘mixed crofters’ (see 2.1.4 above) and to subtenants and tenants of a short lease.”[25]

A range of further matters have arisen in relation to the conditions:

- There are mixed views in relation to the distance provided in the residence duty. While the requirement in and of itself appears to be supported, it has been noted that the 32km distance is inflexible and does not accord with modern life;
- There is a lack of clarity in relation to defining and identifying ‘neglect’;
- There is a lack of clarity around the definition of ‘purposeful use’. It has been noted that there is growing engagement and desire for engagement by crofters in environmental projects (such as

[25] Sump at paragraph 2.3.

renewable energy schemes) and land management schemes, however, there is little guidance as to what is considered 'purposeful use' and how such schemes may be considered;

- The duty to cultivate and maintain the croft lacks certainty around the involvement of other family members or hired labour following the removal of the explicit wording from Schedule 2 in this regard[26]. We also note that such a condition does not fit with circumstances where an Executor has been appointed to a croft tenant's estate. Stakeholders also noted the need for a greater focus on maintaining the quality of arable land;
- Paragraph 4 of Schedule 2 refers to fixed equipment to enable the crofter to cultivate the croft. However, this appears to be inconsistent with the right for a crofter to put their whole croft to 'another purposeful use' (section 5C of the 1993 Act). While we recognise that this condition could be 'read down', we suggest that this lacks clarity on the face of the legislation;
- Paragraph 10 of Schedule 2 specifies "The crofter shall not do any act whereby he becomes apparently insolvent within the meaning of the Bankruptcy (Scotland) Act 2016." There is a question as to whether this condition should remain and if so, if the wording is appropriate given that the crofter may not be in full control of when and how he may fall into the definition of 'apparently insolvent', for example if he were to be sequestrated;
- There are a number of matters arising in relation to paragraph 11 of Schedule 2:
    - whether there are sufficient rights for landlords, particularly in the context of environmental and renewable energy projects, for example to permit the running of cable and/or communication wires under the ground, noting that crofters could resist any changes to legislation that enhance landlords' rights and might interfere with their right to share in the development value of any land resumed by the landlord or made subject to a section 19A Scheme for Development;
    - whether there is sufficient protection for tenants who are entering environmental or land management schemes, which may relate to 'public goods'. For example, some actions by a landlord such as the creation of drains or felling of trees, may breach the conditions of such a scheme which the crofter may be committed to. This could lead to a crofter being penalised. We recognise that there are practical challenges in this regard and that greater understanding between a landlord and tenant may help to overcome potential difficulties;
    - whether the landlord is entitled to take, or in the current context restore, peat as a mineral, for example, for carbon capture and peatland restoration projects, or whether indeed crofters have rights to do so, at least with landlord consent;
    - whether the right for a landlord or crofter to cut peat is still appropriate having regard to the Scottish Government's announcements concerning a climate emergency[27]. In addition, we recognise that common grazings have been identified as opportunities for peatland restoration[28]. If a crofter(s) has agreed to a peatland restoration scheme but their landlord could have a right to cut peat, this would appear to be inconsistent. If crofters were to lose peat cutting rights, compensation may be required;

[26] Paragraph 3 of Schedule 2 previously specified "The crofter shall, by himself or his family, with or without hired labour, cultivate his croft….".
[27] https://www.gov.scot/publications/global-climate-emergency-scotlands-response-climate-change-secretary-roseanna-cunninghams-statement/
[28] See *Protecting Scotland's Future: The Government's Programme for Scotland 2019-20* at page 57 accessible at https://www.gov.scot/binaries/content/documents/govscot/publications/publication/2019/09/protecting-scotlands-future-governments-programme-scotland-2019-20/documents/governments-programme-scotland-2019-20/governments-programme-scotland-2019-20/govscot%3Adocument/governments-programme-scotland-2019-20.pdf?forceDownload=true

- whether the provisions on hunting and shooting of game remain appropriate and in line with Scottish Government policy.

The terms of section 5(3)-(6) of the 1993 Act have also been raised by crofters and other stakeholders. It has been suggested that the terms of subsection (3)(a) should not apply where the crofter has had the benefit of independent legal advice before entering into the agreement. We note that the existing requirement of section 5(3)(a) may be considered by some to be reasonable due to the potential to bind successors to the crofter's interest as a result of section 5(6). Stakeholders have also noted that it is increasingly common for prospective crofters to be required to accept a lease opting out of provisions in the 1993 Act before becoming a crofter[29] and the terms of subsection (6) are of note in this regard. It is unclear whether a potential crofter can enter into an agreement that has the effect of depriving him or her of crofting rights when he or she becomes a crofter. There is some Land Court authority indicating that this is possible but clarity on the matter, as well as consideration of issues of security of tenure in terms of the statutory conditions, would be helpful.

Finally, enforcement of the conditions is necessary and crucial to their success. It is important that the Commission have sufficient resource to enable strong enforcement and also necessary resources to ensure compliance with statutory conditions.

Proposed solutions

As we refer to above, the statutory conditions and duties of crofters are currently spread across various parts of the 1993 Act. It is important that the law has clarity and can readily be understood. We therefore consider that the duties should be consolidated and restated clearly in legislation. We also recognise the underlying policy aim that croft tenants and owner occupier crofters should be subject to the same duties.

As such, we support the proposition from the Sump Report that: "Everyone who is entitled to occupy a croft will be subject to the same statutory duties and, unlike the present, these duties will be located in one prominent place in the Act. Every subtenant (of a tenant crofter) and tenant of a short lease (of an owner-occupier crofter) must obey the same statutory duties."[30]

As noted above, there are mixed views in relation to the 32km residence duty. Some consider that the 32km distance is too far from the point of view of population retention, for instance where all the crofters of an island community could live within 32 km but not on the island itself. Others consider it is not in keeping with modern life. We suggest that this be fully considered by the Scottish Government and consulted upon with crofters and other stakeholders.

Crofters and stakeholders have identified a lack of clarity in relation to defining and identifying 'neglect' and 'purposeful use'. Purposeful use is defined in section 5C(8) of the 1993 Act. However, we consider that it would be of assistance for examples to be provided in relation to neglect and purposeful use. It is likely most appropriate that the Commission provide these. This would be helpful to aid understanding of the law on these

[29] This appears to have followed the Court's decision in the case of *The National Trust for Scotland* v *MaCrae and others* 2000 SLCR 56
[30] See Final Report on the Crofting Law Sump, paragraph 2.3.

matters. The arrangements relating to tenant's diversification rights in agricultural holdings may provide a framework in relation to purposeful use. A statutory definition of "misuse or neglect" would also be useful.

As we note above, the duty to cultivate and maintain the croft lacks certainty around the involvement of other family members or hired labour following the removal of the explicit wording in this regard[31]. We suggest that the wording in section 5C(2) be revised to reflect that family members or hired labour can assist to reflect modern day practices – this could be achieved either by altering the wording to reflect that the "crofter must ensure that the croft is cultivated or put to another purposeful use…" or by inserting the wording previously contained in paragraph 3 of schedule 2 that the crofter must "by himself or his family, with or without hired labour…".

We consider that the wording of the condition in paragraph 4 of schedule 2 should be amended to refer to cultivation of the croft or another purposeful use. This would ensure that the conditions were in line with the provisions of section 5C.

In relation to the matter of bankruptcy in paragraph 10 of schedule 2, there is a question as to whether this condition should remain. Some crofters and other stakeholders consider it would be appropriate for the condition to be removed. There are a number of arguments that support removal of the condition – for example, a bankruptcy may be discharged fairly quickly; a crofter could find themselves in financial difficulty as a result of another business interest unrelated to their croft; a trustee in bankruptcy may have little or no interest in the croft/tenancy as an asset particularly where it involves a family home; and the fairly onerous process to enforce the condition may result in the condition not being enforced. We consider that it would be appropriate to review the existence of the condition.

If the condition is to remain, we suggest the wording be amended to reflect that a crofter may become apparently insolvent as a result of steps taken by another, for example by way of an application by a creditor for sequestration. We therefore suggest that the wording be amended to read: "the crofter shall not become apparently insolvent…".

We do not make any substantive recommendations in relation to the matters set out in paragraph 11 of schedule 2. We suggest that these conditions be fully considered by the Scottish Government in light of policies on environmental protection, and social and economic sustainability. It is important that it is possible for peatland restoration projects, renewable energy developments and projects to enhance biodiversity or habitats to take place on croft and common grazing land and that crofting legislation does not provide an impediment to this, while ensuring that crofters are entitled to share in the benefits associated with any such projects and schemes.

In relation to enforcement of the conditions, we note above the importance that the Commission have sufficient resource to enable strong enforcement of the conditions. Formal enforcement should, however, be a last resort – crofters should be encouraged and supported to comply with their duties. Recognising that enforcement may be required in some cases, we suggest that consideration be given as to whether powers

[31] Paragraph 3 of Schedule 2 previously specified "The crofter shall, by himself or his family, with or without hired labour, cultivate his croft….".

should be given to the Commission to recover costs for enforcement of crofting duties. We would suggest that the Commission be consulted on this matter, should the government wish to take it forward.

4. Definition of 'crofting community'

Issues arising

Section 61(1) of the 1993 Act states:

> "crofting community" means all the persons who (either or both)—
>
> (a) occupy crofts within a township which consists of two or more crofts registered with the Crofters Commission;
>
> (b) hold shares in a common grazing associated with that township".

This definition was criticised by the court in the case of *Eunson* v *Crofting Commission*[32]:

> "[73] We find it a strange definition. It is more a definition of who is a member of a crofting community than a definition of a crofting community itself. As such it has value because members of the crofting community are a class of people entitled to appeal certain decisions of the Commission; see sec 25(8) in the decrofting context and sec 58A(4) more generally. It is therefore important to define what that class comprises. But 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 but it is a term frequently used in the crofting context and is normally understood as meaning a crofting village or other settlement having its own distinct identity. It would seem, therefore, that, on its terms, crofting community simply requires a single township of two or more crofts registered with the Commission, with or without an associated common grazing. The reference to common grazings is itself puzzling. The grazing has to be associated with "that township" and "that township" is one in which the member of the crofting community occupies a croft. But if that person already occupies a croft in that township he or she already qualifies as a member of the crofting community under part (a) of the definition. That does not make sense. To our mind the only way in which this part of the definition can be made to work is by treating it as referring to shares in a common grazings associated with a township of at least two crofts and that is the interpretation we apply in what follows."

We also note that there may be a lack of clarity as to the use of the term 'occupy' in the definition. It appears likely that the intention is to cover those who have a legal right to occupation, i.e. croft tenants, owner-occupier crofters and sub-tenants. There is a lack of clarity as to whether someone who has abandoned a croft or has consent to be absent is still "occupying" the croft in terms of this definition.

Furthermore, the 1993 Act uses a variety of additional terminology when referring to crofting community:

[32] *Eunson* v *Crofting Commission* (Application SLC/10-14/15 – Order of 1 March 2016)

> "Greater problems arise where – as is almost always the case in the Act – "crofting community" is followed by words such as "in the locality of the croft" (secs 5A(1), 20(1), (1AA) and (1AC), 25(1)(a), (1A), (1B) and (8), 26G(2)); "in the area affected by the development" (sec 19A(2)(c), 3(b) and (11)); "in the district in which the croft is situated" (sec 25(2)); and "in the locality of that land" (sec 58A(4) and (7)). The question is whether these words extend the definition beyond the township in which the particular issue – whether it be development under sec 19A, resumption under sec 20, decrofting under sec 25 or any other matter – arises."[33]

The Court in *Eunson* provides interesting commentary on the matter. It is not clear why this variety of wording is used or how these terms differ. This lack of clarity in the law is unsatisfactory. A clear definition is necessary to support transparent decision making.

The application of the definition in the context of the 1993 Act relates to the regulatory aspects of crofting law, its role and responsibilities. It is relevant to consider this context when considering the definition of crofting community. The underlying policy of protection of the crofting system and the rights and responsibilities associated with crofting are key.

A narrow definition of a crofting community, or at the least, primacy to the views of those involved in crofting, appears to be broadly favoured by crofters and other stakeholders. A narrow definition is likely to assist simple and streamlined application of crofting law. Having a smaller number of potential objectors to Crofting Commission applications also allows the Commission to process applications more efficiently, as objections inevitably increase the time it takes to process applications.

The wide-ranging circumstances and geographical differences across Scotland's crofting areas makes it challenging to achieve a definition which will be universally suitable. It is noted that the concept of 'township' works in some geographical areas but not in others. For example, in some areas where crofting is not clearly organised into townships, the Commission has some townships in its records that consist of a singly croft only.

In defining the terms, consideration as to the desired balance between local crofting interest, local community interest and the wider interests of crofters must be given. The concepts of communities of place and communities of interest may be considered. In this context, there is likely to be overlaps between these concepts. The majority of recent legislation relating to communities focusses on communities of place (for example, the Community Empowerment (Scotland) Act 2015, Land Reform Act (Scotland) 2016, and Islands (Scotland) Act 2018). It must be recognised that in some areas, there may not be a 'community of interests' even between crofters.

Central to the debate around the definition of crofting community is whether the 'crofting community' should include crofters only, include non-crofters, provide for a majority of crofters (for example, as provided for in the community right to buy provisions in the Land Reform (Scotland) Act 2003) or give primacy to the views of crofters.

[33] *Eunson* v *Crofting Commission* (Application SLC/10-14/15 – Order of 1 March 2016) at paragraph 73

The definition of crofters in this regard is also significant – in terms of the Act, this includes crofting tenants, owner occupier crofters and crofters with shares in common grazings. There is a question as to whether only active crofters should be included in the definition. This may give rise to interaction with the matters addressed above – for example, the status of owners who are classed as landlords of a vacant croft and adherence to crofting duties. In addition, some may consider that family members are crofters too. There is also a question around cottars. Should these parties play a role in the definition?

There is one particular context where a broader definition of "crofting community" may be particularly useful which is in the context of decrofting applications. Section 25(2) of the 1993 Act refers to the "general interest of the crofting community in the district". The case of *Gray v Crofters Commission*[34] noted that "crofting community" in this situation should be widely rather than narrowly defined, though the decision in this case predated the statutory definition of "crofting community" now found in the 1993 Act. The words "general" and "in the district" would imply that a broader consideration than a singly crofting community is to be considered, but this interpretation is not consistent with the current statutory definition. It is possible, for instance, that deleting the word "community" in section 25(2) of the 1993 Act could allow its original statutory purpose to be more clearly applied.

Proposed solutions

As referred to above, a number of difficulties have been identified with the definition of 'crofting community' as set out in section 61 of the 1993 Act.

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

There are benefits of a narrow approach to the definition: for example, the definition applies to those to whom regulatory matters of crofting law are primarily relevant, the crofters, and there is a limited number of individuals who are entitled to lodge objections with the Commission under the 1993 Act. We recognise that the scope of those who may lodge objections will have resource implications for the Commission and would also likely increase the length of time to obtain any Commission consents or approvals. However, on some matters, there may be a wider crofting interest from within a local crofting community, primarily in relation to decrofting applications where a number of discrete townships within a larger crofting community may have an interest in an application, as well as non-crofters who wish to acquire crofter status. In addition, a narrow approach to the definition would likely include only those who are croft tenants, owner occupier crofters and

[34] 1980 SLT (Land Ct.) 2

crofters with shares in common grazings, but not family members, landlords, cottars or others with an interest in crofting (for example, those working on a croft).

If a narrow approach is desired, it may be appropriate to define a crofting community as:

> "crofting community" means a community which consists of two or more persons who (either or both)—
>
> (a) occupy crofts within a township which consists of two or more crofts registered with the Crofting Commission;
> (b) hold shares in a common grazing associated with a township which consists of two or more crofts registered with the Crofting Commission.

This definition has similarities to that provided in the Islands (Scotland) Act 2018, section 2, in respect of island communities, but in this case, is based on a community of place only (rather than also a community of interest approach)[35]. We consider that the use of the word "persons" would allow sufficient scope for natural and legal persons to be included. We consider it would be appropriate for the legislation to clarify that for the purposes of the definition, a "person" includes a subtenant or short lease tenant. An alternative approach, if desired, would be to use the phrase "are crofters within a township" which we consider would restrict the definition to those who are tenant crofters or owner occupier crofters under condition (a) and those holding shares in a common grazing under condition (b).

We recognise that this definition is limited only to townships consisting of two or more crofts. We do not consider that this causes difficulties in respect of areas where there is only a single croft – it appears that, if a narrow approach to the definition is desired, there need not be scope for others who occupy crofts to be notified or consulted given that they are not within the relevant township.

If it is desired that only those who are actively involved in crofting be entitled to pass comment or object to proposals under the 1993 Act, consideration could be given as to whether it may be appropriate to require those occupying crofts or crofters (depending on the approach taken to the definition) to register with the Commission in order to take these steps, however, this would bring further administrative burden on crofters and the Commission. It is likely to be challenging, in practical terms, to identify if an individual is actively crofting. We suggest that further consideration and consultation would be required on any such approach, as unintended consequences could result from a prescriptive definition being made.

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

[35] For example, the Islands (Scotland) Act 2018, section 2 provides for a second test for island community: "(b) is based on common interest, identity or geography…..".

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

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

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

In this regard, we consider that if a wider approach than that provided in the definition of 'crofting community' (or any similarly scoped definition to be enacted in future) is desired in respect of any or all of these matters, then these matters require to be specifically carved out of the scope of the general definition of 'crofting community' provided in the legislation. We recognise that a wider approach may be desired for some matters but not others. For example, in respect of decrofting, a wider approach would enable positive demonstration of interest and demand for croft land, in contrast to other regulatory provisions which have a greater focus on objection to certain proposals.

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

Alternatively, if a narrower approach to the definition of 'crofting community' is envisaged, this should be specified in the legislation. In addition, the use of the variety of terms "locality", "area" and "district" lacks clarity and consistency. The legislation should be amended either to use the same term or for terms to be clearly defined and how any such definition relates to the primary definition of crofting community. The practical effect of the statutory definition of crofting community is that the words "locality", "area" and "district" simply locate where the crofting community is and do not indicate that the interests of that locality, area or district should be taken into account.

Other remarks

As referred to above, we consider that widespread reform of the law of crofting is required and this merits prompt action by the Scottish Government. The scope of this project was limited to the matters addressed above, however, a number of other matters relating to crofting law arose during work on the project. These include:

1. The 1993 Act contains various references to a person's "wife or husband" which have not been updated to include civil partners, presumably through oversight (for example, sections 17 and 36). All such references throughout the Crofting Acts should be appropriately amended. Similarly, there are references to the Secretary of State which may be updated.

2. As noted above, the terms of section 5(3)-(6) of the 1993 Act have been raised by crofters and other stakeholders. We suggest that consideration be given to how these provisions are being used, both by the Land Court and by crofters and landlords, to determine whether any amendment should be made to the provisions.

3. The 2010 Act introduced the possibility of a bequest of a croft tenancy to two beneficiaries with a requirement that the croft be subdivided (section 10(1)(b) of the 1993 Act). The extent to which this provision has been utilised is unclear and we note the potential risks involved if the Commission do not give consent to the division or if an application for registration of the division is not made. We consider that there would be merit in a review of this provision to ascertain its use and whether any changes to the law in this regard would be merited.

4. Consideration could be given to clarifying whether joint tenancies could be created in respect of crofts, after consideration of the relevant law and policy and consultation, including with the Commission.

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