

Scottish Government's Crofting Legislation Stakeholder Consultation Group

Proposals to the Scottish Government for the way forward following submission of The Final Report on the Crofting Law Sump

Background

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

Paul Wheelhouse MSP, who was at that time 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.

The Crofting Law Sump was set up by the Crofting Law Group to assist the Scottish Government in this process. It was administered by Derek Flynn, retired crofting lawyer, and Keith Graham, formerly Principal Clerk of the Scottish Land Court. They collated the issues and problems that are causing difficulties, prioritised them and indicated how the problems might be resolved.

In a letter to Rob Gibson MSP, dated 5 August 2014, Paul Wheelhouse MSP wrote:-

“You ask specifically about the Scottish Government's plans for crofting law reform in light of recent output from the Crofting Law Group's (CLG) "crofting sump". I was pleased that the CLG volunteered to consult crofting stakeholders, collate responses and provide the Scottish Government with its findings as input to the Scottish Government's wider consultation process. I expect the sump to submit its views towards the end of this year and to provide suggestions on what might be done, both administratively and legislatively, to address the various issues raised during the Parliamentary passage of the Crofting (Amendment) (Scotland) Act 2013.”

“Following conclusion of the passage of that legislation, I asked my officials to consider how best these issues might be taken forward and the Scottish Government's Crofting Legislation Stakeholder Consultation Group was formed. The Group consists of members from crofting representative organisations and other key stakeholders, including: the Scottish Land Court; Scottish Land & Estates; National Farmers Union Scotland; Scottish Crofting Federation; Crofting Commission; Highlands & Islands Enterprise; Registers of Scotland; Crofting Law Group; and the Cross-Party Group on Crofting. The Group will consider the sump's report and then submit to me proposals for the way forward. I hope that some issues can be resolved administratively, but I expect that the majority will require varying degrees of legislative change.”

‘One Scotland: the Government's Programme for Scotland 2014-15’ states:-

“The Crofting Law Group will present a review of crofting legislation to the Scottish Government by the end of 2014, which will inform changes to both the legislation and administration of crofting that will be taken forward in early course. The Scottish Government will fully engage with the Crofting Law Group and wider stakeholder organisations to ensure buy-in to the changes.”

Proposals for the way forward

The Scottish Government’s Crofting Legislation Stakeholder Consultation Group (“the Group”), having considered The Final Report on the Crofting Law Sump (November 2014) (“the Report”) as submitted to the Scottish Government on 10 December 2014, hereby make the following proposals to the Scottish Government:-

1. The Report identifies 57 issues requiring attention. It is proposed that the Scottish Government should promote a Bill to resolve all 57 issues involved.
2. It is submitted that due to the extent of the issues requiring attention the Scottish Government may wish to take this opportunity to consider crofting policy afresh and the potential benefits of a ‘clean sheet’ approach to crofting law or, at least, an overall review of the existing legislation and the possible simplification thereof.
3. It is appreciated that Proposal 1 above is unlikely to be achieved during the remaining term of the current Scottish Government. In the interim and during that term it is proposed that the Scottish Government should promote a Bill to resolve the nine high priority issues identified by the Group. These are:-
 - (2) Redefining “Crofter”: 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) Ownership and change of ownership of croft land: There should 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. .
 - (4) Multiple owners: 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) Owner-occupier crofters: 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) Removing certain types of decrofting from registration provisions: 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) Provisions relating to sublets and short term leases: A subtenant and tenants of short term lets 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".
 - (13) Public Notification: 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.
 - (16) Contract or agreement made by a crofter affecting rights of future tenant: Introducing similar provisions for owner-occupiers as are currently available to croft tenants. 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) Affecting Assignations: The process of assignation of a croft tenancy has been complicated by the introduction of the registration process. The current process is potentially unworkable as there are contradictory provisions for affecting a croft tenancy following Commission approval in the 1993 and 2010 Acts. This must be resolved soon.
4. If the Scottish Government are not of a mind to deal with all nine high priority issues in the short term then it is proposed that at the very least they should deal with the two issues that are seen as an utmost priority by the Group as they are causing acute difficulties at present, namely:-
- (4) Multiple owners: 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) Owner-occupier crofters: 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.

However, it should be noted that the Group are of the opinion that the other seven issues should all be relatively easy ones to resolve in legislative terms and should be included in any Bill promoted by the Scottish Government in the short term.

5. If the current Scottish Government adopt Proposal 3 or Proposal 4 in the short term then it is proposed that they provide a manifesto commitment to deal with Proposal 1 during the term of the next Scottish Government.
6. If the current Scottish Government adopt Proposal 3 or Proposal 4 in the short term they may, of course, wish to consider the possibility of adding the necessary legislation into an existing Bill that is currently going through the Scottish Parliament. It may be expedient to do so rather than promoting a new specific Crofting Bill for the purpose of enacting the necessary legislative change in early course.
7. There are two issues that the Report identifies as requiring review by committees of practitioners. These are:-
 - (9) The matter of succession (i.e. to the rightful occupancy of crofts). It is proposed that the Scottish Government should ensure that this area of the law is reviewed by a committee of practitioners well-versed in crofting law and the law of succession in Scots Law.
 - (10) The matter of using permanent improvements on tenanted crofts for mortgage purposes. It is proposed that the Scottish Government should ensure that this area of the law is reviewed by a committee of practitioners well-versed in crofting law and the law of securities.

It is proposed that these two committees be formed by the Scottish Government as soon as possible so that their findings can form part, in due course, of the promotion of Proposal 1.

The Group look forward to receiving the Scottish Government's response to these proposals in very early course bearing in mind that if Proposals 3 or 4 are to be adopted action will require to be taken as a matter of some urgency to achieve legislative change during the remaining term of the current Scottish Government.

10 February 2015