

Crofting Law

The Final Report on
the Crofting Law Sump

Crofting Law Group
November 2014

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During the passage through the Scottish Parliament of the Crofting (Amendment) (Scotland) Act 2013, MSPs were informed, by practitioners giving evidence, about the many problems in the existing legislation that were causing difficulties for crofters, landlords and others.

Paul Wheelhouse MSP, Minister for Environment and Climate Change with responsibility for crofting, gave an undertaking that his officials would investigate, in consultation with stakeholders, what the best method might be for dealing with these outstanding issues.

In September 2013, the Crofting Law Group announced details of its "Crofting Law Sump", which was set up to assist the Scottish Government in this process. The purpose of the Sump is to gather together details of the significant issues and problems within existing crofting legislation and to provide an opportunity for those involved in crofting to give them close attention.

Those CLG members who attended the Group's Annual General Meeting at Inverness on 30 May 2014 took time to consider and debate the issues contained in the "Collected Sump". Thanks are due to them and to the group leaders who recorded their deliberations and opinions. Our contribution, as the administrators of the Sump, was then to comment on each issue and to indicate the activity level at which each might be resolved.

In September, the "Commented Sump" was circulated as a consultation document to key stakeholders by the Crofting Legislation Stakeholders Group and by the Crofting Law Group to its members. We would like to acknowledge our debt to the members of these two groups, especially to those who provided us with the 126 problem issues and to those who returned response sheets enabling us to prepare from these issues a list of high priority matters. These were discussed in an open meeting at the CLG Annual Conference held in North Uist on 28 October 2014.

This document, the "Completed Sump" is consequently the result of a lot of effort. We hope its findings will gain the approval of everyone involved. We recognise, of course, that some will wish to give greater emphasis to matters affecting them or those they represent. We have little doubt that there will be opportunities to do so in the future.

The purpose of undertaking this review of the problems of Crofting Law was to help bring about clarity in the present law and, if appropriate, to encourage the development of a new legislative base for crofting, enabling the law to be modernised and restated. This record of our findings is being laid before the next meeting of the Crofting Legislation Stakeholders Group, who are to decide how best to take the business forward.

However we promised to submit this Final Report to the Scottish Government on completion and we humbly do so.

Derek Flyn
Keith Graham

November 2014

Contents

Cover / Introduction / Contents	1 / 2 / 3
List of High Priority Propositions	4
Issues raised in the Sump	6
1 Crofting law should be simplified	6
2 Definition of “Crofter”, statutory duties and rightful occupancy	6
3 Landlords and landowners	11
4 Multiple-ownership of a croft	13
5 Owner-occupier crofters	15
6 Decrofting	20
7 Subletting and short leases	23
8 Commission procedures	24
9 Succession	29
10 Mortgages & securities	33
11 Sanctions	35
12 The Crofting Register	36
13 Public notification	37
14 Minor Reorganisation / Dispute Resolution	38
15 New crofts	38
16 Defining croft land, extending its use and restricting rights	40
17 Assignment of Croft	43
List of Corrections requiring legislative provision	45

List of High Priority Propositions

1.2 **Proposition:** Work should commence on the preparation of a simplified crofting code.

2.1 **Proposition:** To simplify Crofting Law, the term “crofter” should be re-defined to take account of everyone who is entitled to occupy a croft as a principal.

3.3 **Proposition:** There should be a clear duty on the “person who acquires croft land” to inform the Commission and this should apply to the persons identified at (A), (B) and (C) above. Further, it should apply not only to ‘croft land’ but also any site of a dwelling-house on or pertaining to a croft and any common grazing or part thereof.

4.1 **Proposition:** Where owners of croft land hold separate title to distinct parts of a vacant croft, there should be provision to overcome a situation where one landlord fails to respond or unreasonably refuses to consent to an application in respect of that croft. Likewise, if any landlord refuses, the Commission should have the power to decide when a refusal is unreasonable and overturn that refusal.

5.8 **Proposition:** It should be made possible for a person to apply to the Commission to be recognised as the rightful occupier of a croft (and as such the crofter) where, for instance, a person is a constituting landlord.

6.7 **Proposition:** The legislation should be amended to exclude decrofting applications and directions in respect of ‘ss 17 & 18 Feus’ from the registration provisions; and such feus, which are readily identifiable, should be issued with a decrofting direction (or similar) without the need to register them as crofts.

7.1 **Proposition:** A subtenant being required to obey both (a) the statutory conditions and (b) the statutory duties. Statutory condition 6A should be amended to state that “The crofter shall be responsible for ensuring where the croft is sublet, that the subtenant adheres to the statutory conditions *and duties*”.

8.3 **Proposition:** The legal consequences of failure or delay by the Commission should be clarified. The suitability of 28 days as a time limit should also be considered along with all the other time limits imposed on the Commission.

9.1 **Proposition:** The matter of succession (i.e. to the rightful occupancy of crofts) should be reviewed by a committee of practitioners well-versed in crofting law and the law of succession in Scots Law.

10.1 **Proposition:** The matter of using permanent improvements on tenanted crofts for mortgage purposes should be reviewed by a committee of practitioners well-versed in crofting law and the law of securities.

11 **Proposition:** It should be made clear when the Commission decides to grant any application subject to conditions that reasonable and proportionate sanctions will follow should these conditions be breached.

12.2 **Proposition:** The effect of a successful appeal on any regulatory decision by the Commission requires to be assessed and adjudicated. Power to do so should be given to the Commission when it is not given to the Land Court.

13.2 **Proposition:** There is disagreement about the need for public notification. The Sump was created to identify where the statute is neither clear nor effective. This is a case in point. The matter should be revisited.

14 **Proposition:** There should be a new power to resolve matters by means of a minor reorganisation of a croft or two requiring redrawing of boundaries or declaration of rightful occupiers, i.e. a limited reorganisation scheme not at present allowed for. The appropriate body to be empowered to do so is the Commission.

15.1 **Proposition:** Some matters might be resolved if the Commission were able to consider two applications together: (a) creating the croft and (b) letting to the desired tenant.

16.4 **Proposition:** For the benefit of certainty regarding alternative uses for croft land, we agree that a procedure similar to s 5(3) should be available to owner-occupier crofters either by application to the Land Court or the Commission, preferably the latter.

17.2 **Proposition:** The process of assignation of a croft tenancy has been complicated by the introduction of the registration process. The current process is potentially unworkable. This must be resolved soon.

1 Crofting law should be simplified

“Crofting law is too complicated. Simplification is required. Crofters cannot understand it.”
[Crofting Law Sump 2014, C1]

“We believe new legislation is needed to replace, simplify and clarify the accumulated laws which set the framework for crofting today.” [ColoC Report, 2008, 1.6.20]

“No change should be made to those rights given to individual crofters in the 1886 Crofters Act, namely security of tenure, succession, fair rents and the value of their improvements. However these rights should only be enjoyed by those resident on or near their croft and using the land beneficially.” [ColoC Report, 2008, 1.6.21]

We, as administrators of the Sump agree that Crofting law is too complicated and that simplification is required. It is not only crofters who cannot understand it.

1.1 Early consolidation and re-arrangement of the 1993 Act

Crofting law has to be seen against the backdrop of Scots Law. At its simplest, crofting law is about safeguarding the land in the form of crofts and providing security to those entitled to occupy that land ('security of tenure'). Administrative effort should be concentrated on (a) identifying the land subject to crofting controls (crofts) and (b) identifying those who have right to occupy that land (crofters).

In return, each of those who have right to occupy a croft have been provided with clear statutory duties. Regulatory effort should be concentrated on ensuring those crofters who have right to occupy crofts are obeying and are encouraged to obey these statutory duties.

Early consolidation and re-arrangement of the 1993 Act (as amended) would help and would appear to be relatively straightforward. However, as the Sump has illustrated, there are many matters needing early attention that cannot await a consolidation. These matters form the bulk of this report.

We have highlighted the HIGH PRIORITY issues which require legislative provision.

1.2 A single simplified crofting regulation Act

Meanwhile, we have been encouraged to believe that all these matters can be given attention in due course and to imagine a simplified crofting regulation Act that will make a refreshed crofting system compellingly attractive for crofters; that will encourage the creation of new crofts and the realisation of collaborative development opportunities.
[Crofting Law Sump 2014, C2]

Proposition: Work should commence on the preparation of a simplified crofting code.

This is a HIGH PRIORITY issue.

2 Definition of “Crofter”, statutory duties and rightful occupancy of crofts

Definition of a crofter [A2.1 S 3(3)]

Definition of a crofter - as “natural person” [A2.2, F1 S 3(3)]

Definition of a crofter- equal opportunities [A2.3 S 3(3)]

Definition of a crofter- joint tenancies [A2.4, F2 S 3(3)]

Constituting landlord- wants to be owner-occupier crofter [D2.1 S 19B(3)(c)]

Croft Collecting [F3 S 8]

Crofters' residency duty [J1, J2 S 5AA]

Crofters' duty to cultivate and maintain [J3 S 5C]

Owner-occupied crofts: duties, etc. [J4, J5 Ss 19B, 19C & 19D]

2.1 A simplified definition of 'crofter'

At its simplest, crofting law is about controlling and safeguarding the occupancy of land in the form of crofts and providing security to those entitled to occupy that land. Originally provided for tenant crofters, this "security of tenure" requires to be extended and developed to apply to owner-occupier crofters. In return for this security, each of those who have right to occupy a croft have been given clear statutory duties, which if not obeyed can result in the loss of that right.

The first control that can be exercised is over who is to be recognised as the rightful occupier of a croft and therefore worthy of that security. Where such control is available, it is in the hands of the Crofting Commission ('the Commission'). The second control is in the administration of crofting, identifying those who are rightfully occupying crofts and those who aren't and ensuring that those who are entitled to occupy crofts are meeting their statutory duties. But there is at present a need to simplify and these controls can be inconsistent. Part of the problem is to do with outdated terminology.

Proposition: To simplify Crofting Law, the term "crofter" should be re-defined to take account of everyone who is entitled to occupy a croft as a principal.

This is a HIGH PRIORITY issue.

2.1.1 Rightful Occupancy of crofts

The 1993 Act, s 3(3) says, 'in this Act "crofter" means the tenant of a croft.' This definition has been fundamental to the legislation but is no longer appropriate. That narrow use of the term "crofter" now has to be distinguished from "owner-occupier crofter", a term belatedly introduced in 2010. This has a propensity to confuse and is one of the more obvious examples of the present impenetrability of Crofting Law, caused by the "layering" of amendments, one after the other, without refining the accumulated mass of legislation .

Proposition: The single term "crofter" should now embrace every rightful occupier of a croft.

2.1.2 Control over who gets the right to occupy a croft

Although the original intention appears to have been that the Commission would have to consent to the incoming (tenant) crofter, no such control can be had over an owner-occupier crofter, whose legal position is vitally different to a tenant crofter.

For example, pre 1976 wording remains in the legislation:

s 8(1) "A crofter shall not assign his croft unless he obtains the consent of the Commission."
When what is really meant is that a *tenant crofter* shall not assign the *tenancy* of his croft ...

Since 1976, tenant crofters have been able to buy their croft, and around a quarter of crofters have done so. Because a crofter was defined as the tenant of a croft, those who purchased their crofts were no longer crofters but became the landlord of a vacant croft, which they could have been required to relet, although this was not done so long as they continued to reside on the croft. The right of a crofter who had purchased his croft to continue occupying it was, on the face of it, only recognised by statute in 2010 when the "owner-occupier crofter" was defined. Somewhat belatedly, such a croft was no longer to be held to be vacant.

But by introducing the definition of an "owner-occupier crofter" in 2010, the purchasing crofter and his successor(s) in title can be identified as the current owner-occupier crofter(s), without requiring any consent from the Commission.

This means that the recognition of owner-occupier crofters is substantially different from the assignation of a croft tenancy in two ways:

that no consent of the Commission is required to become an owner-occupier crofter
there is no prohibition in the number of persons who can become the owner-occupier crofters of a croft at any time.

And it seems that no effort has been made to equalise the processes, not that we consider it would be easy to do so.

In passing, we think this lack of control seems to militate against the power of the Commission to refuse consent to any assignation of a croft tenancy. The Act [s 8] gives no guidance as to why such consent might be refused. That is left to the Commission, e.g. where it is clear that the statutory duties are not to be obeyed or where the proposed assignee already has several crofts or where Landlord has made it known by objection that he is opposed to the grant of consent or some other matter raised in s 58A.

A declared purpose of recognising owner-occupier crofters was also to equalise the responsibilities of tenant crofters and owner-occupier crofters by requiring them to fulfil identical statutory duties, but there are several ways in which the Commission's control over the occupancy of crofts by tenant crofters and owner-occupier crofters has not been equalised, e.g. there seems to be no limit to the number of crofts of which an individual might become the owner-occupier crofter.

Proposition: The Commission be given additional powers, for example:
to demand information from the several owner-occupier crofters of a single croft as to how the statutory duties will be fulfilled;
to control someone from collecting owner-occupier crofts in order to prevent them from obtaining the rights to occupy a disproportionate number of crofts.

2.1.3 Vacant crofts

Who rightfully occupies a croft? A croft can either be rightfully occupied or vacant. If it is vacant, we take it that there is no rightful occupier. If there is a rightful occupier then the statutory duties must apply to him.

A croft is taken to be vacant "notwithstanding that it is occupied" (1993 Act, s 23 (10)) if it is occupied otherwise than by—

- (a) the tenant of the croft;
- (b) the owner-occupier crofter of the croft;
- (c) the subtenant of a sublease to which section 27 applies; or
- (d) the tenant of a "short lease" to which section 29A applies.

The principal right to occupy a croft is therefore held by (a) tenant crofters or (b) owner-occupier crofters.

A dependent right to occupy a croft is held by (c) every subtenant of a tenant crofter and (d) every tenant of a short lease of an owner-occupier crofter.

It will be noted that every dependent right to occupy a croft is (i) temporary being for a fixed period and (ii) requires the consent in writing of the Commission.

Proposition: Any croft that is not occupied by the rightful occupier (or their dependent) should be recorded as vacant, so that any croft not so recorded has an identified crofter.

2.1.4 Identification of rightful occupier of croft

Disregarding (c) subtenants and (d) tenants of a short lease, who both hold their rights to occupy on a temporary basis from (a) tenant crofters and (b) owner-occupier crofters respectively, we can identify and recognise three types of rightful occupiers of crofts:

tenant crofters;
owner-occupier crofters; and
those crofters who have purchased part of their croft but not the entire croft as required in the definition of owner-occupier crofters. These "mixed crofters" are part tenant and part owner-occupiers of their crofts.

The perception of the tenant crofter as the rightful occupier of his croft has already changed. Unfortunately, the narrow use of the term "crofter" meaning tenant crofter has been distinguished from "owner-occupier crofter". This distinction is unnecessarily divisive whereas we believe a single term should be inclusive. Further it should be wide enough to include "mixed crofters", who are otherwise excluded from the definitions.

The owner-occupier crofter is closely defined by the Act. In that definition the first condition is that he is the owner of a croft (s 19B(2)), which we understand to mean he must be owner of the whole croft. We perceive an unnecessary problem in dealing with part-purchased crofts. This results in a "mixed" situation where part of the croft remains in the tenancy of the tenant crofter. This should not fall into the category of a vacant croft and would be resolved by defining the crofter by his right to occupy the whole croft rather than having to ascertain how the croft is owned.

Proposition: that the person with (A) the principal right to occupy a croft should be described as the "crofter"; that the single term "crofter" should identify everyone who is entitled to occupy a croft as a principal; that the term should not be used for those with (B) the dependent right to occupy a croft, i.e. every subtenant of a tenant crofter and every tenant of a short lease of an owner-occupier crofter.

2.2 Closer examination of the definition of 'crofter'

2.2.1 Definition of the crofter as a natural person

We have looked in vain at the Crofting Commission Plan for any suggestion that the crofter could be other than a natural person. There is no doubt that the original legislation was set up to deal only with natural persons. We have heard mischievous technical arguments that it is possible that a legal body (other than a natural person) could become the rightful occupier. No situation has been brought to our attention where such other legal body has become recognised as the rightful occupier, either as tenant crofter or owner-occupier crofter. Whilst it has come to our attention that there are some proposals, e.g. the provision of demonstration crofts, where it would be useful that other legal bodies be permitted to use registered crofts for their own purposes, we are not aware of a strong lobby for it to become normal that they should do so.

Nonetheless, we consider that allowing other bodies to be recognised as rightful occupiers of crofts would be a radical departure from the norm and would require a change in the Commission's present policy, if not a change in the law.

Proposition: The new definition of crofter will make it clear that it can include only natural persons.

2.2.2 Definition of the crofter – equal opportunities - males and females

Under s 59A(1) the Commission are instructed to "discharge their functions in a manner which encourages equal opportunities and, in particular, the observance of the equal opportunities requirements". According to the Commission's annual report for 2012-13 approximately 2/3 of crofters are male and 1/3 female. The ratio of males to females is a matter of historical consequence. It is difficult to see how this imbalance could be rectified without clear direction. Joint tenancies (see 2.2.3 below) might be considered but that is beyond our present remit. We do not propose them as the solution here.

2.2.3 Definition of the crofter – joint tenants

It has been argued that if the legislation can work in respect of joint owner-occupiers perhaps something could also be considered in respect of joint tenants. S 26(8) of the Small Landholders (Scotland) Act 1911 said that s 2 of that Act “shall extend to and include joint tenants being existing crofters, existing yearly tenants of qualified leaseholders but not more than one person shall be registered as a new holder”. In other words existing joint tenants as at the passing of the 1911 Act (i.e. 1st April 1912) could remain as joint tenants but no new joint tenancies could be created. However, Sir Crispin Agnew of Lochnaw Bt, QC in his book on Crofting Law (p62 at footnote 5) says “the 1993 Act does not exclude a joint tenancy.”

Little is known of existing joint tenancies and they have received little encouragement for over a century. To re-introduce them would require a change of policy. A case would have to be made based on whether there are any advantages in allowing or encouraging joint tenancies and what the rules regarding them might be, e.g. in respect of the statutory duties, on succession, or on the effect of divorce or separation of the joint tenants and whether one tenant can remove the other from the tenancy.

Proposition: that it be made clear that not more than one person shall be registered as the rightful occupier of any new croft.

2.3 Statutory Duties of “crofter” as rightful occupier

The statutory duties are duplicated in the Act to equalise the responsibilities of owner occupier crofters with tenant crofters by requiring all of them to reside on or near their crofts and to put them to purposeful use. It contains new and enhanced powers for the Commission to take action against absenteeism and misuse or neglect of their croft by both tenant and owner-occupier crofters. The intent of the re-statement of statutory duties is to ensure that any person with the right to occupy the croft has the same responsibilities, whether (a) tenant crofter; or (b) owner-occupier crofter. It fails to take account of any “mixed crofter”.

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. These duties now apply to every tenant crofter whether or not there is an active landlord and they do to owner-occupier crofters.

Proposition: 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 be expected to the same statutory duties.

2.3.1 Crofters' residency duty

A crofter must be ordinarily resident on, or within 32 kilometres of, that crofter's croft. This has been legislated for as a matter of policy and it appears in the Act as a statutory duty. This duty now exists whether or not there is an active landlord. The Commission is required to enforce that policy. It is important that the meaning of “ordinarily resident” is understood.

Residency duty: at present this is found in two places in the Act -

S 5AA: A crofter must be ordinarily resident on, or within 32 kilometres of, that crofter's croft.

S 19C(2) (a): the owner-occupier crofter must be ordinarily resident on, or within 32 kilometres of, the owner-occupier's croft;

The definition of ‘ordinarily resident’, which it was feared may be subject to dispute, has been addressed by the Commission, whose interpretation has been clarified in their Plan.

2.3.2 Crofters' duties of care

not to misuse or neglect
to cultivate and maintain

The imposition of the same statutory duties for tenant crofters and owner-occupier crofters is a matter of policy. These duties now exist whether or not there is an active landlord. Those duties are that the crofter (a) must (i) cultivate the croft; or (ii) put it to another purposeful use, so that every part of the croft which is capable of being cultivated or put to another purposeful use either is cultivated or is put to such use; and (b) must keep the croft in a fit state for cultivation (except in so far as the use of the croft for another purposeful use is incompatible with the croft being kept in such a state).

3 Landlords and landowners

Change of ownership of croft land [12, 13 § 17(7)]

3.1 No control over landownership

Who can own a croft? Frankly, there is no control over who can be the owner of the land or who can be the landlord of a croft. The croft unit (croft and the common grazing) may all be in one ownership, with one owner or landlord, or it may be in the ownership of several joint owners; or the ownership of the croft unit may be split, so that parts of the croft are in separate parts owned by different owners; or the common grazing or even the grazing right might be split, so that the common grazing or parts of it are in the hands of different owners.

Nonetheless, the way the croft unit is owned cannot affect the crofter's right to occupy his croft.

3.2 No right to occupy a croft and no right to divide it without written consent

There being no control over the transfer of ownership, it will be appreciated that title to ownership of the land is in fact dealing only with the landlord/landowner's interest and that this interest does not include or infer any right in the holders of that interest to occupy the land as their entitlement against the right of the crofter. Nor can there be any entitlement to divide a croft unit simply because the landlord/landowner's interest has been split by private arrangement. Many problems appear to stem from ignorance or misunderstanding of crofting rights or simple mischief in obtaining title to land subject to crofting controls, which problems are not to be solved merely by occupying and using the land. The relative statutory provision has remained steadfast in declaring that land to be vacant despite being "occupied otherwise". [See 2.1.1 Vacant crofts]

Where a croft is vacant (despite being "occupied otherwise") there are legal implications that remain real and alive despite being unenforced, even for lengthy periods. Care should be taken by the holders of such title of ownership for it is not always the fault of the Commission that enforcement has not taken place. The strength of this protective legislation does not wither because of the lack of information or the laxity of controls provided.

The problem of multiple owners is derived from the splitting of the landlord/ landowner's interest. This becomes clearer if the croft unit has been identified in a formal way, e.g. by entry in the Register of Crofts or registration in the Crofting Register. The existence of multiple owners cannot affect the unitary nature of the croft. For the avoidance of doubt, the term "multiple-owners" is used here to describe a situation where different owners hold separate title to distinct parts of a croft (see 4 below - Multiple-ownership of a croft).

Proposition: The only way to change the rightful occupancy of a croft is in a formal way supervised by the Commission, but, to resolve intractable problems, the Commission should be given powers of minor reorganisation. (See 14 below)

3.3 Ownership and change of ownership of croft land

We do not think that it can be the responsibility of a tenant crofter to discover his landlord. The duty must fall on the landlord to make himself known to both the crofter tenant and to the Commission. This is especially true when the landlord/ landowner's interest changes hands.

S 17(7) (originally s 6(7) of the 1976 Act) states that "any person acquiring croft land shall be required to give notice of the change of ownership of croft land to the Crofting Commission". Unfortunately it fails to have effect because of uncertainty. It is not clear to whom this provision is addressed. It could be (A) any person who acquires croft land in any circumstances, including the new proprietor of an estate; (B) any person who acquires croft land as the nominee of a crofter on purchase; (C) any person who acquires croft land as the nominee of a crofter after a successful purchase application to the Land Court; or, as has been suggested, (D) it may mean the Commission must require the notice to be given.

Without knowledge of the ownership of any holding, the records of the Commission are incomplete. This is a constraint on the Commission's power to serve notice under s 40 on the owner of the holding, or on the executor of the person who most recently was the owner of the holding, requiring them to furnish the Commission with such information as may be specified in the notice with regard to the extent, the rent and the tenure of the holding and with regard to such other matters relating to the ownership or the occupation of the holding as the Commission may reasonably require for the execution of their functions under this Act.

Information regarding the landlord/landowner's interest in crofts and common grazings requires not to be gathered but to be reported to the Commission for their Register of Crofts and, where appropriate, that information should be entered in the Crofting Register. The duty to inform the Commission should be on the person holding or acquiring the interest to do so. Failure to fulfil this duty will mean that the information held by the Commission is old or incomplete. The responsibility for this is not primarily with the Commission. The prudent landlord should get himself known.

Proposition: There should there be a clear duty on the "person who acquires croft land" to bring the change of ownership to the notice of the Commission. Further, it should apply not only to 'croft land' but also any site of a dwelling-house on or pertaining to a croft and any common grazing or part thereof.

This is a HIGH PRIORITY issue.

3.4 Failure to intimate change of ownership of croft land

The requirement to inform the Commission has not been evenly dealt with by those who "otherwise occupy" land stated by the Act to be vacant. Indeed, they may consider it wiser in their own interests to remain silent notwithstanding the requirement placed on them to report that the croft (or part) that they have acquired is vacant (s 23). It is likely that such an owner-occupier, who does not qualify as owner-occupier crofter, does not see himself as the landlord of a croft (or part croft) and does not admit the possibility of its being vacant (being "otherwise occupied"). This silence can have lasted many years and the reluctance to report has been exacerbated for lack of a penalty, whether they were aware of the requirement or not. The true penalty is that the land they occupy is "vacant" and there is a need for this to be resolved.

Although s 17(7) requires that any person acquiring croft land shall give notice of the change of ownership of the land to the Crofting Commission, there is no timescale involved and no sanction should the purchaser of the land fail to notify the Commission. This appears inconsistent with s 23(3) and s 40(2) which both have timescales and sanctions relating to failing to provide the Commission with information. We agree that for consistency, timescales and sanctions should be set out in the legislation for persons failing to comply with the notification requirements

Proposition: Any change of ownership of land subject to crofting tenure should be brought to the attention of the Commission by the acquirer and that timescales and sanctions should apply.

3.5 Rectification Procedure

There is a problem regarding the lack of any rectification procedure for those who "otherwise occupy" land stated by the Act to be vacant. That restriction of action, even where the need for rectification is understood has been brought to our attention by 3.4 above. The Commission policy of December 2012 has just brought matters to a head. (See 4.1 below)

If we are correct in our perception that the creation of the problem was not the responsibility of the Commission but those acquiring the landowner's title of a croft (or part thereof) then providing a solution at public expense is hardly the obvious solution. Some have claimed that it is the change of policy that has produced these problem but we are not convinced that this is the case. We do however agree that a solution needs to be provided to resolve intractable problems.

Proposition: that the Commission be given power to provide a limited reorganisation scheme to resolve intractable problems. (See 14 below)

4 Multiple-ownership of a croft

Multiple-ownership of a croft: Unanimity requirement [G4 Various]

Multiple-ownership of a croft: Decrofting [M4 S 25]

Multiple-ownership of a croft: Re-let of croft [G2.1 S 9]

Multiple-ownership of a croft: Division of croft [G2.2 S 9]

4.1 The "Multiple-owners" policy of the Commission is seen as an acute problem.

From the Commission's website:

"Where owners of croft land hold separate title to distinct parts of a vacant croft there has been uncertainty whether an application to decroft or let could be made separately by an individual owner in respect of the distinct part of the croft they own, or

if such an application has to be made by all the owners of the croft in their capacity as, collectively, the 'landlord' of that croft.

The matter was discussed at the Commission Board Meeting on 14 December 2012 and a policy adopted that all decrofting and letting applications in respect of crofts with multiple owners, must be submitted by all the owners in their capacity collectively as the 'landlord' of the croft, even in those cases where the application related to a part of the croft held in title by only one of their number."

The principal concern is the difficulty which arises from the requirement that all the part owners (some claiming to be owner-occupiers) of separate parts of a croft must to conjoin in regulatory applications.

There does not appear to be any mechanism to overcome a situation where one part-owner either fails to respond or unreasonably refuses to consent. A part-owner of a very small part of a croft can thus frustrate a reasonable application to decroft or re-let a part of the croft.

Proposition: Where owners of croft land hold separate title to distinct parts of a vacant croft, there should be provision to overcome a situation where one landlord fails to respond or unreasonably refuses to consent to an application in respect of that croft. Likewise, if any landlord refuses, the Commission should have the power to decide when a refusal is unreasonable and overturn that refusal.

This is a HIGH PRIORITY issue.

The Commission's website continues:

"This does not address the situation where only part of the croft had been purchased by the tenant. In these cases the whole croft is not vacant, part of the croft remains tenanted and only the purchased part of the croft is vacant. The Commission therefore considered application requirements where the part croft owner sought to decroft or let their vacant part of the croft.

At its Board Meeting on 7 August 2013 the Commission decided that applications where the croft is part tenanted and part vacant have to be submitted by all the part owners (the owner of the vacant part and the landlord of the tenanted part) in their capacity as collectively the landlord of the croft.

This approach is consistent with our earlier policy statement and is applied with immediate effect."

This is a recognition of the "mixed crofter" situation. (See 2.1.4)

4.2 New power of "minor reorganisation"

A related issue in relation to landlords/landowners of separate parts of a holding is that there does not presently appear to be any procedure whereby such landlords/landowners can apply for the consent of the Commission to divide the croft into the separate parts owned by the respective landlords.

The normal process would be for the landlord of a croft to re-let part of a vacant croft as a new holding. The multiple-owners' remedy in these circumstances appears to be to make a joint application to re-let part. If the multiple-owners jointly wish to see the croft divided into the individual portions owned by them then the only remedy appears to be for there to be two separate re-letting applications both signed by each landlord. Such a process seems unnecessarily complicated.

We have previously commented that we are not sure how big a problem this is or how often it occurs. It is to be wise after the event to warn that the acquisition of the landlord's interest of part of a croft should not be undertaken lightly. Those who find themselves involved feel very strongly about it.

Although we believe it to be troublesome, we do not think there can be any right to divide a croft, just because the landlord's interest has been split by private arrangement. It must require consent. That said, we think a landlord effectively divides a vacant croft when he relets it, in parts, with the consent of the Commission, and we think it should be possible to amend s 9 to allow the crofter or the landlords/landowners to apply for the Commission's consent to divide a registered croft. However as the act of division can affect the rights of all the landlords of all the parts, directly or indirectly, we understand why they should all be required to be involved in the process.

As it can prove difficult (or impossible) in many cases to have the multiple-owners conjoin in proceeding with certain aspects of the croft management where Commission approval or

consent is required, some relief is necessary. Their policy decisions of 14 December 2012 and 7 August 2013 have drawn attention to legislative difficulties. We think that the solution might be found in a 'minor reorganisation'.

Proposition: There should be a new power to resolve matters. (See 14 below)

5 Owner-occupier crofters

Owner-occupied crofts [J4, J5 Ss 19B, 19C & 19D]
Meaning of "owner-occupier crofter" [J6, J7, J8 S 19B(2)]
Meaning of "owner-occupier crofter" [J9 S 19B(3)(a)]
Meaning of "owner-occupier crofter" [J10 S 19B(3)(b)]
Meaning of "owner-occupier crofter" [J11 S 19B(6)]
Meaning of "owner-occupier crofter" [J12 S 19B(4)]
Division of owner-occupier crofter's croft [G3 S 19D(1)]
Division of owner-occupied crofts [J13 S 19D(6)]
Letting of owner-occupied crofts [L4 S 29A]

5.1 Statutory meaning of owner-occupier crofter in s 19B "flawed and inconsistent"

The meaning of 'owner-occupier crofter' etc. in s 19B is too complicated. More than that, we believe it to be flawed and inconsistent.

5.1.1 Awkward subsections [s 23(12) & (12A)]

Whilst there appears to have been no mechanism specifically designed to keep close track of the ownership of the estates of landlords, either whole or in parts, changes in how crofts were occupied always needed to be recorded in the Register of Crofts. This was especially true when crofts were vacant and, somewhat unusually, there was placed on every landlord an obligation to inform the Commission about any croft that became vacant. Failure to do so was to be met by an empty threat of criminal sanction on summary conviction.

At the launching of the statutory purchase provisions for tenant crofters, the 1976 Act introduced a rather awkward subsection declaring that, for the avoidance of doubt that obligation would have effect (and be deemed always to have had effect since 27th August 1961) as if a person who has become the owner-occupier of a croft were required within one month of the date on which he became such owner-occupier to give notice thereof to the Commission; and any reference in the obligation to a landlord included a reference to an owner-occupier. The effect was to pretend to treat any person who had become the owner-occupier of a croft like a landlord who has a vacant croft (although it is not clear how any sanction would be invoked, if ever it was). It was not necessary to define an owner-occupier by the extent of what he owned because the provision did not differentiate between a part croft and a whole croft. Nor did it seek to differentiate between on the one hand a former tenant crofter who had purchased his own croft and continued to occupy it (or his nominee or successor or a later acquirer of his whole interest) and on the other hand a third party who acquired part of a croft intending to use it or occupy it himself.

5.1.2 Croft vacant notwithstanding it was "occupied otherwise"

These differences did not cause legal difficulties, because a croft was to be taken to be vacant (notwithstanding it was occupied) if it was occupied otherwise than by the tenant of the croft. Any occupancy of a croft outwith an approved tenancy was conclusive that the croft was to be considered vacant. So a crofter who purchased his own croft (albeit encouraged by the 1976 Act to do so) was to be in the same position as the landlord of a vacant croft. This legally correct but nonsensical approach was applied to any croft purchased by and remaining in the occupancy of its former tenant. It was the source of much confusion, annoyance and derision. Despite the opportunity afforded by the 1993

consolidation, no amendment of policy was to be admitted and no legislative attempt was to be made to sort it out.

Proposition: It is unnecessarily complicated to define rightful occupancy of a croft by reference only to tenant crofters and owner-occupier crofters. When the purchase provisions were introduced in 1976, no account was taken of them legislatively regarding rightful occupation until 2010. In the meantime, it was left for the Crofters Commission to do so by way of letters of comfort indicating circumstances in which they would not seek re-letting proposals for 'vacant' crofts. The Crofting Commission should not have to invent procedures to avoid similar situations.

We have already alluded to our belief that, in addition to the rightful occupiers of the croft at present recognised by the Act, i.e. (a) tenant crofters and (b) owner-occupier crofters, the Act should allow for any "mixed crofter". (See 2.1.4 above) This would be in keeping with current understanding and would not appear to conflict with public policy. We propose that a new, simplified method be found to allow others to be recognised as rightful occupiers of crofts.

5.2 Recognition of "owner-occupier crofters"

It was not until the 2010 Act that there was statutory recognition that tenant crofters who purchased their croft were fitting persons to continue to occupy their own crofts; and this some 34 years after the purchase provisions had been introduced. These former tenants (and their successors) were to be recognised as "owner-occupier crofters" and new sections 19B to 19D were inserted into the 1993 Act specifically to cover their now privileged position. Despite the simplicity of that intention, the definitions and rights of owner-occupiers and owner-occupier crofters need clarification.

The lengthy period between the introduction of the right to buy in 1976 and the belated recognition of owner-occupier crofters in 2010 has resulted in many inconsistencies and misunderstandings. This is especially true where purchased crofts and part-purchased crofts are now owned and occupied by persons not statutorily recognised as owner-occupier crofters.

During that period, there was statutory recognition that an owner-occupier of a croft could exist and mention was made in the 1976 Act along with a requirement to inform the Commission. But the wording of the expanded s 23(12) (that any reference to a landlord included a reference to an owner-occupier) is clumsy and its effect dubious, especially if its intention was to remind every owner-occupier that his croft was in law vacant.

Since 2010, s 23(12A) there has been introduced a special sub-set of owner-occupiers who are required to identify themselves "where the owner-occupier is an owner-occupier crofter" but that provision is also clumsy and its effect doubtful, especially if it is intended to be directed to everyone who now qualifies as an owner-occupier crofter and more so if it is intended to alert every owner-occupier crofter that his croft is, in law, no longer vacant. For it is important to remember that throughout that period from 1976 to 2010 every croft (or part croft) purchased by the tenant crofter and continued to be occupied by him was, in law, vacant.

5.3 Joint owner-occupier crofters and Multiple owner-occupiers

"Clarification is required regarding "joint" owner-occupier crofters."

Whereas most, if not all, tenant crofters are individuals, this is not true of owner-occupier crofters. All the elements of the definition in s 19B are in the singular but the singular is generally taken to import the plural. The duties of residency and cultivation are imposed on

owner-occupier crofters and it should be made clear how joint owner-occupier crofters will satisfy the Commission that these duties are fulfilled.

We do not think the same policies can apply to multiple owner-occupiers, i.e. where several owner-occupiers occupy distinct parts of the same croft. The Commission cannot be satisfied by the residency and cultivation of one of a number of multiple owner-occupiers.

The legislation applies to "owner-occupiers" in certain instances as opposed to "owner-occupier crofters". If the croft is occupied by owner-occupiers it is held to be "occupied otherwise". Such owner-occupiers are to be treated as landlords of a vacant croft who are occupying the croft themselves and such a croft is to be taken as vacant.

5.4 Part owners of a croft

The definition of an owner-occupier crofter excludes all persons who own part of a croft. The first condition of that definition is that the person is the owner of a croft but the definition does not extend to those persons who own only part of a croft. The consequence is that these part croft owners cannot be regulated in the same way as owner-occupier crofters, as not being owner-occupier crofters they do not come under the residency and land use duty provisions.

The Commission adopted the policy that all owners of separate parts of a croft have to secure the agreement of the other part croft owners when applying to decroft or let their part of the croft, on the basis that the application has to be made by all the owners collectively as the landlord of the croft. (See 4.1 above) The consequence of any other approach would mean a de-facto acceptance of croft fragmentation without Commission consent.

5.5 Definition of "owner-occupier crofters"

5.5.1 The first condition is that the person is the owner of a croft - s 19B(2).

When the purchase provisions were introduced in 1976, it was never envisaged that a crofter would be expected to purchase his entire croft (or would be at a disadvantage should he purchase only the part he wished to develop). In some cases, the desire of a tenant crofter to become the owner-occupier crofter of his own croft can be thwarted by the actions of a crofting landlord, who sells the crofting estate in parts without reference to the croft boundaries. The result can be that the tenant crofter purchases his croft in parts. The meaning of owner-occupier crofter does not extend to include those part croft owners (described by us at 2.1.4 above) as "mixed crofters" who occupy both the tenanted and the owned parts of their crofts and comply with the residence and land use requirements.

Proposition: It should be made possible for a person to apply to the Commission to be recognised as the rightful occupier of a croft (and as such the crofter) where, for instance, a tenant crofter has become the owner of part of his croft and occupies both the tenanted and the owned parts.

5.5.2 The second condition (a) is that the person was the crofter of the croft at the time of acquiring it – s 19B(3)(a)

This would appear to exclude those crofts entered into the owner-occupied section of the Register of Crofts as being Landholders Holdings under the Small Landholders (Scotland) Act 1911 which were acquired prior to 1955, as the person was not a crofter at the time of acquiring it, nor was the subject a croft. As there is no apparent provision for this category of owner, they would appear to be excluded from the definition. Should the definition of owner-occupier crofter be extended to include those landholders holdings acquired by landholders prior to 1955 and re-classified as crofts by the Crofters (Scotland) Act 1955?

Proposition: The definition should be extended as suggested or that it be made possible for a person to apply to the Commission to be recognised as the rightful occupier of a croft (and as such the crofter) where, for instance, a person is the owner of holding that he occupies.

5.5.3 The second condition (b) is that the person acquired title to the croft as the nominee of a crofter – s 19B(3)(b)

The difficulty here is that the provision does not differentiate between the situations whether a crofter renounces the tenancy, or whether they retain the tenancy. Where a person acquires title as the nominee of a crofter then, unless the crofter renounces the tenancy, the nominee purchaser becomes landlord of the croft, and the crofter remains the tenant of the croft. It is only in those situations where a tenant renounces that a nominee purchaser's status would be that of an owner-occupier crofter. The third condition, referring to the croft not being let to any person as a crofter is not explicit on this point. [s 19B(4)]

Proposition: that the definition of owner-occupier crofter should make reference to applying only where the crofter renounced the tenancy of the croft.

5.5.4 The second condition (c) is that the person purchased the croft from the constituting landlord (or is such a purchaser's successor in title). – s 19B(3)(c)

This condition illustrates the unnecessary layering that is occurring when trying to force the term 'owner-occupier crofter' to cover all eventualities. Whereas we have found support for a person constituting a croft to be able to become the crofter, here it is made clear that a person purchasing from the 'constituting landlord' can automatically become an 'owner-occupier crofter'.

Proposition: that it be made possible for a person to apply to the Commission to be recognised as the rightful occupier of a croft (and as such the crofter) where, for instance, a person intends to constitute an individual croft.

5.5.5 The third condition (a) is that the croft has not been let to any person as a crofter at any time since it was acquired – s 19B(4)(a)

Currently, it seems that if crofter A (1) purchases his croft and (2) lets the tenancy to crofter B, Crofter A can never be an owner-occupier crofter even if Crofter B subsequently renounces his tenancy.

Proposition: It should be made possible for a person to apply to the Commission to be recognised as the rightful occupier of a croft (and as such the crofter) where, for instance, a person intends to re-occupy an individual croft.

5.5.6 The third condition (b) is that the croft has not been let to any person as a crofter at any time since it was constituted – s 19B(4)(b)

This appears to make a mockery of the prohibition against the constituting landlord becoming the rightful occupier (or crofter) of the new croft. The next owner, if the 'owner's successor', is also labelled [s 19B(6)(b)] as the "constituting landlord" whereas the purchaser from the constituting landlord can be the "owner-occupier crofter". [s 19B(3)(c)] Who is this purchaser to be, for he cannot have been the tenant crofter? Why should a purchaser be preferred to any other successor?

Proposition: It be made possible for a person to apply to the Commission to be recognised as the rightful occupier of a croft (and as such the crofter) where, for instance, a person intends to occupy an individual croft, notwithstanding it was the applicant who constituted it or notwithstanding he has purchased only the landlord's interest.

5.6 An owner-occupier crofter may not transfer in part

5.6.1 Prohibition

Under s 19D(1), an owner-occupier crofter may not transfer (whether or not for valuable consideration) ownership of any part of the owner-occupier's croft without first dividing the croft into the part which the owner-occupier crofter proposes to transfer and the part which the owner-occupier crofter proposes to retain, which presupposes that he will not wish to divide his croft into more than two parts or that he will not wish to retain any part.

Proposition: In view of the definition of division in s 19D(8), meaning the division of an owner-occupier crofter's croft "into two or more new crofts", s 19D(1) should be amended to allow the owner-occupier crofter to divide his croft into two or more crofts and that he need not be required to retain any part.

5.6.2 Transfer is null and void

S 19D(6) states that "Any transfer of ownership of any part of an owner-occupied croft, which is not a new croft created by a division, and any deed purporting to transfer ownership of that part, is null and void." We predict that declaring an apparently valid transfer to be "null and void" will be problematical in the future.

5.7 Joint Owner-occupied crofts: duties, etc.

Unlike joint tenants (see above) there are likely to be many "joint" owner-occupier crofters. At present, all the elements of the definition of owner-occupier crofter are singular, although this is generally taken to import the plural.

Where the statutory duties of residency and cultivation are imposed on several owner-occupier crofters, how is the Commission to be satisfied regarding the statutory duties? The legislation applies to "owner-occupiers" in certain instances as opposed to "owner-occupier crofters". An owner-occupier is presumably simply a landlord of a vacant croft who is occupying the croft himself.

Proposition: It should be made clear that it is for the Commission to be satisfied that the statutory duties are being fulfilled, albeit by only one of a number of several owner-occupier crofters but that the requirement to fulfil the duties falls on every one of them.

5.8 New crofts and owner-occupier crofters

This issue was raised by both the Commission and the SCF, the latter asking "Why can't it be possible for an owner constituting a new croft, acceptable to the Commission, to become an owner-occupier crofter, rather than being considered a "constituting landlord", always on the understanding that they will have to accept the statutory duties of residence and care?"

The applicant becomes a constituting landlord when a new croft is constituted but he does not then become an owner-occupier crofter if the three conditions in s 19B are not satisfied. Strangely enough someone else would become an owner-occupier-crofter if he "purchased the croft from the constituting landlord (or is such a purchaser's successor in title)" as required by s 19B(3)(c).

There is no provision for recognising an owner of land thus constituted as a croft under this provision and who intends to occupy and work the croft themselves and comply with the residence and land use duties as an 'owner-occupier crofter'.

Proposition: It should be made possible for a person to apply to the Commission to be recognised as the rightful occupier of a croft (and as such the crofter) where, for instance, a person is a constituting landlord.

This is a HIGH PRIORITY issue.

5.9 Letting of owner-occupied crofts

S 29A states that “An owner-occupier crofter may not let the owner-occupier's croft (or any part of it) without the consent of the Commission.”

This was placed in the Sump and we were asked, “What about consultation with (other) landlords and grazing committees?” We consider this to be a matter for the Commission. We make no recommendation. Obvious problems arise when the Commission is seeking proposals to re-let or let a croft and the ownership has been fragmented. (See 3.2 above; and 4 Multi-ownership of a croft)

If a crofter purchases their croft and then re-lets it, but that let is terminated for any particular reason, then the landlord no longer satisfies the conditions of s 19B to qualify as an owner-occupier crofter. The landlord may well work and live on the croft and have no intention of re-letting it.

Proposition: It should be made possible for a person to apply to the Commission to be recognised as the rightful occupier of a croft (and as such the crofter) where, for instance, a person is the owner of an individual croft, has been the owner-occupier crofter of it, and wishes to occupy the croft again.

5.10 Other confusing legislation involving owner-occupiers

An example of this can be found in s 46 which is still headed, “Financial assistance to owners and owner-occupiers of crofts and other holdings”. This allows the Scottish Ministers to provide assistance by way of grant for the erection, improvement or rebuilding of buildings other than dwelling-houses or towards the provision or improvement of roads, or water or electricity or gas supplies for owner-occupier crofters and for owners of holdings to which subsection (2) applies as he has to provide such assistance for crofters.

S 46(2) applies to any holding which—

- (a) is situated in the crofting counties; and*
- (b) is either—*
 - (i) a holding of which the area does not exceed 30 hectares, or*
 - (ii) a holding of which the annual rent, if it were a croft let to a crofter under this Act, would not in the opinion of the Scottish Ministers exceed £100, or*
 - (iii) a holding which exceeds 30 hectares and of which the annual rent if it were a croft so let would in the opinion of the Scottish Ministers exceed £100, but which in the opinion of the Scottish Ministers is not substantially larger than 30 hectares or is capable of being let as a croft at an annual rent not substantially in excess of £100; and*
- (c) is owned by a person who in the opinion of the Scottish Ministers uses his holding in a way which is substantially the same as that of a crofter; and*
- (d) is occupied by the owner thereof.*

Our concern is that this does not emphasize the difference between crofts and other holdings.

6 Decrofting

Decrofting [M3 S 25]

Decrofting of grazing right [M1 S 24]

Decrofting for non-reasonable purpose [M2 S 24(3) & 25(1)&(2)]

Decrofting appeals [M6 S 25(8)]

Decrofting of feus granted under ss 17 or 18 of the 1955 Act [M5 S 25(1)]

Decrofting ss 17 and 18 feus [B30 2010 Act, Part 2, 4(1)(ii) and 5(1)]

Decrofting: exclusion of ss 17 and 18 feus from registration [M7 2010 Act - Part 2: ss 4(1)(ii) and 5(1)]

We would like to see the provisions relating to decrofting made plainer.

6.1 Decrofting of grazing right

Question 11 of the Crofters Commission's reference to the Scottish Land Court on a range of issues relating to grazing rights and croft land asked: *"Where a crofter has purchased the croft land and grazing right as a servitude and subsequently obtains the Crofters Commission's consent to de-croft all the croft land, does that de-crofting also de-croft the servitude right of grazing?"*

We are of the view that, as there is already a provision to 'modify' an application to decroft in S 25(5), this allows the Commission to make a suitable modification of the application, to make it apply to the croft land only. Any decision of the Commission dealing with a whole croft could make it clear that the right of grazing is not being decrofted.

6.2 Decrofting for non-reasonable purpose

The Commission seek clarification whether there is provision under the existing legislation to allow applicants to apply to decroft for a non-reasonable purpose; and if there is provision for non-reasonable purpose applications do the Commission have to give regard to the factors set out at ss 25(1)(a), 25(1A) and 25(1B) in considering such applications?

The wording of the provisions appears to confirm that the Commission have the power to deal with applications for a decrofting direction where the sole reason is the taking land out of crofting tenure and these are here referred to as 'general purpose' applications. In terms of s 25(2) the Commission are required to have regard to the general interest of the crofting community in the district of the croft and in particular to the demand, if any, for the tenancy of the croft from persons who might reasonably be expected to obtain that tenancy if the croft were offered for letting on the open market. But they are not required to give regard to "the factors set out at ss 25(1)(a), 25(1A) and 25(1B)", for these are mandatory only in the circumstances to which they relate.

6.3 Decrofting appeals

Any appeal against a decrofting direction by the Commission is restricted to the applicant (i.e. the owner of the land) or any member of the crofting community in the locality of the land; but where it is in advance of purchase the appeal is restricted to the applicant or the owner of the land (and not to any member of the crofting community).

Where land is being removed from crofting tenure it can be seen as a loss to the crofting community. It is inconsistent to provide a general right of appeal to any member of the crofting community against a decrofting direction in every case under s 25(1)(a) for a reasonable purpose (although not under s 25(1)(b) (site of dwellinghouse on or pertaining to a croft) nor under s 25(1)(c) (ss 17 & 18 feus) except where it is in advance of purchase. We believe an appeal should be available (additionally) to any member of the crofting community in every case under s 25(1)(a).

6.4 Creating a 'croft' of the site of a dwellinghouse

The issue here is to do with creating a 'croft' of the site of a dwellinghouse and requiring it to be placed in the Crofting Register just so that the 'croft' can be decrofted, when the truth is that the dwellinghouse was officially removed from a tenanted croft many years ago. Because no formal decrofting direction was issued in the past, since 2007, under s 25(1), the Commission are directed to give a (decrofting) direction under section 24(3)(c) if the application is made in respect of a croft the conveyance in feu of which was granted under ss 17 or 18 of the 1955 Act.

6.5 Historical Explanation

1955 Act, s 17 dealt with "absentee crofters", where the Commission determined in relation to a croft that the tenancy of the crofter should be terminated and the croft let to some other person or persons; then, an order could be made terminating the tenancy of the crofter and requiring him to give up his occupation of the croft.

Where such an order was made and the Commission were satisfied (a) that the crofter or any of his predecessors in the tenancy had provided or paid for the whole or the greater part of the dwellinghouse and that the crofter was entitled on the termination of his tenancy to compensation for the dwellinghouse as an improvement; and (b) that the dwellinghouse was not required after the termination of the tenancy in connection with any future occupation of the croft, the crofter was entitled to obtain a conveyance in feu (under reservation of minerals) of the dwelling-house and garden ground .

1955 Act, s 18 dealt with "aged crofters" where on the application of a crofter and after consultation with the landlord the Commission were satisfied (a) that the crofter was unable through illness or old age or infirmity properly to work his croft; and (b) that he was willing to renounce the tenancy of his croft subject to the conditions that he would retain the occupation of the dwelling-house on the croft and that the ownership thereof would be vested in him; and (c) that it was in the general interest of the crofting community; the Commission could authorise him to renounce his tenancy accordingly. Where the Commission so authorised, and the crofter renounced his tenancy, he was entitled, if, not later than one month before the term at which the renunciation took effect, to give notice to the Commission and to the landlord, that he wished to obtain a conveyance in feu (under reservation of minerals) of the dwelling-house with the like pertinents and on the like terms and conditions and in the like manner as if an order terminating his tenancy had been made under s 17.

6.6 Misunderstanding

At a time when most, if not all, crofts were tenanted, these subjects were being removed from tenancy. It is thought that, at the time, the (Crofters) Commission understood each site to fall out of crofting tenure. It was intended that the subjects were to be separated from their croft so that the remainder of the croft could be re-let. The subjects were not recorded as a new croft and details of the subjects were not recorded anew in the Register of Crofts. As the subjects involved could only be the site of a dwellinghouse, it is unreasonable now to consider them as 'crofts'. The need for 'ss 17 & 18 Feus' was brought to an end in 1976, when every tenant crofter was given the right to purchase the site of his dwellinghouse and to decroft it.

In these circumstances, registration of each of the feu subjects involved as a 'croft' is quite unnecessary. S 15 of the Crofting Reform (Scotland) Act 2010 already allows the Keeper to remove resumed and decrofted crofts from the Crofting Register after 20 years. As the activity creating 'ss 17 & 18 Feus' took place in the past, i.e. between 1955 and 1976, and the lack of any decrofting direction can be considered to have been an oversight at that time, it is appropriate that no registration of the feu (as a croft) be required when the decrofting direction (or declaration) is granted. We understand that such directions will be in respect only of the subjects feued, i.e. the site of a dwellinghouse with relative garden ground as at the date of the feu and that the plan attached to the direction will normally be a copy of the original feu plan.

6.7 Registration requirement

The Crofting Reform (S) Act 2010 - Part 2: ss 4(1)(ii) and 5(1) establishes that the application for a decrofting direction under s 24(3) is a trigger to register an unregistered croft, and the issuing of a decrofting direction is a change trigger for a registered croft. There is no provision excluding those directions made under s 25(1)(c) in respect of a croft the conveyance in feu

of which was granted under ss 17 or 18 of the 1955 Act. The issue of a decrofting direction in these cases is essentially a rubber stamp exercise, for the subjects comprise a standalone feu which has been separated from the parent croft for decades. The application is not advertised.

Proposition: The legislation should be amended to exclude decrofting applications and directions in respect of 'ss 17 & 18 Feus' from the registration provisions; and such feus, which are readily identifiable, should be issued with a decrofting direction (or similar) without the need to register them as crofts.

This is a HIGH PRIORITY issue.

7 Subletting and short leases

Enforcement of duties when a croft is sublet [K4, R1 S 26B(2) & 26E(d)(i)]

Provisions as to right to sublet [R2, R3, R6 S 27]

Miscellaneous provisions regarding subleases of crofts [R4 S 29]

The Statutory Conditions [R5 Sched 2]

Compulsory subletting [R7 S 28]

Enforcement of duties when an owner-occupied croft is let on a short lease [J18 S 26E(e)(i)]

7.1 Enforcement of duties when a croft is sublet

S 26B(2) states that where a crofter has sublet his croft, the crofter is deemed to comply with his residency and land use duties (other than the duty not to misuse the croft) if the subtenant complies with the duties. But s 26E(d)(i) prevents the Commission from taking enforcement action under section 26H to terminate the tenancy where the Commission have consented to the sublet of the croft. However there is no corresponding reference in Section 26E to this only applying if the subtenant complies with the duties.

Statutory condition 6A states that "The crofter shall be responsible for ensuring, where the croft is sublet, that the subtenant adheres to the statutory conditions." There is no corresponding requirement that the crofter ensures that the subtenant adheres to the statutory duties relating to residence and land use. Ought not the subtenant be required to obey both (a) the statutory conditions and (b) statutory residence and land use duties?

S 26B(2) states that where a crofter has sublet his croft, the crofter is deemed to comply with his residency and land use duties (other than the duty not to misuse the croft) if the subtenant complies with the duties.

S 26E(d)(i) goes on to prevent the Commission from taking enforcement action against the tenant (under section 26H) to terminate the tenancy where the Commission have consented to the sublet of the croft.

Proposition: A subtenant being required to obey both (a) the statutory conditions and (b) the statutory duties. Statutory condition 6A should be amended to state that "The crofter shall be responsible for ensuring where the croft is sublet, that the subtenant adheres to the statutory conditions *and duties*".

This is a HIGH PRIORITY issue.

7.2 Provisions as to right to sublet

Consideration should be given to resolving tensions between the principles of the 2007 Act in terms of allowing tenants to sublet for up to 10 years, and the tenant residence duty requirements of the 2010 Act.

Section 27(1) refers to a crofter being "entitled to sublet his croft, for a period not exceeding 10 years, without the consent of the landlord of the croft." How can the notion of

entitlement to sublet in section 27(1) be reconciled with the tenant's residence and land use duties?

Two matters arise: The "notion of entitlement" and the period of the sublet.

(1) The notion of entitlement is tempered by the need for consent. But at the stage of application for consent, it appears that a tenant, albeit in breach of (a) the statutory conditions or (b) statutory residence and land use duties, is entitled to seek consent to a sublet.

The mention of "a period not exceeding 10 years" has raised concerns. Where and how is the period of the sublet to be dealt with? Is it in the application to the Commission? Does the Applicant (tenant) stipulate the period he wishes to sublet his croft in his application? Or is it to be left to the Commission to decide?

Section 27(2) states that "A crofter shall not sublet his croft otherwise than with the consent in writing of the Commission and in accordance with such conditions (which shall not include conditions relating to rent) as the Commission in giving their consent may impose...". The Commission subsequently received legal advice to the effect that in giving their consent, that they were able to impose a condition relating to the duration of the lease, i.e. if a crofter applied for a 10 year sublet, the Commission could opt to give their consent but could condition the duration of the lease to 3 years. It would then be option to the crofter to challenge the Commission's conditioning of the duration under the appeal provisions set out at s 52A(1)(b).

Proposition: To avoid ambiguity, s 27(2) should be amended to clarify this matter. An Applicant should be required to specify the period of sublet sought in his application for consent. The Commission should be able to modify the application by reducing the period sought. (The Commission is already permitted to modify decrofting applications to reduce the area sought). It is clumsy to allow one type of application to be controlled in extent by condition and the other by modification.

7.3 Compulsory subletting - removal of references

Compulsory subletting first appeared in the Crofters (Scotland) Act 1955 but has never been brought into force. It became s 28 and has now been repealed. Correction is required. We recommend that all references to that section should now be removed: in 29(2) to 28(4) & 28(7) and in 29(4) to 28. (See XXX)

7.4 Enforcement of duties when an owner-occupied croft is let on a short lease

S 26B(3) states that where an owner-occupier crofter has let his croft on a short term lease, the owner-occupier crofter is deemed to comply with his residency and land use duties (other than the duty not to misuse the croft) if the tenant complies with the duties. S 26E(e)(i) prevents the Commission from taking enforcement action under s 26J to require the owner-occupier crofter to provide proposals for letting the croft if the Commission have consented to the short term let of the croft. However there is no corresponding reference in s 26E to this only applying if the tenant complies with the duties.

Therefore potentially the Commission is prevented from taking enforcement action against an owner-occupier crofter in breach of duties, simply because the croft is let on a short lease, even where the tenant is also failing to comply with the duties.

8 Commission procedures

Register of Crofts [B23 S 41(2)]

Letting vacant crofts [L1 S 23]

Commission consent for absence from croft [K1, K2, K3 Ss 21B, 21C, 21D]

Owner Occupier crofters: letting procedure [K5, K6 S 26J(3)]
Division of croft [G1 S 9]
Suspected breach of duty [J14, J15, J16, J17 Ss 26A, 26C, 26D]
Annual Notices [J19 S 40A(6) and 40(2)]
Grazings committee: duty to report [N1, S7 S 49A]
Administrative devolvement [N2]

The new Crofting Commission have examined closely the tasks placed on them by the Crofting Acts.

8.1 Register of Crofts

S 41(2)(b) states that "There shall be entered in the Register of Crofts the name, age and date and birth, of the tenant and landlord of each croft." However although owner-occupier crofters were introduced by the 2010 Act, there was no corresponding change in the section of the 1993 Act relating to holding the age and date of birth of owner-occupier crofters on the Register of Crofts.

Proposition: For consistency, we think the legislation should be amended to require the same information of each rightful occupier of a croft, including owner-occupier crofters.

8.2 Letting vacant crofts

"Letting a croft should be a matter for the landlord and the grazing committee. The Commission (or Land Court) should only be involved where there is a disagreement."

At present the letting of a vacant croft is a matter for the landlord, who requires the approval of the Commission. We would not propose any change to this. Similarly, the letting of owner-occupied crofts is a matter for the owner-occupier crofter and again we would propose no change. It is for the Commission to decide as to how to proceed. It has been pointed out that the procedures for the letting of crofts "do not seem very clear". We are inclined to agree that matters have not been helped by the provisions for 'proposals' introduced in 2010. (See 2.1.5 below)

8.2.1 Proposals to let vacant crofts [L2 S 23]

S 23(5ZA) allows no more than three 'proposals' to be submitted to the Commission in response to a notice given under s 23(5). Ss 23(5ZA); (5ZB); (5ZC) could be deleted.
Comment: In certain circumstances, the Commission may call on the proprietor of the croft (landlord or owner-occupier crofter) to submit to them proposals for re-letting (or letting) the croft. Whilst it has been suggested that the limitation to three proposals and the restricted time limits could simply be deleted, this would be to radically change the policy. We recognise there is a difficulty with the existing law, encapsulated in the word 'proposal'. It appears in s 23 when a landlord is called on to re-let a vacant croft. It also appears in s 26J when an owner-occupier crofter must submit a 'proposal' for letting the croft. It is not clear what a 'proposal' means in this context.

The Commission explain, "If the 'proposal' does require to be an 'application', then the timescales for approving or rejecting the letting application contradict those set out elsewhere in the Act e.g. s 58A 'Obtaining Commission approval or consent.' If however the 'proposal' is not an application, then this would appear to be at odds with the registration provisions at ss 23(5ZE) and 26J(6)." The Commission goes on to ask that the legislation be reviewed to clarify the timescale.

We recognise that, whilst a 'proposal' might take the form of an application, it can also take the form of a mere suggestion or **Proposition**, the approval or rejection of which would appear to require as much consideration as a full application.

Level: 1 - a problem which requires an immediate legislative provision.

8.2.2 Landlord involvement

"The sections that refer to croft lets or sublets do not seem very clear. Should the landlord not be involved in agreeing lets or sublets?"

This is a matter for the Commission. We make no recommendation.

8.3 Consent for absence from croft

In 2010, new sections 21B, 21C and 21D introduced a new concession for both tenant crofters and owner-occupier crofters to be absent from their crofts with the permission of the Commission. This is done on the understanding that there may be valid reasons for absence. Without such consent, absent tenants could have their tenancies terminated and absent owner-occupier crofters could be required to submit letting proposals for failing to reside on, or near, their croft.

8.3.1 Commission consent for absence from croft

S 21B requires that the Commission must decide an application from a tenant crofter or owner-occupier crofter for consent to be absent from the croft within 28 days of the application being made. The Act is however silent on what the consequences are if the Commission fail to decide the application within the 28 day time period allowed.

8.3.2 Extension of duration of consent

S 21C requires that the Commission must decide an application from a tenant crofter or owner-occupier crofter for the duration of their consent to be absent from the croft to be extended within 28 days of the application being made. The Act is however silent on what the consequences are if the Commission fail to decide the application within the 28 day time period allowed.

8.3.3 Variation on condition of consent

S 21D requires that the Commission must decide an application from a tenant crofter or owner-occupier crofter for a variation of any condition (except relating to duration) on their consent to be absent from the croft to be made within 28 days of the application being made. The Act is however silent on what the consequences are if the Commission fail to decide the application within the 28 day time period allowed.

Proposition: The legal consequences of failure or delay by the Commission should be clarified. The suitability of 28 days as a time limit should also be considered along with all the other time limits imposed on the Commission.

This is a HIGH PRIORITY issue.

8.4 Owner Occupier crofters: letting procedure

S 26J(3) requires the Commission to decide whether to approve or reject a proposal for letting the croft within eight weeks of the issue of the direction requiring the owner-occupier crofter to submit letting proposals. The Act is however silent on what the consequences are if the Commission fail to decide whether to approve or reject the proposal within the eight week period allowed.

It is not clear here whether the 'proposal' to let the croft has to constitute the submission of an application to let the croft within the set timescale. If the 'proposal' does require to be an application, then the timescales for approving or rejecting the letting application contradict those set out elsewhere in the Act e.g. s 58A "Obtaining Commission approval or consent." If however the 'proposal' is not an application, then this would appear to be at odds with the registration provisions at s 26J(6)(a) which envisage the registration timescale to the letting of the owner-occupier croft, rather than the approval of a proposal to let the croft. Is a 'proposal' in this context is the same as an application?

Proposition: Can the legislation be reviewed to clarify the apparent discrepancy in the timescales for dealing with such an application? It could simplify matters by simply requiring the Commission to serve notice on the owner-occupier crofter requiring them to submit a letting application within a set timescale, then any application submitted would be dealt with under the s 58A relating to letting applications submitted under s 23.

8.5 Division of Croft

Division/amalgamation/accumulation: "Amalgamation" does not appear in the Acts. Changes to the extent of croft occupancy depend much on the policy of the Commission. "Accumulation" does not appear; neither does "croft collecting". In some circumstances the Commission can refuse assignments to someone with several crofts but they cannot control someone collecting owner-occupied crofts.

Should the Commission be able to take action on "croft collecting" e.g. by enforcing re-letting, division, etc.? In the case of applications to divide a tenanted croft, public notices have to be given to divide and then to assign but in amalgamation of crofts there seems to be no parallel protection against accumulation of crofts which may be the more undesirable process as it reduces the scope to maintain active crofting populations. In amalgamation the only requirement is for assignment (and not accumulation) to be publicly announced. Should not all increased occupancy be subject to the same scrutiny as the division of a croft? [Regarding someone collecting owner-occupied crofts, see F3]

We agree that the same level of scrutiny should apply to individuals increasing the number of holdings that they seek to occupy. Division of a tenanted croft for the purpose of assignment (of one or more new crofts) is a two stage process.

Proposition: We recommend that this (and other joint matters) be dealt with by a single application. With joint or simultaneous applications, the Commission would be avoiding division taking place without the purpose being fulfilled.

8.6 Suspected breach of duty

There are several ways in which the Commission can inform itself about a suspected breach of duty. The duty is on the Commission to investigate any suspected breach of duty.

It has been complained to us that it is "not acceptable to expect a grazings committee to act as a policeman to neighbours". It is felt that this would not be helpful in a local community. We tend to agree.

8.6.1 Notice of suspected breach of duty

"The landlord should be consulted. Most of these matters under ss 26E- 26J should include consultation with landlord. Some could be dealt with by landlords and grazings committee with the Commission as arbiter."

If there is good reason why the landlord should be consulted then provision for this can be made. There is a limited time in which to comment. S 26C(5) requires that the Commission must decide whether a duty is being complied with, before the expiry of 14 days, beginning when the 28 day representation ends. The Act is however silent on what the consequences are if the Commission fail to decide the application within the 14 day time period allowed.

Proposition: The legislation should clarify the consequences of the Commission failing to deal with the application. We consider the 14 day period to be unnecessarily tight.

8.6.3 Notice of suspected breach of duty

S 26C(5) requires that the Commission must decide whether a duty is being complied with, before the expiry of 14 days, beginning when the 28 day representation ends. The Act is however silent on what the consequences are if the Commission fail to decide the application within the 14 day time period allowed. Should the legislation clarify the legal consequences of the Commission failing to dealing with the application within the 14 day time scale set out in the legislation?

We agree that the legislation should clarify the consequences of the Commission failing to deal with the application. We consider the 14 day period to be unnecessarily tight. [Time limits]

8.6.4 Undertakings

S 26D(4) requires that the Commission must decide whether to accept an undertaking, before the expiry of 28 days, beginning with the day on which the relevant person offers to give the undertaking. The Act is however silent on what the consequences are if the Commission fail to decide whether to accept the undertaking within the 28 day time period allowed. Should the legislation clarify the legal consequences of the Commission failing to decide whether to accept the undertaking within the 28 day time scale set out in the legislation?

We agree that the legislation should clarify the consequences of the Commission failing to decide to accept the undertaking within the 28 day period.

8.7 Annual Notices

S 40A(6) establishes that the failure of a tenant or owner-occupier crofter to provide the information requested in the Annual Notice will constitute an offence for which they would be liable to summary conviction. With around 18,000 crofts however there could be potentially a high number of notices not returned to the Commission.

In such cases could there be an alternative sanction available to the Commission included in the legislation e.g. the Commission given the right not to accept a regulatory application from a tenant or an owner-occupier crofter who has failed to provide information as required by the s 40A Annual Notice provisions?

This will be a question of policy initially but if the suggestion is accepted it will require legislation.

8.8 Grazings committee: duty to report

It has been complained to us that the 'Duty to Report' on (1) the condition of the crofts of each tenant and owner-occupier crofter with a share in the grazing and (2) any breach of duty by a tenant or owner-occupier crofter is not an appropriate matter for a grazings committee. Until now, the committee's duty, clearly laid out in legislation, was to manage common grazings.

We are informed that this "duty" was not consulted on or debated in the passage of the bill through Parliament, having been added as a last minute amendment in stage 3. (See 8.9 below).

8.9 Administrative devolvment

Suggested devolvment from Crofting Commission to common grazing committees and Landlords (where there was a disagreement, the Commission to act as arbiter).

- Assignment
- Succession
- Croft Division or Amalgamation
- Re-letting

Short lease grant to a tenant of a short lease of owner occupied crofters.

Subletting

(s50A) Joint forestry ventures etc

(s50b) Use of common grazings for other purposes

What appears to be the laudable goal of devolvement of the administration of crofts to local bodies such as grazing committees and landlords has been suggested; but that is clearly a matter of policy and, therefore, future debate.

In contrast, one step regarding local administration has already taken. The introduction of the 'Duty to Report' (see 8.8 above) is seen by some to be "not an appropriate matter for a grazings committee", yet this has already reached the statute book and can therefore be taken to be government policy.

A major complaint is that the 'Duty to Report' is beyond the previous duty of any grazing committee, clearly laid out in legislation, to manage the common grazing. The requirement to report on (1) the condition of the crofts of each tenant and owner-occupier crofter with a share in the grazing and (2) any breach of statutory duty of residence or care by a tenant or owner-occupier crofter is considered to be excessive and repulsive. These committees, where they exist, may not be qualified or equipped to report on what individual crofters are doing.

The present structure of grazings committees may no longer be appropriate.

We do not feel competent to express any firm view on these matters, all of which require policy decisions or corrections.

9 Succession

Succession- complexity of succession provisions [H1, H14 Ss 10 & 11]

Bequest of Croft [H2 S 10]

Acceptance of bequest by executor on behalf of beneficiary [H3 S 10(2A)]

Division of croft by Will [H4, H5, H6, H7, H9 S 10(4A)]

Bequests of parts of the croft [H8 S 10(4C)]

Succession time limit [H10 S 11(2)& (4)]

Intestacy [H11 S 11(8)]

Deemed crofts [H12, B29]

Decrofting by an executor [H13]

Succession to crofts is a highly complicated matter. It deserves close attention by those involved. Recent changes appear to have been misinformed. To better explain, we can do little better than summarise a 2010 paper by Simon Fraser, CLG member and prominent crofting lawyer, the gist of which we recognise and support:

"Many practitioners have long had concerns regarding the law of succession in respect of croft tenancies. These concerns became more focussed after the introduction of the 2007 Act when the Crofters Commission took over the administration of such matters. Prior to then the rules (as they apparently stood) were not applied rigidly and indeed there was a traditional approach generally taken by factors or proprietors which sought where possible to give effect to the deceased's wishes notwithstanding that this approach required a generous interpretation of the law from time to time."

"The law of crofting succession is rather more complicated than any other area of the law of succession relating to private property in Scotland. The vast majority of crofters and a considerable number of solicitors are unaware of the law involved. Many crofters still write their own wills and indeed an unfortunately high number of uninformed solicitors make faulty wills so far as they relate to crofts. The pitfalls are many and, in the view of those who have to work with crofting law, mostly unnecessary."

9.1 Succession - complexity of succession provisions

The two sections, ss 10 & 11, were both amended by the 2007 & 2010 Acts. These amendments were complex. Succession to the tenancy of a croft, which was once

accomplished by simple notification to the landlord or his factor, has become extremely burdensome. The statutory requirements are beyond most crofters and their advisers. Despite these amendments, succession to crofts remains a problem area.

Proposition: The matter of succession (i.e. to the rightful occupancy of crofts) should be reviewed by a committee of practitioners well-versed in crofting law and the law of succession in Scots Law.

This is a HIGH PRIORITY issue.

9.2 Bequest of Croft

It has long been the case that a tenant crofter can bequeath his tenancy to 'a member of the crofter's family' but that such a bequest to a person who is not 'a member of the crofter's family' was to be null and void unless the Commission otherwise determined. (1955 Act, s 10(7)) Now, a person to whom the tenancy of a croft (or of part of a croft) is bequeathed (the "legatee") must, if the legatee accepts the bequest (a) give notice of the bequest to the landlord; and (b) send a copy of the notice to the Commission, before the end of the period of 12 months beginning with the death of the crofter. It appears that the intention of the current law is to give testamentary freedom to the crofter. There is no need to obtain approval from the landlord or the Commission. It is not explained what happens when the landlord is unknown or cannot be contacted.

9.3 Acceptance of bequest by executor on behalf of beneficiary

It is now permissible for the notice of the bequest to be given on behalf of a legatee by the Executor of the deceased crofter provided the Executor has been authorised by the legatee to do so. It would appear that the Executor will have to be confirmed before he can give notice of the bequest. It should be made clear that only a confirmed Executor can give notice of acceptance of a bequest on behalf of the beneficiary.

We agree. This provision has the potential to create problems, should the matter of notification be left to the deceased's executor, for it must be done within twelve months of the date of death and the matter of confirmation of the executor is outwith the control of the legatee.

9.4 Division of croft by Will

It might be considered that, by s 10(4A), the deceased tenant crofter has been encouraged to seek to divide his croft by his Will without prior consideration of the matter by the Commission. This may have unforeseen and unfortunate consequences, for there can be no assurance that consent to the division will be forthcoming, except where the division relates to a bequest of the tenancy of the part of the croft comprising the site of the dwelling-house to one natural person and the tenancy of the remaining part to one other such person. If the Commission do not give their consent to the division of the croft or if such consent is given but an application for registration of the division is not made as required, each bequest is null and void.

There is no similar power to apply to divide the croft of a deceased owner-occupier crofter in terms of his Will. This would appear to be an oversight. (See 9.6 below)

We contend that the division of the croft by any Will should not be permitted except in the case of the site of the dwellinghouse where the Executor is then permitted to seek a title for the site (coupled with decrofting) as this is the matter which caused the original concern. The not uncommon problem that needed to be solved was, when a crofter in his Will indicated

that he wished the croft house to go to his wife and the croft to one of his children, that was deemed to be an invalid bequest thus causing unnecessary difficulties.

The solution now provided by the statute goes much further than was required, resulting in crofters attaching to their Wills plans showing different areas being left to different beneficiaries. (How else would a Will indicate the proposed division?) This requires to be reconsidered.

9.5 Division of croft by Will requiring action by the executor

A bequest of a croft is normally accepted by action of the beneficiary alone. Where the Will seeks to divide a croft, it is for the executor to apply to the Commission for consent to divide the croft in accordance with the terms of the will. It would appear that the Executor will have to be confirmed before he makes the application for consent to divide the croft. This creates an expectation or duty on the Executor to confirm within twelve months of the date of death to ensure that the application for consent to divide the croft is made timeously. Failure to confirm would be another reason for each bequest being null and void. The SCF asked, "Should there not be a debate about whether there should be such a novel power to divide a tenanted croft (other than the site of the dwellinghouse)."

We agree. (See 9.3 and 9.4 above) On a separate point, we believe the creation of a 'croft' that is really only a house-site should also be avoided.

9.6 Division of croft by an executor following a bequest by a crofter

Changes to s 10 of the 1993 Act introduced by the Crofting Reform (Scotland) Act 2010 introduced provision for a crofter to bequeath the tenancy of the croft to two or more natural persons, and for the deceased crofter's executor to apply to the Commission for consent under section 9 to divide the croft accordingly. However section 58A(6) states that the Commission must grant the application where it relates to a bequest of the part of the croft comprising the site of the dwelling house to one person, and the remaining part to another person. This would result in small crofts comprising house sites only being created in the crofting counties, which would appear to be inconsistent with the legislation and policy requiring crofts to be either cultivated or put to another purposeful use.

This innovation is not popular. We consider that allowing a tenant crofter to divide his tenanted subjects in his Will is inappropriate unless the consent of the Commission has been obtained prior to his death. Further, we believe the creation of a 'croft' that is really only a house-site should also be avoided.

9.7 Decrofting by an executor

"An executor is often faced with the need to dispose of the deceased's interest in a croft, the main item of value being the croft house. Rarely can the croft and house be disposed of as a whole – the buyer unless rich will need a mortgage and in order to obtain a mortgage the house will need to be decrofted, a title taken and the house then sold – very often to the assignee of the croft. However an executor has no right to apply to decroft. It would be so much easier for all concerned (and there would be no downside to anyone) if an executor able to do so just as the crofter could have done were he still alive."

We think this would be worth looking into further.

9.8 Division of croft by Will of deceased owner-occupier crofters

Changes to s 10 of the 1993 Act introduced by the Crofting Reform (Scotland) Act 2010 introduced provision for a tenant crofter to bequeath the tenancy of the croft to two or

more natural persons, and for the deceased crofter's executor to apply to the Commission for consent under s 9 to divide the croft accordingly. The Commission have since received applications by executors of deceased owner-occupier crofters to divide the owner-occupied croft following the death of the crofter. The Commission received legal advice there was no specific provision in the legislation which allowed owner-occupier crofters to apply to divide the croft (even where there was an instruction in a deceased owner-occupier crofter's will to do so). The Commission asked if this and other succession provisions in relation to owner-occupied crofts also be considered, as the Act is currently silent in relation to owner-occupied crofts and succession.

We agree. It was understood that the position of an owner-occupier crofter was to be broadly similar to that of a tenant crofter.

9.9 Division of croft by executor

"Landlords should be consulted. This could be dealt with by landlords and grazing committees with Commission acting as an arbiter."

"No public notification of the application is required and no opportunity for the crofting community to object."

At first sight, the division of crofts does seem to have a potential effect on the landlord's estate and on the crofting community. However, "A crofter shall not divide his croft unless he obtains the consent of the Commission" (s 9) replaced the prohibition against sub-division that previously required both the consent of the landlord and the Commission. Any further change would require a change in policy.

9.10 Bequests of parts of the croft

This is to do with the wording used. S 10(4C) suggests that the bequests of parts of the croft are to be regarded as "the bequest". However, if the Commission do not give their consent to the division of the croft or if such consent is given but an application for registration of the division is not made as required under section 9(3)(a) then each bequest is null and void. It should be recognised that there is more than one bequest.

Proposition: "The bequest" should be replaced with "Any bequest as is mentioned in subsection (1)(b)". This is a correction that requires legislative provision.

9.11 Succession time limit

It appears to be the case that if the Executor does not obtain an extension to the two year period prior to the expiry of that two year period then the Executor's right to transfer the tenancy is extinguished. This is a strict rule which appears to be the intention of the legislators.

9.12 Intestacy

Concern about description as "confirmation in respect of the intestate estate": S 11(8) says, "*Where the Commission, in pursuance of this section, declare the croft vacant -- (a) they shall give notice to that effect (i) to the landlord; (ii) if an executor is confirmed in respect of the intestate estate of the deceased crofter, to the executor; and (iii) if no executor is so confirmed, to each person of whom the Commission is aware ...*"

The Executor's job is to confirm to the whole estate. Does it mean the interest in the croft which is being declared vacant? If so, it should say so, but the reference should be to the executor confirmed in respect of the estate of the deceased crofter (or the part of the estate consisting of the interest in the croft). Although the wording allows for the possibility of an executor qua creditor (who might confirm to part of the estate only, this is very unusual. In certain circumstances there will be no intestate estate, e.g. where a Will leaves the whole

estate to a universal legatory, but the right to the croft (i.e. the tenancy) falls to be treated as intestate estate.

We think the reference should be to the executor confirmed in respect of the estate of the deceased crofter (or the part of the estate consisting of the interest in the croft) and not in respect of "the intestate estate of the deceased crofter".

9.13 Deemed crofts

In terms of both testate and intestate succession there is reference to completion of the process on the date of registration. The first registration of deemed crofts (consisting solely of grazing rights) was not taking place when this issue was placed in the Sump because it appeared impossible for a valid bequest or intestate succession of such a deemed croft to complete.

We understand this matter has now been resolved. (See also 12.3)

10 Mortgages & securities

Mortgages for tenant crofters [Q1]
Securities [Q2]

10.1 Croft improvements as security items

Some matters have been placed in the Sump which we do not think belong there. If they are to be pursued, they will require to be considered in detail elsewhere in due course.

For instance, we have been asked to consider the inability of tenant crofters to obtain normal commercial mortgages, as follows: "Where crofters wish to build a house on their tenanted croft they cannot currently obtain mortgages to finance this because a croft is seen by banks and other financial institutions as being tenanted on a year to year basis. As a result, crofts are regularly purchased by tenants simply to allow them to obtain finance for a house. An amendment to conveyancing legislation in the Land Registration (Scotland) Act 1979 and/or Land Registration etc. (Scotland) Act 2012 to include croft tenancies in the definition of a real right would mean they would be available as security, removing the need for otherwise unwanted and unnecessary purchases. This seems a small change to achieve a practical benefit."

To like effect, the Final Report the Committee of Inquiry on Crofting (COIOC) (known as "the Shucksmith Report") recommended amendment of the Registration of Leases (Scotland) Act 1857 to make a crofting lease registrable and "hence eligible for standard securities". (COIOC 3.14.18) The intention was to facilitate a tenant crofter's ability to obtain loan finance without the necessity of decrofting.

We recognise that this is a longstanding problem. We do not think that either of the above proposals provides an easy solution. Any commercial mortgage-lender will look closely at the item offered as security to examine how easily the value of that item might be realised (and recovered) should the borrower default.

Unlike most property used as security for loans, there is no regular market place for crofting subjects. The constraints on people who acquire croft tenancies are not always fully understood. Indeed the statements quoted above indicate to us that the matter requires further explanation.

Proposition: The matter of using permanent improvements on tenanted crofts for mortgage purposes should be reviewed by a committee of practitioners well-versed in crofting law and the law of securities.

This is a HIGH PRIORITY issue.

10.2 Mortgages for tenant crofters

Of the rights provided to a crofter tenant, it is the entitlement to claim compensation from his landlord that encourages him to improve his croft. Such improvements that are permitted include the crofter's provision of his own croft house. On termination of his tenancy, for instance, should the crofter become insolvent for any reason, it is the landlord who may be placed in a precarious position, for it is from the landlord that the compensation is to be claimed and it is from the landlord that payment of the compensation is to be made. Since 1976, it has been the tenant crofter's right to obtain a title to the site of his dwellinghouse and garden ground (and to have it decrofted) and, if necessary sold. That is the ultimate protection for the crofter tenant. Such a course is not available to a creditor.

Should the borrower be a tenant crofter, he would be seeking to give as security his right to compensation (for his house), i.e. a 'permanent improvement' on land belonging to another, his landlord. At present, if the crofter is unable to pay his debts, he can be removed from his croft at the instance of his landlord and, when that happens, he has a right to compensation for his permanent improvements, including the value of his house (but not its site). This compensation requires to be claimed by him from that landlord, who must then pay the sum involved. That claim is not easily available to creditors (see below Q2) and, with all due respect, in such circumstances, the benevolent involvement of any landlord cannot be assured.

10.3 Securities

"At present, can a crofting tenancy (where, of course, there is a landlord and a tenant) be used for security for sums due by the tenant to a third party?"

"Is there is a means of imposing an effective security by way of a notice or charging order on a croft tenancy?"

We have considered the interests of a crofter in the tenancy of his croft as security subjects. The crofting tenancy is unusual in that there are two possible areas of worth, not always separated:

A. Permanent improvements

When his tenancy is brought to an end, the tenant crofter (or the executor of the deceased crofter) is entitled to compensation for any permanent improvement made on the croft by that crofter or his predecessors in the tenancy. (s 30(1))

B. Market value

This includes such "additional" sum that may be obtained by the tenant crofter on transferring his tenancy, with the consent of the Crofting Commission, to his assignee. An assignation for any additional value is notoriously difficult to attain where the crofter tenant (or his executor) are not active in the process. The market value may well prove illusory and therefore it may be discounted from any secured worth.

Where a croft tenancy is terminated, i.e. not transferred or abandoned, the amount of compensation payable to the crofter (or his executor) can, failing agreement, be fixed by the Land Court. (s.30(4)) Where there is no termination, e.g. by renunciation or removal (s.30(1)(i)&(ii) or under the Succession Act 1964, s.16(3)) there is no automatic entitlement to compensation. Such termination therefore requires appropriate timeous activity by the landlord or the tenant or his executor. Other ways of bringing the tenancy to an end, such as abandonment, do not precipitate any claim for compensation, which is in any case restricted to the crofter (or his executor). Unclaimed (or unclaimable) compensation is simply lost.

10.4 Transfer of rights to compensation

In seeking to set out the present position, it is right to note that a special procedure existed (s.26(2)) to protect the situation where the crofter's "rights to compensation for permanent improvements (had) been transferred in whole or part to the Scottish Ministers under s.43 of the 1993 Act. The Scottish Ministers could apply to the Land Court for an order of removal of the crofter thus gaining access to those rights to compensation. But s.43 was repealed in 2007 and does not appear to have been replaced. That privileged position no longer afforded to the Scottish Ministers, (to seek removal and therefore termination of the tenancy) where rights to compensation had been transferred to them, does not appear to have been given to any other party except HIE, although the rights of HIE were always to be postponed to any rights of the Scottish Ministers.

The existence, and subsequent repeal, of these provisions would seem to illustrate that rights to claim compensation are not easily transferred from a crofter tenant.

Although there may be legislation to enable the recovery of charges for residential accommodation from residents' assets; and although there is a mechanism to create a security over a resident's interest in land by recording a charging order to secure a debt arising from unpaid residential accommodation charges, such charging orders on being recorded in the Register of Sasines or registered in the Land Register would appear to be good only against the interests contained in these registers.

10.5 Ineffective mechanism

We conclude that we do not consider charging orders to be an effective mechanism for securing the value of croft tenancies to a third party. Further, whilst they would clearly give security over the ownership of owner-occupied crofts, they may not give much protection against the re-letting of such crofts to a new tenant.

There can be little doubt that the (new) Crofting Register would be the best place for recording a claim of a creditor against the interest of the occupier of a croft. Recording the claim in GRS or Land Register can only be good against the landowner's interest. It will catch the owner's interest in an owner-occupied croft but will not catch the occupier's interest in a tenanted croft, despite an intention that it should. We have two final thoughts. Firstly, that the Crofting Commission have no locus in this and, secondly, the tenant of a croft can have no responsibility for his landlord's title.

11 Sanctions

Sanction when Crofting Commission are dealing with an application [T1 S 58A(6)]

11 When Crofting Commission are dealing with an application

S 58A(6) states that when dealing with an application to obtain the Commission's approval or consent, the Commission must decide the application by:

Granting it; Granting it subject to conditions; or Refusing it.

However there is no provision in the legislation as to what sanctions can be applied if the applicant breaches any of the conditions imposed by the Commission in granting the application. This is in contrast with s 29A(6) "short term lease" which allows that the Commission may terminate a short lease granted under this section if: a condition imposed by the Commission under s 29A(4) is breached; or the tenant fails to comply with a condition of let (other than any relating to rent). These are important matters to do with the working of the Commission and the enforcement of their decisions. They should be clarified. There is support for clear sanctions, e.g. loss of apportionment where conditions are breached.

Proposition: It should be made clear when the Commission decides to grant any application subject to conditions that reasonable and proportionate sanctions will follow should these conditions be breached.

This is a HIGH PRIORITY issue.

12 The Crofting Register

Information to be held by the Crofting Register [P1 2010 Act, s 3]
First Registration [P6 2010 Act, Part 4]
Challenge to first registration [P4 2010 Act, Part 2, s 14]
Deemed Crofts comprising unapportioned grazing rights [S2 S 3(5)]

12.1 Information to be held by the Crofting Register [P1 2010 Act, s 3]

We applaud the establishment of a new, definitive map-based Crofting Register with a goal to provide an accurate, legal register of interests in, and extent (boundaries) of, crofts and common grazings.

Two questions were raised:

“Should not access rights be on the register? The Keeper has power (discretionary) to do it.”
“Should shares in common grazings not be recorded?” “The Register should include the number held by any crofter.”

We would welcome a discussion with Registers of Scotland re the Crofting Register. There is some strong feeling that access rights should be included in the Crofting Register. We recognise that recording access rights might pose difficulties, e.g. where the access right is not documented or where it lies over land in the ownership of a third party, i.e. neither landlord nor owner-occupier.

We do not know why the number of shares in a common grazing should not be recorded in the Crofting Register. These should be ascertainable.

12.2 First Registration

We are told that there is no obvious reason (other than possibly oversight) why mandatory first registration in the Crofting Register does not apply to the purchase of the croft by the crofter. We understand this to mean the purchase of his croft by a tenant crofter (who then becomes an ‘owner-occupier crofter’). But when the landlord of a croft changes, this is a trigger.

12.3 Challenge to first registration

S 14 of the 2010 Act sets out the provisions for challenges to the first registration of crofts. However what is unclear here, in the scenario where the registration of the croft was triggered by a regulatory application trigger decided by the Commission is “what is the status of the Commission’s regulatory decision if it was either not appealed or appealed unsuccessfully, if there is a subsequent successful challenge to the croft registration?” (This would relate in particular to division and decrofting applications.) We agree this is a matter that must be clarified.

Proposition: The effect of a successful appeal on any regulatory decision by the Commission requires to be assessed and adjudicated. Power to do so should be given to the Commission when it is not given to the Land Court.

This is a HIGH PRIORITY issue.

12.4 Deemed Crofts comprising unapportioned grazing rights

Throughout the 1993 Act, the legislation appears to require the crofter to register a deemed croft comprising unapportioned grazing rights, if he wishes to receive Commission consent to a regulatory application, and/or to effect an otherwise valid transfer of the tenancy of the croft.

However Section 11(2)(a) of the 2010 Act states that "The Keeper must enter in the registration schedule a description of the land which comprises the croft that must consist of or include a description of it based on the ordnance map or some such other map as the Keeper considers appropriate."

As the deemed croft does not have a defined area, other than the common grazings over which the grazing right is held, it was unclear what the Keeper requires to do in order to register the deemed croft.

We believe that deemed crofts should be entered in the Crofting Register and understand this matter has now been resolved. (See also 9.3)

13 Public notification

Notification of First Registration of a croft [P2 2010 Act, Part 2, s 12(8)(a)]
Appointment, etc of grazings committee or grazings constable [S5 S 47(1)]

Despite there being little interest by lawyers in the requirement (and cost) of public notifications, these two matters were raised by crofters and deserve attention. If the cost of publishing notices is more than £100 in respect of each of 18,000 crofts, the total sum involved will exceed £1.8m and for this reason alone the matter is surely deserving of attention, especially to consider if this expenditure is worthwhile.

13.1 Notification of First Registration of a croft

S 12(8)(a) requires an applicant "...on receipt of a registration certificate relating to a first registration must give public notice of the registration of the croft by placing an advertisement for two consecutive weeks, in a local newspaper circulating in the area where the croft is situated." This is the only reference in crofting legislation requiring that a notice has to be advertised for two consecutive weeks, all the regulatory application notifications simply require that public notification of it be given. The two consecutive week notification requirement is therefore inconsistent with other public notification requirements of the Act, and it imposes a further financial burden on the applicant who already has had to bear the £90 fee for registering the croft.

"What is the purpose or reason for this advertisement? Can the requirement be removed?"
"Can the legislation be amended so that the public notification requirement is restricted to one week in line with other public notification provisions in the Crofting Acts?"

In the crofting areas it is not always possible to identify "a local newspaper circulating in the area" and that such public notice may not in fact be very effective.

Proposition: It is not clear to us why notification by newspaper is required, especially when the Commission are charged with the duty of notifying all those involved. In at least some cases the advertisements serve no obvious purpose. No attempt seems to have been made to justify it. The matter should be reconsidered.

13.2 Appointment, etc of grazings committee or grazings constable

S 47(1) states: The crofters who share in a common grazing may from time to time, at a public meeting of which public notification has been given, appoint a grazings committee ...

The wording of this section was changed in 2007. Previously it was possible to obtain the Commission's approval for posting notices in such public place or places as may be approved by them. It is difficult to understand the justification for costly public notification (by newspapers) when all shareholders can be contacted more cheaply individually. It appears

to result in unnecessary expense. Whilst it has been suggested that, once a committee is in existence, there is no need for further public notification, this is not clear. Indeed the opposite would appear to be the case.

Proposition: There is disagreement about the need for public notification. The Sump was created to identify where the statute is neither clear nor effective. This is a case in point. The matter should be revisited.

This is a HIGH PRIORITY issue.

14 Minor Reorganisation / Dispute Resolution

Role of the Commission in resolving long standing issues [V2]

14 Dispute resolution by minor reorganisation

In 2010, s 1(2) was amended giving the Crofting Commission (established by the 1955 Act but continuing in being) its new name and a responsibility for promoting crofting (rather than the interests of crofters).

The Commission have the “general function” of reorganising crofting but their powers are restricted to Reorganisation Schemes under s 38 in relation to any township to bring about a reorganisation of that township in order to secure its preservation or better development.

But we are led to believe there are pressing matters, not easily dealt with by other applications which might involve not whole townships but just one or two crofts and do not require the widest consultation, e.g. Multiple ownership problems.

Proposition: There should be a new power to resolve matters by means of a minor reorganisation of a croft or two requiring redrawing of boundaries or declaration of rightful occupiers, i.e. a limited reorganisation scheme not at present allowed for. The appropriate body to be empowered to do so is the Commission.

This is a HIGH PRIORITY issue.

15 New crofts

New crofts [D1 S 3A]

New Crofts: Application by owners of land [D2 S 3A(1)]

Wish to create croft tied to the letting to a desired tenant [D2.2 S 23(3):]

Wish to create an owner-occupier croft for own occupancy [D2.1 S 19B(3)(c)]

Existing holdings in the crofting counties [D3.1 S 3A(2)]

Existing holdings in designated areas [D4 Ss 3A(2) & 3B & 3C]

Limitations on the size of New Crofts [D5 S 3A]

Regulatory applications [P5 2010 Act, Part 4]

We perceive it to be present policy that an increase rather than a decrease in the number of crofts is expected to deliver a number of public benefits without any additional major costs to the public costs to the public purse. The system of crofting, already in place, is not in the process of being dismantled and the introduction of the Crofting Register will provide much-needed certainty to the amount of land involved.

15.1 Creating New Crofts

Any concern that landowners or present landlords are not included in the process of creating new crofts appears to be unfounded. In terms of s 3A(1) the owner of any land may apply to constitute the land as a croft. On that application being granted the owner will become the landlord. In terms of s 3A(2) we assume that any application by a tenant to the

Commission to constitute their holding as a croft will be served on the landlord as will any application to the Land Court in terms of s 3A(3) for a certificate. But whether it is the owner or the tenant of land who applies to the Commission to constitute the new croft, it is complained that certain provisions make this less attractive than it might be.

15.1.1 Wish to create croft tied to the letting to a desired tenant

When creating a new croft, a landowner he may have in mind a desired tenant, but letting the croft then requires a separate application. Without the 'guarantee' that the desired tenant will be acceptable, the owner of the land may not proceed to constitute the land as a croft. Why can't it be possible to give that guarantee?

Proposition: Some matters might be resolved if the Commission were able to consider two applications together: (a) creating the croft and (b) letting to the desired tenant.

This is a HIGH PRIORITY issue.

15.1.2 Wish to create an owner-occupier croft for own occupancy

When creating a new croft, a landowner he may have in mind that he would wish to occupy it himself as an owner-occupier crofter.

Proposition: that it be made possible for a person to apply to the Commission to be recognised as the rightful occupier of a croft (and as such the crofter) where, for instance, a person intends to constitute an individual croft.

15.2 New Crofts: Applications by tenants of existing holdings

In certain circumstances the present tenant of a holding can seek to have their holding constituted as a croft.

15.2.1 Applications by tenants of existing holdings in the crofting counties

S 3A(2) only allows tenants of holdings situated in areas outwith the crofting counties, but designated by order made by statutory instrument for the purpose of creating new crofts, to apply. There is no provision for tenants of holdings situated in the original crofting counties to do so. We have been asked whether there should be such a provision.

Under the existing arrangements, this means compensating the landlord, for he would receive less rent (an open market rent for an agricultural holding will always be more than a fair rent for a croft) but against that his responsibilities for maintenance etc will be reduced to zero. We agree, this requires to be considered in detail in due course.

15.2.2 Applications by tenants of existing holdings in designated areas

Tenants of holdings situated in designated areas are permitted to apply to have their holdings identified as crofts. We are informed that, in practise, the conversion of small holdings to new crofts has been burdened with legal and financial problems, particularly in relation to the compensation provisions. Ss 3B(7) and 3B(8) dealing with establishing compensation on the application of the tenant through the Land Court requires that the expenses of the valuer in carrying out his functions be met by the tenant and the "valuer" includes two valuers with an oversman."

If the present provisions are a block to implementation, they should be revised to ease the legal and financial burdens placed upon tenant applicants. However, we have no definite view on how these expenses could be eased. It might be considered unfair on an landlord if he was awarded compensation and then had to pay say one half of the valuation costs. One would have to consider also the legal expenses of an application to the Land Court for a certificate under s 3A(3) and, if necessary, a further application to the Land Court to

appoint a valuer. Perhaps they could be combined? At present s 3B requires that the expenses of the valuer in carrying out his functions be met by the tenant and that the "valuer" might include two valuers with an oversman. Although this is traditional, we consider it excessive.

15.3 Limitations on the size of New Crofts

It was drawn to our attention by several parties that there is no reference to the size of the new croft in the New Croft provisions.

We express no view as to the appropriate size of a croft. For the sake of consistency, it appears to us that the maximum extent of a new croft should be subject to the same limit (if any) as an enlarged croft. S 4(4)(b) on the "Enlargement of Crofts" states that the Commission may make a direction if they are satisfied that the enlargement of the croft would not result in the area of the enlarged croft substantially exceeding 30 ha. We believe these to be initially questions of policy for the Commission. Legislation may be required to provide consistency.

15.4 Regulatory applications

Regulatory applications to create new crofts (s 3A) and new common grazing (s 51A) must be accompanied by an application to register the croft or grazing. However with all other regulatory applications, the requirement is that the registration application must be submitted within 6 months of the registration application. During that 6 month period, the Commission may not consent to the regulatory application and need not consider the application. Administratively it is not particularly efficient to be holding onto an application you are not able to determine, or to be expending resources processing an application up to (but not including) the decision stage.

"Could the legislation contain a provision that a regulatory application in relation to an unregistered croft is invalid and will be returned by the Commission if it is not accompanied by an application for first registration of the croft?"

Proposition: This requires attention. The suggested solution appears to be a good one.

16 Defining croft land, extending its use and restricting rights

Definition of "croft land" [E7, F4, F5 S 12(3)]

Common grazing rights [S1 S 3(4)(a)]

Deemed croft as an apportionment

Contract or agreement made by a crofter affecting rights of tenant [E1 S 5(3)]

Consent for purposeful use by tenant crofter [E2 S 5C(4)]

Owner-occupier crofter to put the croft to another purposeful use [E3 S 5C(4), 5C(5)]

Obtaining consent to put the croft to another purposeful use [E4, E5, E6 S 5C(6), 5C(7)]

Schemes for development [E8 S 19A]

Resumption of common grazing: application to be made by landlord [S3 S 20(1)]

Common grazing – period of apportionment [S4 S 52(10)]

Fencing of Crofter Forestry [S8 S 50(3C)]

16.1 Definitions

16.1.1 Extension of the definition of "croft land"

This is apparently not to do with purchase. It has been suggested that, if it is government policy that tenant crofters should be able to benefit from renewable resources, the definition of croft land may require to be extended to include any water course. It has also been suggested that a tenant crofter might not be entitled to sink the feet of pylons in the ground etc.

16.1.2 Common grazing rights

The present definition of a croft now includes in s 3(4)(a) "any right in pasture or grazing land held or to be held by the tenant of a croft, whether alone or in common with others. Should this part of the definition be revisited?

"Grazings shares – need to clarify their status – pertinential rights or tenancy?"

"Can you assign grazings shares separately from a croft? – need to clarify."

It is clear that there has been much confusion recently about grazing rights despite many of the causes of that confusion having been around since the introduction of the croft purchase provisions in 1976. The Land Court has done much, in various cases, to explain the law as it relates to grazing rights but it appears that it will require even closer examination if it is to be simplified.

16.1.3 Deemed croft as an apportionment

The whole issue of apportionments and the right to buy might require further scrutiny.

If a deemed croft of grazing rights becomes an apportionment, it should be clarified in what circumstances (if any) it is to be identified as 'croft land' for the purchase provisions.

In the Reference by the Crofters Commission (Application RN SLC 121/11) it was not disputed that the original Queen's Printer's copy of the 1993 Act should have omitted part of sec 12(3)(b) as, although the addition of that part had been mooted, it did not form part of the Act as passed by Parliament. Many copies of the Act have been produced in different publications in reliance on the Printer's version. However the critical version is the version as enacted rather than the version as printed.

Proposition: Consideration now be given to implementing the recommendations of the Scottish Law Commission (Paper 141) dated May 1993 which recommended a new clause 12(3)(b)(ii) as follows: "(ii) comprises the whole croft, other than any right in pasture or grazing which has not been so apportioned: or". The provision relating to machair which is at present "(ii)" should appear as "(iii)". This "new" clause does in fact appear in certain prints of the Act but has not been enacted.

16.2 Consent for purposeful use by tenant crofter

In the context of renewable energy the issue arises as to how crofters can promote schemes themselves if the landlord does not consent. The crofter can obtain the consent of the Commission to the putting of the croft to some reasonable use but the consent of the Commission would not entitle the crofter to compensation in the event of termination of the tenancy. Few crofters are likely to take the risk of investing large sums of their own money into schemes if they have no right to compensation on termination.

Here "layered law" results in obscurity and lack of certainty as to what the Act now provides. Additionally there is the potential problem of realising the compensation payments when the landlord is inactive, remote or insolvent. The problem seems to be that a tenant crofter needs certainty of compensation for improvements if he is to proceed with an expensive scheme on his tenanted croft.

We have concerns about the degree of certainty of recovering compensation from a recalcitrant landlord. (See 10 Mortgages & Securities) We think that in many cases the purchase provisions could be used to remove or avoid a non-consenting landlord. This would remove the complicated arrangements required regarding compensation for a tenant crofter at termination. There seems no reason for a landlord/landowner to be involved in contractual arrangements to facilitate a tenant's renewable energy scheme unless it is perceived to be of mutual benefit.

There is currently no reference in ss 5C(6) & 5C(7) relating to obtaining consent to the land being put to purposeful use and ss 30(6A) and 30(6B) which deal with whether any

improvements erected or carried out for putting a croft to purposeful use should be excluded or included when considering "Compensation to crofter for improvements".

Proposition: The legislation be amended to the effect that any consent by either the landlord or the Commission should also deal with the question of compensation for any improvements as set out at sub-sections 30(6A) and 30(6B)?

16.3 Owner-occupier crofter to put the croft to another purposeful use

The Act requires a crofter to obtain the consent of their landlord, of the Commission, if they wish to put their croft, or any part of it, to another purposeful use. However there is no such requirement on an owner-occupier crofter to obtain consent to put their owner-occupied croft, to another purposeful use.

During the parliamentary debate stage of the Crofters Amendment (Scotland) Act 2013, the Minister indicated that the Government was committed to ensuring that, insofar as possible, all crofters are treated equally, while taking account of the differing status between tenant and owner-occupier crofters. Is it therefore inconsistent with that commitment to require a crofter to obtain consent, where no such requirement is placed on an owner-occupier crofter.

Proposition: The requirement to apply to the Commission for consent to put the croft to another purposeful use should also apply to owner-occupier crofters. This would provide comfort to those contracting with owner-occupier crofters.

16.4 Contract or agreement made by a crofter affecting rights of future tenant

Concern has been expressed that s 5(3) which allows a contract or agreement made by a crofter by which he is deprived of a statutory right does not provide a procedure which is available to owner-occupier crofters. This is seen as particularly regrettable in the context of entering into appropriate contractual arrangements to facilitate renewable energy schemes.

Proposition: For the benefit of certainty regarding alternative uses for croft land, we agree that a procedure similar to s 5(3) should be available to owner-occupier crofters either by application to the Land Court or the Commission, preferably the latter.

This is a HIGH PRIORITY issue.

16.5 Obtaining consent to put the croft to another purposeful use

S 5C(7) requires that the Commission must decide an application from a crofter for consent that a crofter put their land to another purposeful use within 28 days of receiving it. During the 28 day period the Commission are required to consult with both the landlord and the members of the community in the locality of the land. The Act is however silent on what the consequences are if the Commission fail to decide carry out this consultation and decide the application within the 28 day time period allowed. It is also a very tight deadline to meet given the consultation requirements.

The legislation should also clarify the legal consequences of the Commission failing to dealing with the application within the 28 day time scale set out in the Act.

16.6 Schemes for development

In resumption applications the Land Court have adopted the practice of informing an applicant that if they consider too large an area is being sought to be resumed. So, if an application seeks to resume (say) 1 ha for a site for one house the Court will investigate and

may suggest that the application be amended to reduce the area sought to the “normal” extent of a house site of 0.1 ha. If the application is not amended as suggested the Court will refuse to grant the application.

At present the Land Court may only consent or refuse to consent to a scheme for development as lodged.

Proposition: Powers to suggest amendments, i.e. propose changes, to a scheme for development should be given to the Land Court. We also think the Land Court should be able to subsequently amend a scheme for which it has granted consent on reasonable grounds after consulting all interested parties.

16.7 Resumption of common grazing: application to be made by landlord

The problem is with the description of the landlord of a common grazing when it belongs to another “owner”. An application for resumption, which may be in respect of the croft or any part thereof, croft land or common grazing, requires to be made by the landlord to the Land Court.

We agree that clarity is required when dealing with ‘owners’ as opposed to landlords. For example, it has been suggested that the ‘owner’ is the person who can make an application for resumption.

16.8 Common grazing – period of apportionment [S4 S 52(10)]

Apportionments for a fixed term – how does this sit with a crofter’s right to buy an apportionment which is contiguous or adjacent to his croft land?

We agree. This obvious problem appears to have been ignored by the legislators.

16.9 Fencing of Crofter Forestry

Where the owner’s consent is, under subsection 50(2)(bb), subject to a condition that land be fenced, or otherwise enclosed, any expenditure incurred in complying with that condition is to be met –

- (a) in a case where the applicant is the grazings committee, by that committee, and
- (b) in any other case, jointly and severally by the crofters sharing in the common grazing.

We note the first problem and agree that only those shareholders participating should contribute.

17 Assignment of Croft

Assignment of Croft [U3 S 8; Part 2 & sched 4 of the 2010 Act]

Date of Assignment [U4 S 8(6)]

17.1 Assignment of Croft

Sched 4, para 3(8)(c) of the 2010 Act inserted into s 8(6) of the 1993 Act the requirement that “In relation to an unregistered croft or a first registered croft, an assignment to which the Commission have given their consent shall take effect on such date as the Commission shall specify in the consent (being a date not less than 2 months after that on which the consent of consent was intimated to the crofter) unless before that date the crofter or his executor or legatee and the assignee jointly give to the Commission notice in writing that they do not intend to proceed with the assignment.”

Part 2, s 10(4) of the 2010 Act requires the person assigning the croft to notify the Commission within 3 months of the granting of the assignment application, that the assignment has taken effect. S 10(5) states that “Where the Commission are not notified of a change in

accordance, the change is (notwithstanding any provision to the contrary) deemed not to have taken effect.”

This raises 2 questions:

“Why, in the case of unregistered crofts or first registered crofts only, has the provision been retained in the 1993 Act for the crofter and the assignee to jointly give notice to the Commission in writing that they do not intend to proceed with the assignation, when the failure of the crofter to notify the Commission that the assignation has been effected within 3 months results in the assignation being deemed under s 10(4) not to have taken effect anyway?”

“If there is a good reason for the provision being retained for the parties to give notice to the Commission that they do not intend to proceed with the assignation, why does the provision not extend to registered crofts?”

17.2 Date of Assignation

There seems to be a problem with the effective date of an Assignation. There is a conflict in the terms of the 1993 Act and 2010 Act:

1993 Act, s 8(6) In relation to an unregistered croft or a first registered croft, an assignation to which the Commission have given their consent under this section shall take effect on such date as the Commission shall specify in the consent (being a date not less than two months after that on which the consent was intimated to the crofter) unless before that date the crofter or his executor or legatee and the assignee jointly give to the Commission notice in writing that they do not intend to proceed with the assignation.

1993 Act, s 8(6A) In relation to a registered croft (other than a first registered croft) (a) any consent of the Commission given under this section to an assignation expires at the end of the period of 3 months beginning with the date on which such consent was given unless an application for registration of the assignation is submitted by virtue of s 5 of the 2010 Act before the expiry of that period;

2010 Act, s 10(4) The person taking the step mentioned in s 4(4)(c) [the crofter applying for consent to the assignation] must, within 3 months of the granting of the application mentioned in the step, notify the Commission that a change has taken effect.

2010 Act, s 10 (5) Where the Commission are not notified of a change in accordance with subsection (4), the change is (notwithstanding any provision to the contrary) deemed not to have taken effect.

The 1993 Act states that the assignation shall take effect but the 2010 Act requires the assignor to give notice within three months (notwithstanding any provision to the contrary). Failure to give notice causes the assignation not to have taken effect. The assignee has no place in the process.

Proposition: The process of assignation of a croft tenancy has been complicated by the introduction of the registration process. The current process is potentially unworkable. This must be resolved soon.

This is a HIGH PRIORITY issue.

List of Corrections requiring legislative provision

Concerning the Crofters Holdings Book [A1 S 2(3)]
Plurality of bequests [A3 S 10(4C); H8]
Miscellaneous provisions regarding subleases of crofts [A5 S 29]
Common Grazings Regulations [A6 Ss 48 & 50:]
Use of Common Grazings for other purposes [A7 Ss 48 & 50:]
Compulsory subletting - removal of references [R7 S 28]

Correction 1 Concerning the Crofters Holdings Book

Under s 41 (5) the Crofters Holdings Book is now incorporated into the Register of Crofts maintained by the Crofting Commission. But s 2(3) still requires the Commission to send to the principal clerk of the Land Court for recording in the Crofters Holdings Book every order, determination, consent, authorisation or other proceeding of theirs which they may think proper to be recorded therein.

Proposition: As the Crofters Holdings Book is now part of the Register of Crofts, which is maintained by the Commission, there can be no need for the Commission to send information to Land Court. The Crofters Holdings Book is known only to veterans, such as the administrators of the sump. This provision is redundant and should be removed.

Correction 2 Plurality of bequests

S 10(4C) suggests that the bequests of parts of the croft are to be regarded as "the bequest"... whereas it should be recognised that there is more than one bequest.

Proposition: We suggest that "The bequest" is replaced with "Any bequest as is mentioned in subsection (1)(b)".

Correction 3 Miscellaneous provisions regarding subleases of crofts

Proposition: As s 28 has been repealed, remove references - in s 29(2) to s 28(4) & s 28(7); in s 29(4) to s 28.

Correction 4 Common Grazings Regulations

S 48(1)(a) mentions "any proposal approved under section 50B(11) of this Act" but that subsection was repealed in 2010.

S 49(2)(a) mentions "any proposal approved under section 50B(9) of this Act" but that subsection was also repealed in 2010.

Proposition: remove redundant mentions or adjust appropriately.

Correction 5 Use of Common Grazings for other purposes

S 50B(7) to (15) were repealed by para 30(b) of Schedule 4 of the Crofting Reform (Scotland) Act 2010. The repealed subsections relate to the process by which the grazings committee (or constable) sought the Commission's approval to implement a proposal to use the common grazings for other purposes. The following subsections of the 1993 Act continue to make reference to these repealed provisions: Ss 48(1)(a), Ss 48(4A), Ss 48(6A)

Proposition: These sub-sections should be revised to ensure that they (i) no longer refer to sections which were repealed, but (ii) do reference revised provisions where appropriate.

Correction 6 Compulsory subletting - removal of references

This first appeared in the Crofters (Scotland) Act 1955 but has never been brought into force. It became s 28 and has now been repealed. Correction is required.

Proposition: We recommend that all references to that section should now be removed: in 29(2) to 28(4) & 28(7) and in 29(4) to 28.