

## CONSIDERATION OF COMMISSION APPROACH TO DEALING WITH SECTION 47(8)

### Background

Section 47(8) of the Crofters (Scotland) Act 1993 sets out what the Commission is permitted to do in circumstances where a grazing clerk or members of a grazing committee are not properly carrying out their duties.

*If the Commission are satisfied, after making such inquiry, if any, as they may deem necessary, that any or all of the members of a grazing committee (however appointed under this section) are not properly carrying out the duties imposed on them (or that the grazing clerk is not properly carrying out the duties imposed on him) under this Act, the Commission may remove from office any or all such members or such clerk and may appoint or provide for the appointment of other persons (whether crofters or not) in their or his place.*

The wording of the relevant subsection has altered little since 1955. It should be noted that this subsection is permissive as opposed to prescriptive. It allows the Commission to take such action as opposed to requiring that such action is taken in the relevant circumstances. Therefore, it is for the Commission to determine whether such action is appropriate and justified. Indeed the Commission is not necessarily required to take any action.

Recent circumstances have highlighted the need for the Commission to consider more carefully its approach to dealing with reports of grazing clerks and grazing committees who may not be properly carrying out their duties. An ad hoc process has developed that has resulted in the actual inquiry process, in some instances, being undertaken by the members of the Complaints Committee. While the Committee's Terms of Reference do mention 'grazings investigations' it appears more in the context of scrutinising and monitoring how these have been handled rather than executing the process. While the wording may be open to interpretation, there does not appear to be the same direct involvement in other types of complaints. In these other instances, the complaint is investigated by a member of staff and the results provided for the Complaints Committee to scrutinise and monitor.

The Commission's own agreed procedure for delegated decision making indicates that the decisions relating to section 47(8) are taken by a single Commissioner. While there is a mechanism for upgrading decision making to three Commissioners or more, if necessary, it is not apparent that this is happening. To that extent what is occurring appears to differ from the published decision making level. There is a degree of irony in that the Commission may be requiring grazing committees to adhere to regulations while not being clear about the procedure it is itself employing in directing this.

### Consideration of Process

As the relevant section 47(8) is not prescriptive, the Commission has options as to how it operates. The removal of a clerk and grazing committee and their replacement is an ultimate step that the Commission is able to take, but need not necessarily do so. Generally, that should be considered as a last resort which may be used when other options or steps in the process have proved unsuccessful.

It may be recognised that the Commission is not obliged to enter into a formal process from the outset. The Commission has the option of making whatever inquiry, if any, that it considers necessary. Therefore, an initial inquiry may indicate that a grazing committee is not carrying out its duties properly and there is need for corrective action. The preference at this stage could be to provide advice on how any failures in duty may be corrected. In this context, the Act also enables the Commission to provide guidance to grazing committees. With regard to grazing committees, section 48(7) states:

*A person appointed by the Commission shall have power to summon and to attend any meeting for the purpose of advising them and otherwise assisting them in the performance of their duties.*

It may not always be necessary to attend a meeting of a grazing committee as guidance may be provided in writing from the outset. However, even if a person appointed by the Commission did attend a meeting and advise a grazing committee, written guidance should still be provided, along with an agreed timetable for implementing any corrective actions. It could also be the case that making inquiry into a complaint could overlap with providing guidance. What has to be considered here is that the Act enables a Commission appointee to meet with the grazing committee to provide assistance. Any combination of making an inquiry and advising a committee of correct procedure should, therefore, be limited to a meeting with a grazing committee. Any other elements of the inquiry should be separate and distinctive.

The Commission may consider that it is necessary to make inquiry by interviewing the grazing committee and complainants. In some of the instances that have been investigated the Commission has held shareholders' meetings. While this may be an open and transparent manner in which to operate, it has potential to cause problems and may not necessarily be the most appropriate mechanism for dealing with the matter in hand. As already indicated, where the Commission feel it necessary to give guidance to a committee, it may be better that this is provided directly and specifically to the committee.

Should the Commission consider it necessary to hold a wider shareholders' meeting, it should establish clear protocols for conducting the meeting. This should clearly state the purpose of the meeting and the order in which contributions can be made by the relevant parties. The Commission itself should be quite clear of the need to hold a meeting of this nature and how the Commission should be represented at it. Where there are opposing factions and divisions amongst shareholders, it is not immediately apparent that meetings of this nature will necessarily result in productive outcomes. If the purpose is to advise and direct, and possibly conciliate, there may be a need for advance work to be carried out. If the meeting is part of the inquiry process, it should be conducted on the basis that the purpose is to gather evidence.

Where it is necessary to carry out investigations within the actual communities, the Commission has the option to appoint an agent to undertake any investigations on its behalf. This option would be appropriate in that it would clearly separate the investigatory process from any decision making process. In doing so, it should help to ensure that allegations of bias are not readily levelled against the Commission. Following the findings of any inquiry, undertaken for or on behalf of the Commission, a clear programme for any rectification on the Committee's part should be set out. An inquiry findings should be in report form, which clearly details any failures in duty on the part of a committee and how these might be rectified. The decision as to what is formally communicated to a committee, indicating any failures and the period for rectification, should be taken at the agreed level of delegation.

The clerk or members of the committee, whichever is relevant, would be given a period of time (possibly 28 days) in which to agree to undertake the remedial requirements or to provide any reason why they cannot be carried out or undertaken within the set time period. Upon any representation the Commission could reconsider the matter and provide any amendment or change in timescale that it considered justifiable. This effectively allows an element of appeal. Where the Commission agrees to any amendment, a further period of acceptance will be given.

This period will be for acceptance of the Commission requirements and not for further negotiation.

Where a Committee does not respond, accept or carry out any agreed requirements the Commission can then remove them from office. As the relevant subsection is not prescriptive, the Commission has the flexibility to exercise judgement proportionate to the level of failure on the part of the offending party.

Where the Commission does remove a clerk or the members of a committee from office it *may* appoint another person or persons in their place. Therefore, the Commission need only appoint a replacement if it is considered necessary. The Commission has previously accepted that a grazing constable is not appointed at this stage. A constable may be appointed where the crofters who share in a common grazings have failed to appoint a grazing committee (Section 47(3)). Technically, that is not the situation that applies in this instance. However, a committee may consist of one person; so the Commission can appoint one person to operate as the committee for a relevant period of time. Where it is a single individual, such as the grazing clerk or committee member, the choice of replacement may remain with the grazing committee, depending upon the circumstances.

The Commission may consider it necessary to appoint a replacement in order to carry out the duties that the grazing committee has failed to undertake. It has to be considered that, depending upon the circumstances, these requirements could be onerous, particularly if it relates to the previous management of financial matters. The Commission does have the option of not immediately appointing any replacement and allowing, in the circumstances where a grazing committee has been removed from office, the crofters sharing in the grazings to appoint their own committee. The Act does state that the Commission may provide for the appointment of other persons, which would seem to indicate that the Commission does not necessarily have to make the appointments itself, but simply make provisions for the appointment of a committee. The Commission could accept or make it a requirement that a new committee carry out any outstanding duties. As a matter of course, it would be appropriate for the Commission to inform all shareholders if it removes a grazing committee from office.

The Commission also has to consider whether it is necessarily the appropriate body to deal with certain matters.

#### **Summarised procedure:**

- Initial consideration of complaint – are there identifiable failures to carry out duties/ adhere to regulations that the Commission considers should be rectified?
- Can any failures in duty be addressed within reasonable timeframe without recourse to more formal action by providing appropriate guidance?
- Where further inquiry is necessary, how should that be undertaken?
- If necessary, inquiries may be undertaken with relevant parties by suitable agent for Commission
- A report of any failures of duty should be provided for the Commission, along with any recommendations for rectification
- Where the Commission consider it necessary it may hold a meeting for shareholders. It should be clear as to its purpose and as to how it will be conducted
- From the information gathered from all relevant sources, a Paper should be provided that sets out the situation and whatever rectification is required. Any findings and directions should be provided at the relevant delegated decision making level

- Findings and directions should be communicated to the committee or other relevant party, with 28 days allowed to communicate acceptance, make suggested amendments or provide appropriate comments
- Where any response with comment or amendment is provided, the Commission will consider these and then provide a final direction for agreement within 28 days
- Where there is no response, agreement or failures in duty are not rectified, as subsequently agreed, the Commission will then consider removal from office. This possibility will have been communicated at an earlier stage
- Any decision to remove will be taken at the relevant delegated decision making level. The decision to remove should be communicated to all shareholders
- The Commission will also determine whether it is necessary to appoint any replacement
- The Commission may make provision for the appointment of another committee. This would be done on the basis that a new committee appointed by the shareholders would carry out any unfulfilled duties of the previous committee.

### **Overall Consideration**

It may be the view that this has the potential to lead to an extended process. This should not necessarily be the case. It is more about providing a clearer route that allows the Commission to conduct inquiry and reach justifiable outcomes in a fair and even-handed manner. While there may be other more apparently expedient means, these may not necessarily deliver in this manner, nor save the Commission time and resources in the longer term.

# SECTION 47(8) COMPLAINT WORKFLOW

