



The Future for Crofting Law



Peter Misselbrook

peter.misselbrook@shepwedd.com

Emma De Saily

emma.desaily@shepwedd.com

It is well recognised that the legislative framework for crofting law is cumbersome and difficult to navigate. Security of crofters' rights was first legislated on in the late 19th century, and a raft of crofting legislation has followed. Consolidation of crofting law was effected in 1993, but in the last decade alone, there have been three further Acts which have added to the complexity of the law in this area.

With a view to providing much needed clarity, and to address areas where reform is required, Scottish Government published a Crofting Consultation on 28 August 2017. The main purpose of the Consultation is to ascertain the specific changes required to existing crofting legislation to make it transparent, understandable and fit for the 21st Century. It also seeks to identify the areas of Crofting Law where substantive change may be required for the law to operate more effectively.

The Consultation considers how the legislation can be tidied up and presents four different options for legislative change. These range from a consolidating Act to a complete re-write of the statutory framework.

Seven key areas for change

In terms of the substantive law, seven key areas are identified where it is recognised that legislative change is required to help crofting prosper: absenteeism, assignation and succession, common grazings, the Crofting Commission's regulatory functions and processes, crofting legislation, owner-occupier crofts and standard securities. In pinpointing these areas, the Scottish Government considered the Rural Economy and Connectivity Committee's 2017 Report *'Review of Priorities for Crofting Law Reform'*,¹ the Crofting Law Sump² and the Shucksmith Report³. Focus groups in major crofting areas were also consulted.

For each key area, views are sought on what are the main

opportunities for change and which parts of the legislation can be amended to implement such change. One or two issues are identified in each of the seven areas but as responses from stakeholders come in, many more issues may come to light. At present, therefore, it is too early to be able to forecast the exact shape the reform will take, although the Consultation gives a strong indication of the general direction of reform.

Crofting Commission's functions

It is acknowledged that the Crofting Commission is not taking enforcement action in many cases where it has been identified that crofters are not complying with their statutory duties. It is probable, therefore, that we will see changes to the current legislation which will give the Crofting Commission more flexible investigative and enforcement powers, or even introduce new penalties on crofters for breach of their duties such as the introduction of fines.

It is proposed that the regulatory functions of the Crofting Commission could be assisted by the streamlining and simplification of its processes and operations. This may result in a broader overhaul of the Crofting Commission's operational procedures.

Assignation and succession

We are also likely to see changes to the law relating to

¹<https://sp-bpr-en-prod-cdnep.azureedge.net/published/REC/2017/3/9/Review-of-Priorities-for-Crofting-Law-Reform-1/4th%20Report,%202017.pdf>

²<http://www.crofting.org/uploads/news/CLGreport.pdf>

³https://consult.scotland.gov.uk/agriculture-and-rural-communities/crofting-consultation-2017/supporting_documents/Shucksmith%20Report.pdf



assignment and succession of crofts. Some stakeholders consider the time limit of 24 months for the transfer of a croft in cases of intestate succession to be too short, due to the complex administrative procedures involved. Consequently, it is possible that this time limit will be extended. There could be scope for redressing the imbalance between the criteria for transfer of a croft in cases of intestate succession, and the stricter criteria in cases of assignment.

Raising finance

One of the other major areas the Consultation covers is the possibility of amending the legislation so that a tenant crofter can borrow money in exchange for giving a fixed security over their tenancy to a lender. Currently, banks will only lend over owner-occupier crofts or de-crofted land. The expectation is that funds raised in this way will be re-invested in the sector, which will ultimately lead to regeneration and growth.

Owner-occupiers v tenants

There are differing views on how to balance the rights and responsibilities between tenant crofters and owner-occupier crofters. Current legislation supports equivalence, although there is a view that the status of owner-occupier crofters would benefit from clarification. There is however also support from stakeholders for the converse view: that only tenanted crofts should be subject to crofting law. Responses to the Consultation should help to determine the direction in which this important aspect of the law should develop.

Crofting Register

Since November 2013, it has been compulsory for crofts to be registered in the Crofting Register when they are assigned, sublet or land is de-crofted. A crofter can also register his/her croft voluntarily. The registration process

is seen to be overly burdensome, and expensive. The Consultation will seek views on ways to improve this process.

Absenteeism, Mis-use and Neglect

Stakeholder views were divided on how best to address issues of absenteeism, which may or may not result in neglect. The Consultation asks whether more regulations, or a more flexible local approach should be adopted, while acknowledging that, due to differing local circumstances, a mixed approach to take account of such differences may be more appropriate.

Common Grazings

Many concerns have been raised in connection with common grazings, from clarification of the types of activities that can be carried on, to procedural and management issues with Grazings Committees. This Consultation provides an opportunity to address how to improve management and encourage wider participation. Future reform

Legislating to achieve these reforms is not the only option. It is possible that some of the issues can be addressed by non-legislative means, so that reform across the sector need not be purely legislative.

If nothing else, what is certain at this stage is that the process of reform will (and should) be a time consuming process and must be conducted with careful eye on the changing political landscape. Those who are likely to be affected by a future Bill should take this opportunity to provide a response to the Consultation to ensure that, where possible, the future of crofting law is shaped by those it affects most.

Responses are being gathered until 20 November 2017. The Consultation can be accessed [here](#).



Peter Misselbrook
Head of Rural Property
T +44 (0)131 473 5435
M +44 (0)781 385 3729
E peter.misselbrook@shepwedd.com



Emma De Saily
Solicitor
T +44 (0)131 473 5304
E emma.desaily@shepwedd.com