



Scottish Government

Governance Review – Crofting Commission

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Introduction

Review background

1. During November and December 2016 we reviewed the governance arrangements in place at the Crofting Commission. The review was undertaken for and at the request of the Scottish Government.
2. This review was commissioned to look into certain aspects of the governance systems, procedures and practices in place within the Crofting Commission.

Context and application

3. The agreed purpose of this work was to review the current position, with a focus on making recommendations on future actions and supporting continuous improvement. It should help inform developments within the Commission as it moves forward, particularly given the upcoming Commissioner elections and the evolution of the organisation.
4. This has been a targeted rather than exhaustive review, to address key issues and consider particular cases. It has looked at processes in place to support the work and decision making of the Commission. The scope of the review excludes review or comment on the decisions taken. Nor does it offer any legal opinions.
5. No view, expressed or implied, is made regarding the activities or practices of stakeholders external to the Commission.
6. This report has been produced for the sole use of the Scottish Government (and, by extension, the Crofting Commission). No liability is accepted to any third party, to the fullest extent permitted by the law. It should not be reproduced in whole or in part or relied upon by third parties without the relevant expressed authority.

Acknowledgements

7. We would like to thank all those consulted as part of this review for their time and assistance.

Scope and focus

8. Our approach involved a number of steps and a range of methods of enquiry. Discussions with Scottish Government at the outset have helped to ensure the work is appropriately focused and targeted.
9. The overall aim was to determine whether the Crofting Commission has robust governance arrangements in place. In order to achieve this aim, our work has included:
 - Examining available records, reports, governance documentation and submissions
 - Interviewing staff and Commissioners as appropriate
 - Considering arrangements for meetings and timely provision of minutes, agendas and papers
 - Assessing how the Commission's work is supported by proper consideration and effective decision making
 - Assessing aspects of governance in place to support decision making in the Bohuntin, Upper Coll Common, and Mangersta Grazings cases
 - Considering Executive support, and how reports and recommendations submitted by the Executive meet the needs of the Commission Board; and
 - Considering conflict of interest arrangements.

Conclusion

10. There have been notable failures in governance within the Crofting Commission, at both executive and non-executive levels. The Commission has not been working as a fully effective, coordinated entity. It has spent considerable time discussing internal problems and reacting to crises and conflicts. Whilst no body operates without pressures and setbacks, the Commission has been particularly impaired in this respect.
11. The way in which the September 2016 Brora board meeting and the subsequent repercussions have been handled must have eroded crofters' and the wider public's perception of the ability of the Commission to operate as a cohesive and focussed unit. This type of adverse publicity is overshadowing the Commission and its staff. It is detracting from the wider outcomes and achievements of the organisation.
12. Strong personalities, differences of opinion and apparent incongruent individual objectives and priorities have also impaired effective and efficient governance. What could be perceived by some individuals as a passion for supporting crofting and "doing the right thing" for crofters can simultaneously create an entrenched and inflexible approach to addressing and resolving challenges facing the Commission. This has repeatedly led to personality clashes, a culture without full and transparent exchange of equally-important views, and a breakdown of some relationships which are crucial to good governance. There is a strong case for the Commission seeking professional support from an independent expert to work through the interpersonal issues which are impacting the workings of the organisation.
13. Documentation and robustness of records management has also been an issue. In some areas of enquiry, we have been offered different and contrasting accounts of events which are not reconcilable, and for which documentation is either inconclusive, not robustly maintained (eg in terms of what constitutes extant or withdrawn/superseded paperwork), and/or the "official" record of what happened is in dispute. This exacerbates problems where there are differences of opinion, recollection and/or objectives.
14. There are also concerns in the way public engagement and announcements have been made (particularly at Commissioner level), without clear cognisance of the Commission's policies, procedures and collective decision making process. This impacts on how the Commission is perceived in public, how its work and decisions are interpreted, and the general level of confidence in the Commission. It is vital that communications policies are universally observed.
15. The Scottish Government has provided some ongoing support to the Commission, but there needs to be a balance between this support and the ability of the Commission to deal with matters internally and of its own accord. Crofting Commission Board and staff could benefit significantly from expanding their networks and seeking greater engagement with and learning from other NDPBs and public sector bodies. These types of networks provide a valuable source of knowledge, experience and lessons learned.
16. Commissioners and staff should always feel they demonstrate the characteristics set out below. Not doing so reflects a governance problem which is likely only to degrade if left unaddressed.
 - Having the confidence to raise concerns
 - Having the ability to disagree, but with an optimism and confidence that a negotiated solution can likely be agreed (or at least be collectively supported in public)
 - Encouraging praise where it is due

- Always respecting each other, Office Holders, and the strategy and objectives of the Commission.

Findings and Recommendations

Relationships

17. Strong personalities, differences of opinion and (at times) incongruent individual objectives and priorities have adversely impacted on the effective and efficient governance of the Commission. Some individuals have displayed an entrenched approach to addressing and resolving challenges facing the Commission. Personality clashes and a breakdown of relationships crucial to good governance have clouded the work of the Commission.

There is a strong case for the Commission seeking professional support from an independent expert to work through the interpersonal issues impairing the ability to work as a cohesive, integrated and fully effective organisation. The exact approach to this issue may be determined by the outcome of the upcoming elections in March 2017.

18. Members of the public are able to raise any concerns about the working of the Board via the published complaints process. However there is less visibility on how concerns should be raised by staff, board members and certain other parties. The whistleblowing process could be used by board members and staff, however this may be considered heavy-handed.

There may be a role for a Senior Independent Director/Commissioner within the organisation. This could be a multi-faceted role, but would at least provide a route for staff and/or other board members if they have concerns which they feel they cannot take to the Convener or Chief Executive (or which have not been resolved successfully through that route). More widely, such a role could provide a sounding board for the Convener, serve as an intermediary for the other Commissioners where necessary, help conduct the Convener's annual performance appraisal, or become involved in external complaints processes where other key individuals (eg Convener and Chief Executive) are conflicted out. Such a role should differ from that of a Vice-Convener; for example, a Senior Independent Director would not have a deputising role for the Convener in his or her absence.

Operating Environment

19. The Commission Board is made up of elected and appointed members with varying degrees of knowledge and experience. The composition of the Board cannot be fully planned as the majority of Commissioners are elected. Although the current Board has a general development programme, individual Commissioners may need different amounts of training and the programme may not reflect their individual needs. Management have already started work to develop a training and development plan to support the new Board in 2017.

We recommend that, as soon as practical after appointment, Board members should undergo a skills and capabilities assessment against the requirements for the role to identify any training and development needs. Board-wide and individual training programmes should then be developed. This should cover both the formalities of acting as a Commissioner and soft-skills and behavioural awareness training to support cohesiveness, collaboration and team working.

Progress against these plans should be monitored and appropriate commentary included in the annual accounts.

A more robust and inclusive Commissioner appraisal process is also required, to help identify and deliver ongoing training and skills development. The potential to co-opt experts to support the work of the Board or its Committees should also be explored further.

20. The various pieces of crofting legislation were enacted a number of years ago. We found a universal consensus that certain aspects of the legislation were no longer best suited to the environment that crofting now finds itself operating in. In addition, certain aspects of the legislation had not been tested and no or limited legal precedent or procedural process exists to handle those instances where the wording could be open to challenge or subjective interpretation. (Indeed, this latter point was a recurring and significant issue as we looked into the decision making surrounding the Grazings Committee cases within the scope of this review).

A review of crofting legislation is planned within the lifetime of this parliament. We endorse this review, and encourage that exercise to be mindful of both scope and clarity of legislation. In the meantime, we recommend the Crofting Commission identifies areas that it feels it has insufficient or no policy/processes in place to support, and looks to develop appropriate plans in the interim. Such an exercise could also support the Commission in informing drafting and consultation over any new legislation.

21. The Board meeting held in Brora in September 2016 had significant repercussions for the Commission, in both procedural terms and stakeholder perception. There has now been dubiety over the status of the meeting for several months, including lack of detail over a vote of no confidence in the Convener after he exited the meeting. There has been some confusion about the impact and legality of such event, and how issues should be resolved.

These issues should be clarified as soon as possible, including with the wider public. A process should be put in place to manage any future votes of no confidence, in terms of making it clearer how the existing rules will be interpreted and applied in practice. That questions arising from Brora are still unresolved some months on reinforces the issues highlighted elsewhere in this report.

Decision Making & Transparency

22. In the minutes of Board and sub-committees, actions were noted which were not subsequently reflected (either fully or at all) in the action summaries. The meetings are often full and can move at a relatively fast pace, increasing the risk of actions or key points being overlooked. This is especially important when critical and high-profile decisions are being discussed and action is to be taken.

There are several options available to address this issue. For example, the Commission could choose to audio or video record meetings for minuting purposes, or the Chair/minute taker could summarise at the end of each agenda item (or sub-item) the relevant note and action point(s). This would allow key phrasing or wording to be discussed, so it is as clear as possible

what the meeting has collectively decided has to be done. Any recording/broadcasting could also allow wider stakeholders to observe directly the work of the Commission and overcome any logistical issues in attending meetings.

23. The agenda for each Board meeting can be extensive. It has been a regular occurrence to have oral items and 'special' or 'informal' meetings to discuss any issues, and late amendments to planned agendas. The quantum of this within the Commission is not in line with best practice and erodes transparency and audit trail. This approach may have attractions when dealing with controversial or sensitive items, but this is almost always dwarfed by good governance and public interest arguments. Using these mechanisms too frequently can create the perception that decisions are taken out of public view and the minutes of the Board meeting may become sanitised, with minimal challenge and discussion evident on record. Indeed, it appears that the governance issues the Commission has experienced have been partly tied to the propensity for 'oral' and 'informal' meetings and a resultant lack of clarity over who said what, to whom etc.

We recommend that the number of oral agenda items should be minimised and, ideally, only used for information items rather than those requiring decision. Meetings would benefit from more robust and timely agenda planning. Strategic or potentially controversial decisions should never be taken on the basis of an oral agenda item or informal meeting. It is acceptable to defer items where there has been insufficient time for consideration or information is lacking, but doing so regularly calls into question the meeting administration and preparedness.

At the end of Commission meetings, there may be value in including a (brief) standing agenda item to seek any comments on the meeting preparation, operation, papers and administration, to support continuous improvement.

24. There is a strong and wide perception that the Board has been too involved in detailed matters and in individual cases. We endorse this view. Indeed, this may partly explain some of the issues and delays involved in dealing with certain complaints and cases. A substantial scheme of delegation to officers has recently been put in place in response, and indications to date are that this is delivering a clear improvement to the workings of the Commission. Going forward, the mechanisms in place to assess the extent of its success could be further developed.

The management team and the board should be regularly updated on the impact of recent changes to sub-committee and management delegation. There should be clear metrics developed to allow for ongoing review and assessment of how successful this has been in practice. The Board should also review the terms of reference for each Committee to ensure it is delegating in an efficient but effective manner.

25. Whilst the Commission has a responsibility to engage with crofters and respond to matters brought to its attention, this does not mean it has to take full and sole ownership of any given situation. There is a risk that, by doing so, it is taking forward a matter which is best served by reference to another body or forum.

We recommend that the Commission takes a broader consideration of what it does in practice against the responsibilities for which it is charged. In some cases, it may find that directing a correspondent to engage with other entities and authorities such as HMRC, the police, the

Courts, independent arbitration etc may be a far more appropriate way to seek resolution to a matter of which it becomes aware. Commission management should have a clear role in helping with evaluation of any such cases at an early stage of the process.

26. Over the course of this review, issues in relation to in-house and external legal advice processes were identified and discussed. (We appreciate this can be an area of professional judgement and opinion in the absence of definitive rulings/case law). Some interviewees felt legal advice had been received by the in-house solicitor during the year and decisions were made on that basis. Others now felt decisions had been taken which conflicted with that previous advice, decisions and/or existing policies. These differing views were shared across executive and non-executive levels. Without expressing a legal view, we find it notable that there seems to have been somewhat limited action or success in “tying up” all the various pieces of advice, legal commentary and policy to avoid inconsistent and somewhat isolationist scrutiny and decision making. This particularly arose in relation to the consideration of the legal position for Grazings Committees and Grazings Constable appointments. There was insufficient clarity over respective roles, remits and expected levels of proactivity in seeking/offering legal advice.

Although all Board papers now contain legal impact and policy sections, the role of the internal solicitor and the internal processes for obtaining legal advice should be further discussed and clarified. Linked to the above, this should also include consideration as to whether the matter put before the Commission is better served by directing a correspondent to engage with other entities or authorities.

Governance Standards

27. The Standing Orders assert that, once a decision has been reached by the Board, the individual Commissioners should support the Board position even if they formally disagreed during discussions. This is rooted in the established governance principle of collective solidarity. This principle does not look to quash dissenting voices or robust discussion within an organisation, but rather supports the achievement of a coordinated and cohesive organisational position or policy. It is also a key aspect of raising and maintaining confidence for external stakeholders and service users. There has been repeated and public dissent from this principle and from agreed policies, particularly in some Commissioner commentary.

We recommend that the importance of this principle and compliance thereof is covered in training for Commissioners, including the induction materials for new Commissioners. Non-observance to the agreed process should be identified and acted on, commensurate with the context of the specific situation.

28. In addition to the other issues noted in this report, our review of the Crofting Commission against the Good Corporate Governance Checklist¹ identified a related recommendation, as follows:

A statement should be included within the Crofting Commission annual report confirming the extent of compliance with relevant governance standards and codes of corporate governance.

¹ On Board guidance

Any non-compliance should be highlighted and explained in the report, along with details of how these will be addressed going forward.

Conflicts of Interest

29. Conflicts of interest are not always declared at the start of the meeting, but held over until the relevant item on the agenda. The process of withdrawing a previously declared conflict of interest is not contained in detail within the current Commission guidance and this has led to some issues at Board meetings (most notably in Brora in September 2016). Each Commissioner is responsible for declaring and rescinding their conflicts, with a reliance on a degree of professional and ethical judgement to interpret the rules and guidance. The current system has proven to be controversial and problematic in practice, and led to adverse publicity given the way the issue played out at the board.

A process should be agreed for withdrawal of previously declared conflicts of interest, and the Commission's conflicts of interest guidance should be updated accordingly. If further guidance or support is deemed required in particular cases, formal advice should be sought from the Standards Commission for Scotland. This should be done in good time before any meeting. Any relevant documentation arising should be available on request, as evidence to support resulting actions (eg rescinding of any interest). There may also be value in further training on declarations and management of conflicts of interests.

Support Structures and Processes

30. Other formal meetings involving board members (eg with groups and stakeholders) are generally not minuted. Some external parties have recorded the meetings themselves and made them public. There is also the perception held by some that the Standing Orders are applicable to all meetings and that the Convener must chair all meetings where he or she is present, though this is not necessarily the case.

There are clear procedures in place for hearings and board meetings, but we recommend that the processes for other meetings (eg where a number of Commissioners are in attendance with external stakeholders) are included in the Standing Orders. Developing this process should take cognisance of "lessons learned" from the meetings with shareholders in relation to Grazings Committees cases.

31. Although there is evidence to support the view that 'case files' are well maintained, we encountered instances where some other documentation (including version control of documentation) is less so. At times it has been difficult to trace back certain discussions and decisions to relevant audit trails and documentation referred to by individuals during our meetings. We were only able to access certain papers when handed an individual's personal copy which they had happened to retain. This does not reflect good practice, nor comprehensive and complete record keeping arrangements. This audit trail issue includes appointment, extension and termination of Grazings Constables. There were also similar concerns raised by some of those interviewed over the appointment of PR support.

Whilst the Crofting Commission does not use a document management system at present, it is investigating the options available. We endorse this evaluation. In the meantime, a clear and complete audit trail of key documentation should be retained (even if any such documentation is subsequently superseded). This should also take account of audit trails surrounding short notice and ad-hoc procurement actions.

32. During the review we were made aware that some Crofting Commission business was transacted using personal emails and contact details. We have been unable to establish a clear rationale for this and we have not reviewed details within this correspondence. Given earlier comments on audit trails and transparency, there is a risk of breach of Freedom of Information or Data Protection legislation, as well as the Commission's own IT and communications policies. This also creates problems in understanding when officers are acting in an official or personal capacity.

All Commissioners and staff should have use of and access to official Crofting Commission communications. They should be firmly reminded of the need to avoid use of non-official mechanisms. Non-compliance should be dealt with, in a manner commensurate with the context of the specific situation.

Cases Reviewed

33. We reviewed certain aspects of the Bohuntin, Mangersta and Upper Coll cases as part of our work and a number of governance observations arose. The Crofting Commission has already taken forward some of these issues and there are expected to be further developments subsequent to the time of writing this report.

Governance issues

34. The governance issues raised during our review of aspects of these cases have been factored into the findings and recommendations set out above. Specific issues of noted concern include:

- Problems with the robustness and transparency of Grazing Constable appointment, extension and early termination processes
- Potential for perception of inconsistency of decision making across Grazing cases, due to the insufficiently robust documentation and lack of transparency of key stages in the process
- Use of insufficiently formal papers and documentation, with it being unclear if these have been seen (either in good time or at all) by all relevant Crofting Commission staff, or noted in official Board paperwork
- In-house and external legal advice process problems, including over respective roles, remits and expected levels of proactivity
- Problems in understanding and interpretation of Board discussions and the written records
- Availability of documentation/minutes/notes for other meetings attended by one or more Commissioners
- Conflict of interest statements and retraction processes, particularly regarding timing and interpretation of existing rules and guidance. This includes a focus on the letter (rather than spirit) of the rules and not having advice formally recorded to support discussion of potential conflicts
- Decision making which could be argued as inconsistent with previously agreed positions (including a lack of clarity over whether this is a knowing departure or an apparent oversight)
- Inconsistent and/or mutually-incompatible understandings by different individuals of Standing Orders, such as in relation to roles at meetings
- Level of Board engagement with the details of Grazing Cases, including the distinct roles of detailed decision making versus oversight and scrutiny.

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