Introduction

The reform of crofting law has been a live Issue throughout my legal career. I worked as a summer student in what was then the Crofting Commission, in 2004, and at that time what was to become the Crofting Reform (Scotland) Act 2007 was at an embryonic stage.

Since that time there has been an almost constant procession of draft bills, consultations, further draft bills, bills introduced to Parliament and passed by Parliament, commencement orders, a Committee of Inquiry and, at the end of it all, three Acts of Parliament, -namely the Crofting Reform (Scotland) Act 2007 and the Crofting Reform (Scotland) Act 2010, and also the Crofting Amendment (Scotland) Act 2013, which dealt solely with a decrofting problem. All of these pieces of legislation amended the last consolidation, the Crofters (Scotland) Act 1993.

The statutory framework is now cumbersome, to say the very least. Until 2013 it seemed that we were stuck with it; the Scottish Government showed no signs of taking any further action, perhaps being afflicted (like the rest of us) by bill fatigue. Quite simply, everybody was tired of trying to reform crofting law. In my own response to the Land Reform Review Group's call for evidence, (Annex A to this paper) in 2012, I believed there to be no appetite for reform of crofting law.

The crofting legal community began calling for reform in light of the circumstances surrounding the Crofting Amendment (Scotland) Act 2013. That legislation was deemed necessary due to a perceived problem with the decrofting provisions contained in the Crofting Reform (Scotland) Act 2010. Some argued that there was no problem, but the Commission were convinced that there was, and the amending legislation was rushed through Parliament in the summer of 2013.

It was this further layer of complexity provided by the 2013 Act which prompted me (and others) to call publicly for the improvement of crofting legislation. I attach a copy of my response to the consultation on the Crofting Amendment (Scotland) Act 2013 (Annex B).

Main Areas of Concern

The Crofting Law Group and its members have been at the forefront of calls for change. The Committee will have seen the Sump's Final Report, and so I will not go in to that in any detail other than to say that I endorse, with just one exception, the findings of the Sump.
In addition, I would like to draw attention to three specific issues which are viewed generally as problematic.

Impenetrability of Legislation

The Sump talks (at paragraph 2.1.1 (page 7)) of "the present impenetrability of Crofting law, caused by the "layering" of amendments, one after the other, without refining the accumulated mass of legislation".

In my view this "impenetrability" is illustrated particularly well by the succession procedures, where one is obliged to use multiple paper versions of the legislation laid out together on a very large desk (or the floor), together with rulers and highlighter pens, to establish what the law is. Subscription services cannot, it seems, keep up.

The "impenetrability" creates hazardous professional risks for solicitors, and the increased complexity means that transactions, particularly crofting conveyancing transactions, are now extremely complex and protracted as a matter of course, with the knock on effect to crofters in terms of the professional fees which result.

Owner-occupier Crofters (and those who are not)

The problems which have been created by section 19 of the Crofting (Scotland) Act 2010 (hereinafter "the 2010 Act") merit a separate mention. The problems are examined in some detail in part 5 of the Sump Final Report. Unfortunately, there is no mention of them within the high priority list, and I am, respectfully, of the view that they ought to have been prioritized.

The Sump comments at paragraph 5.2 (page 16) that:-

"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."

The label "owner-occupier" has been used since crofters were given the right to acquire their crofts in 1976. Crofters buying their crofts were called 'owner-occupiers' for want of a better label. However, the term was never defined in law, and the legal reality for those crofters who had purchased their crofts was that they were considered to be landlords of a vacant croft.

The Commission, strictly speaking, could have regulated these "owner-occupiers" by imposing a tenant on them, but they generally did not do so if the owner-occupier was complying with the principal duties of a crofter, i.e. she was ordinarily resident and she worked the croft.

This wasn't greatly satisfactory, and a desire became apparent to regulate those who had purchased their crofts in the same way as tenant crofters; defining that group was required a prerequisite.
However, life since the 2010 Act has, in my experience, been considerably more complex for crofting solicitors, and thus more expensive for clients, than it was previously. The definition of "owner-occupier crofter" excludes many of those whom it was designed to catch, and has resulted in a new category of crofter who is neither a tenant crofter, nor an owner-occupier crofter in terms of the new definition. They are, in crofting law terms, neither fish nor fowl.

There are considerable practical disadvantages to this awkward position, including an inability to benefit from the Crofting Counties Agricultural Grant Scheme (CCAGS) and the Croft House Grant Scheme (CHGS); both sources of significant financial assistance available to crofters in addition to 'mainstream' agricultural assistance.

I discussed the problem of owner-occupier crofters in some detail at the Crofting Law Group's Conference in Lochmaddy in 2014, entitled "The Curse of S. 198". I attach a copy of that paper (Annex C). It should be noted that the decision of the Scottish Land Court, in the case of MacGillivray v Crofting Commission (RN SLC/99/13), issued since that paper was published, means that it is not now necessary for all owners of a croft to consent to a decrofting or letting application. This decision was welcomed but serious problems remain.

Funding

The concept of croft mortgages seems to have first been floated (in recent times at any rate) by Professor Mark Shucksmith in his Committee's final report in 2008.

In the wake of that Report the Scottish Government produced a consultation paper which accepted, in general terms, that crofters should be able to obtain loan finance without having to decroft an area of land to do so. However, at that time the Government was not in favour of reintroducing the loan element of the Croft House Grant Scheme, and therefore other ways had to be identified to secure sufficient funds to build a house, namely private loan finance.

The Government agreed to consult the Scottish Committee of Clearing Bankers with a view to moving forward with the idea of obtaining private sector mortgages over croft land. There was also talk at that time of consultation with the Council of Mortgage Lenders, although the results of those discussions (if they took place) were not, as far as I am aware, made public.

Currently, it is theoretically possible for a security to be granted against an owner-occupied croft. This is frequently used by former crofting landlords to secure their right to future claw back (if a crofter sells on the land he or she has purchased, within a period of ten years). However, crofts cannot be used as security for funding from a commercial lender, because the solicitor acting for the lender would be obliged to raise the crofting aspect with the lender and obtain clearance to proceed - which inevitably would be refused.
There are undoubtedly situations where securities have been granted over an owner-occupied (or indeed a vacant) croft, but these almost certainly are accidental and as the result of ignorance on the part of either the client or the solicitor; and almost certainly the lender.

At the time of publishing the consultation paper, the Government considered that the way to encourage private sector lending institutions to lend over croft tenancies was to (1) create certainty over crofting rights by way of the Crofting Register, and (2) ensure that lenders would be able to call up the security in the event of default, thus ensuring their investment could be recouped.

The Crofting Register is now well underway, and whilst it does certainly provide a degree of certainty regarding interests in and boundaries of a croft, it is still a work in progress.

Some thought was given in the consultation paper to the calling up of a standard security, and it was envisaged that: "The creditor will have a number of options at his disposal on calling it up; assigning the tenancy, taking possession of it, or, if necessary, taking full title to the tenancy by obtaining a decree of foreclosure".

Matters such as the necessity of obtaining the lender's permission before assigning, enlarging or dividing a croft, were discussed in that paper, as was the position regarding the fulfilment (or not) of statutory conditions. It was envisaged that creditors must be advised of any notice of suspected breach of duty, or any proposal to change the use to which the croft is put, or indeed any notice of termination of the tenancy.

Reaction to the consultation paper was generally negative, and ultimately, when the draft Crofting Reform (Scotland) Act 2009 was published, the mortgage provisions had been dropped.

Concerns had been voiced by those responding to the consultation paper that the mortgage proposals hadn’t been thought through properly. In my own submission I raised the problem that there are so few crofting households that it would hardly be worth the banks’ time and effort.

Discussion about funding for crofting has, thus far, focused purely on funding for those who have crofts. Although the recently announced increase in the Croft House Grant Scheme has been welcomed in general terms, this can only assist those who already have a croft and who require finance to build. The issue of the obtaining funds for the purchase of crofts has never been addressed.

At least those who have a croft or croft tenancy can theoretically obtain mortgages to build a house by decrofting first. There is no solution, currently, for those who do not have funds to purchase a croft in the first place.
One must be a cash purchaser if one is to purchase a croft. There is simply no other way. This results in a grossly unfair system which discriminates against young people and those who live locally.

For better or for worse, there exists a market in crofts and croft tenancies (despite an element of denial about that in some circles). Sellers are entitled to be compensated for the sale of their assets in the same way as the owner of any other heritable property. Accordingly, prospective purchasers of crofts must have enough in the bank (or another property which they can mortgage) to fund their purchase of the land.

Young people need loans or mortgages to enable them to purchase crofts. If the Government is serious about encouraging young people in to crofting, then creative solutions must be engineered to open up the market in crofts and croft tenancies.

I attach, in case it is of interest to the Committee, a paper (Annex D) which I presented to this year's Land Reform in Scotland Conference at the University of Aberdeen Law School, which incorporates much of what I also presented to this year's Crofting Law Group Conference.

Ideas for Moving Forward

It seems to be accepted that legislation must be improved; and part of that must be to simplify it. As Donald Cameron MSP has recently said, we must ensure that crofting law works for crofters and not just for lawyers.

However, I understand that the Committee wish to hear views on whether a more fundamental review is necessary. Do we, for example, wish to have another committee of enquiry to establish what people want from the crofting system?

The Shucksmth Report was published only 8 years ago, and I am not personally convinced that it is a sensible use of resources to undertake a similar evidence gathering exercise at this stage. Professor Shucksmith's report was generally well received, and my own view is that it would be sufficient to revisit his recommendations and assess afresh, in light of the evidence the Committee hears, which of those should be implemented. Additionally there may be a case made for measures not covered by Professor Shucksmith but which now appear necessary.

In particular, I would urge the Committee to consider whether the Commission should, once again, be appointed rather than elected. I was engaged, as a solicitor in private practice on secondment to the Commission, from May 2011 until September 2012. That is a matter of public record. I also worked as a student under Donald ISmith, former solicitor to the Commission, in 2004. I mention this only to illustrate that I have a fair degree of knowledge as to the internal workings of the Commission, both before the advent of elected commissioners, and after.
With that background, and whilst I endorse in general terms the concept of enhanced democracy, in my view the current Commission have not (despite the efforts of staff, officials and some Commissioners) contributed positively to crofters or the crofting system.

There is nothing undemocratic about our elected parliamentary representatives appointing board members to take decisions on their behalf. Would it be appropriate, for example, to ask all those subject to regulation by SEPA to elect decision makers to that body? Clearly it would not. Regulators ought not to be elected.

The elected Commission was quite simply a bad idea and Commissioners should, in my view, be appointed in future. Indeed, this is the only part of the reform of crofting law which should be fast tracked. In relation to the remainder of the exercise I would urge care and caution to ensure that these reforms will stand the test of time.
Eilidh Ross Maclellan, Solicitor in Private Practice

2 November, 2016

Response to Land Reform Review Group’s Call for Evidence

Introduction

I am a solicitor in private practice, based in Inverness. I practise crofting, property and rural law, specialising in the former. I have worked in the field of crofting law for almost ten years; as a qualified solicitor for almost half of that time.

I welcome in general terms the formation of the Land Reform Review Group, and I note that the Group has been asked to develop innovative and radical proposals that will contribute to Scotland’s future success*, and that the Government expects the Group’s Report to include recommendations as to how further land reform may be promoted and secured. Thus, the Group proceeds on the basis that further land reform is required and is to be welcomed.

Ten years is not a long time in legal terms. The pro-land reform lobby point to that passage of time and say that nothing has happened since the LRSA 2003, and that further land reform is long overdue. My own experience of the application of the law is that it takes time for people, lawyers and governments to become familiar with an act of Parliament, and for a body of case law to be established. The last ten years have been spent coming to terms with the LRSA 2003, and so while the timing of the LRRG may not have come a moment too soon for some, neither, in my view, is its formation overdue.

To take the example of crofting legislation, most of us working in that field long for a period of time to allow us to see how the reform acts of 2007 and 2010 will operate in practice. Not only does government have no appetite for further crofting reform (nor even consolidation, more of which below); neither, in my experience, do crofters or crofting lawyers.

The LRSA 2003 is not, of course, the only act of Parliament which governs tenure, ownership or use of land. There are numerous others, and I note that the Group’s remit is not restricted to consideration of existing legislation. Nonetheless, my own experience has been of the crofting acts and the LRSA2003 and so my response relates to those acts only.

Crofters (Scotland) Act 1993

The two acts reforming the Crofters (Scotland) Act 1993 (Le. the Crofting Reform (Scotland) Act 2007 and the Crofting Reform (Scotland) Act 2010) have preoccupied
the crofting community (not as defined in the amended 1993 Act but in a wider sense meaning everybody who deals with or is affected by crofting legislation) since I started working in the field in 2004. I as mention above, I do not believe there to be any appetite for further reform of the crofting acts.

However I will mention two matters of crofting law which may be of interest to the LRRG.

Firstly, the 1993 Act needs, at some point, to be consolidated. There does not have to be any significant amendment of the Act (although if anything is amended section 19B ought to take priority, containing as it does many anomalies and errors), but consolidation is badly needed to remedy the current confusing structure and referencing.

Secondly, I would encourage either the resurrection of the crofting mortgage provisions (which appeared in a draft of the 2007 Act) or, alternatively, government assistance (in the form of loans rather than grants if necessary) to assist those wishing to purchase croft land or croft tenancies. It is well documented that commercial mortgage lenders will not lend if the land over which security is to be taken is registered croft land (whether owner-occupied or tenanted croft land). This is understandable. But the effect, when coupled with the increase in land values (caused by various factors) is that crofts on the open market are only available to cash purchasers. These cash purchasers tend to be older people who have paid off a mortgage elsewhere, or else people who have sold property in a more expensive part of the country, allowing them to make a cash purchase.

Of course there is no reason why such people should be precluded from purchasing croft land or croft tenancies, but the current financing position means that young people and local people are excluded from the market in croft tenancies. Contrast this with the 'regular' housing market. The availability of mortgages (even now, post-2008, although obviously the recession has had an impact here too) ensures that there is a greater diversity of potential purchasers, and ensures that houses are not only available to older people or people from out with the area, but also to younger people or to local people. The market in croft tenancies and croft land could, and in my view should, be similarly opened up.

Rather than resurrecting the crofting mortgage provisions, the Government could make loans available (at commercial rates, if necessary, thus actually bringing money in to the government) to people wishing to purchase crofts. This is not proposed as an alternative to the crofter housing grant (which is available to crofters and owner-occupier crofters once they are a crofter), but as an additional but different form of finance which will assist people to become crofters in the first place.

If the Government is not minded to introduce such a measure, the crofting mortgage provisions ought to be re-examined, updated and refined, and introduced to Parliament by way of a separate bill. Until something is done to diversify the market
in croft tenancies, young people and local people will find it increasingly difficult to become crofters.

Land Reform (Scotland) Act 2003

Part 1-The Right to Access

The only comment I would make in respect of Part 1 of the LRSA 2003 is that it is an increasing frustration and concern to crofters that persons exercising their right to responsible access can, presently, do so quite legitimately with a dog which is not on a leash. The Act requires only that the dog is under control.

This causes problems for crofters because many dog owners consider themselves to be in control of their dogs when in fact they are not. Being in control of a dog in the absence of livestock is one thing; being in control of a dog in a field of sheep is another.

The sensible solution to this, in my view, is to amend Part 1 of the LRSA 2003 to provide that dogs must be on a leash when in a field with livestock. It is perfectly reasonable for dog owners to want to exercise their dogs without a leash (although of course a dog should always be under control) but it is also reasonable for crofters to wish to protect their livestock. There is no reason why both groups cannot be accommodated by way of a simple amendment.

Part 2 - The Community 'Right to Buy'

The question of whether communities ought to have an enhanced right to purchase their land is fascinating and complex. The LRRG will be aware of the activities of Land Action Scotland (LAS) in Applecross and Bute last autumn. Much can be learned from the experiment, but the most important lesson which I took from the campaign is that the change to community ownership of land (which, despite the campaign's assertions to the contrary was, in my view, the intention) can only be successful if there is the necessary will within the community for that to happen. It might be a 'chicken and egg' situation; where community ownership is successful, communities strengthen and become healthier and more independent. But did the change in ownership cause the healthy community, or vice versa? I offer no answer to that question and it may be that no single answer exists.

What is clear to me is that a high level of community involvement, motivation and cohesion is essential before successful community ownership should be considered. Where such communities exist and where community ownership is achieved, the results can be extraordinary.

It is also important that a community contains individuals with a broad range of skills and experience, for obvious reasons. Not every community will wish or will be equipped to form a community company and take ownership of their land. That it not
to say that all of those currently owning land are so equipped, but there is little sense in replacing one problem with another.

Therefore I would caution against any enhancement of the existing community right to purchase large areas of land without a corresponding obligation to demonstrate a high level of support and motivation and cohesion within that community. The procedures might be simplified (and I make no comment on whether they ought to be), but the level of support and cohesion required must be retained at the current level, at least.

It might be that there are introduced various levels of community 'right to buy'. Perhaps communities wishing to purchase, a small area for a single, specific purpose, for example a village shop, ought to have a stronger 'right to buy' than communities wishing to purchase a large, multi-faceted estate, to reflect the fact that the latter is a more demanding project.

Part 3 - The Crofting Community Right to Buy

There has been such limited activity in relation to Part 3 of the LRSA 2003 that it is difficult to establish what, if anything, about it is in need of reform.

I have little doubt that there will be some crofting communities who have been waiting for the decision of the Court of Session in the case of Paire Crofters Ltd and Paire Renewables Ltd v The Scottish Ministers before embarking on their own journey. The decision was issued on 19 December 2012 and was of course excellent news for the crofters of Paire (but not, of course, Paire Crofters Ltd), answering both questions referred by the Stornoway Sheriff Court to the Inner House in the negative and confirming that this Part of the Act are compliant with the ECHR and within the legislative competence of the Scottish Parliament.

This part of the LRSA 2003 particularly would, in my view, benefit from some time to mature before any further amendment is considered. It is likely that other crofting communities will now attempt to move their ambitions for community ownership forward, and equally likely that their paths will have been smoothed by the crofters of Paire.
Annex B

Submission on the Crofting Amendment (Scotland) Bill Eilidh I.M. Ross, Inksters, Solicitors, Inverness and Portree

Beau/y, I

1 January 2012.

The perceived need for, and the technical detail of, the draft Crofting Amendment Bill has been covered by my colleague Brian Inkster in his own submission, which I fully support.

For my own part, I will make a few comments on the limitations of the draft bill, and the need for further, radical, improvement of crofting legislation. I note the Scottish Government's position that the bill will only be used to address one of the specific (perceived) problems with decrofting of owner-occupier crofts by owner-occupier crofters, namely the issue of whether such crofts can ever be vacant.

Not only are there many anomalies, hiccups, and unforeseen consequences of the provisions currently contained in the Crofters (Scotland) Act 1993 caused by the Crofting Reform (Scotland) Act 2010, but the 1993 Act itself is, in my view, a mess.

Matters are now to be exacerbated by the addition of yet another layer of incomprehensible extra sections and consequential amendments to an Act which was consolidated 20 years ago, and which has been (badly) amended numerous times. If the Act which my fellow crofting solicitors and I work with on a daily basis, and on which we must advise our clients, is in such a poor state of repair, that has serious implications for our profession (not to mention for crofters and landlords).

It is, in my view, now imperative that further steps are taken by the Government to address the wider problems of the 1993 Act. Further amendment is not sufficient, nor even perhaps consolidation, if that would not result in an act which was understandable. The Government know what people want from crofting legislation (that was established by Mark Shucksmith quite recently and, although some do not support his findings, I am not aware of calls for a new committee of enquiry), and the 1993 Act tries to achieve those objectives that but fails in almost countless ways. The Act should be deconstructed and then redrafted in a way which is simple, understandable, and which clearly sets out the rights and obligations of all those whom it regulates (and affects in other ways).

The crofting act is important not simply from a historical perspective (although in my view that element is important); it is an essential part of the economic and social fabric of the Highlands and Islands and it is simply not acceptable that the legislative framework which supports that system is such a shambles. It is now incumbent upon the Scottish Government, once this single problem amongst many has been addressed (albeit in my view doing so complicates matters still further), to address
the 1993 Act without delay. It is no exaggeration to say that the future of the crofting system as a legal entity depends upon it.
Crofting law needs to be better than it is. Whether you believe the solution lies in fresh legislation, or redrafting, or consolidation, or restating; the one point on which most now agree, is that crofting law needs to be improved.

Derek Flyn and Keith Graham have undertaken the unenviable task of working on, and perhaps in, the sump of crofting law for the past few months ...or is it over a year now? It probably feels like a hundred years. The small task we have been asked to take on at this stage is to help decide the priority assigned to fixing each problem; inevitably our views will be shaped by our experiences in practice.

My own experiences in practice tell me that one of the most serious problems is s. 19B of the 1993 Act, which deals with the definition of owner-occupier crofters. This section was introduced by the Crofting Reform (Scotland) Act 2010.

19B        Meaning of "owner-occupier crofter" etc.

(1) In this Act, a person is an "owner-occupier crofter" if all the conditions in subsections (2) to (4) are satisfied

(2) The first condition is that the person is the owner of a croft.

(3) The second condition is that the person -

(a) was the crofter of the croft at the time of acquiring it (or is such a crofter's successor in title);

(b) acquired title to the croft as the nominee of a crofter (or is such a nominee's successor in title); or

(c) purchased the croft from the constituting landlord (or is such a purchaser's successor in title).

(4) The third condition is that the croft has not been let to any person as a crofter section 26J or otherwise --

either by virtue of

(a) at any time since it was acquired as mentioned in subsection (3)(a) or (b); or

(b) at any time since it was constituted as mentioned in subsection (6)(a).

(5) In this Act, an "owner-occupied croft" means a croft owned by an owner-occupier crofter; and "owner-occupier's croft" is to be construed accordingly.
(6) For the purposes of subsection (3)(c), the "constituting landlord" is -

(a) the owner of the land at the time the land was constituted as a croft under section 3A; or

(b) such an owner's successor in title immediately before the croft is sold to the purchaser mentioned in subsection (3)(c).

As this audience will know, the label "owner-occupier" has been used since crofters were given the right to acquire their crofts in 1976. Crofters buying their crofts were called 'owner-occupiers' for want of a better label. However, the term was never defined in law, and the legal reality for those crofters who had purchased their crofts was that they were considered to be landlords of a vacant croft.

The Commission could have regulated these landlords in the same way as other landlords of vacant crofts, by asking them for letting proposals, but instead, in a marvellous example of a practical solution to a legal anomaly, the Commission just didn't, so long as the owner-occupier was complying with the principal duties of a crofter, i.e. she was ordinarily resident and she worked the croft.

This wasn't greatly satisfactory, however, and a desire became apparent to regulate those who had purchased their crofts in the same way (or, more accurately, to the same degree) as crofters (i.e. tenant crofters); hence its appearance in the Crofting Reform (Scotland) Act 2010.

However, life since the 2010 Act has, in my view, been considerably more difficult for crofting solicitors, and more expensive for clients, than it was previously. The title of this presentation may appear provocative, but in fact I consider it to be entirely appropriate. The definition of "owner-occupier crofter" excludes many of those whom it was designed to catch, and has resulted in a new category of crofter who is neither a tenant crofter, nor an owner-occupier crofter in terms of the new definition; they are, in crofting law terms, neither fish nor fowl, and there are considerable disadvantages in this awkward position.

There are other problems of equal importance, and no doubt we will hear more of them throughout the course of the day; but the curse of S. 198 is causing havoc in an increasing number of crofting conveyancing transactions, and it needs to be addressed as a matter of priority.

The Curse of S. 198 (2)

Part of the croft has been sold without having been decrofted or resumed, meaning that the person does not own a croft; they merely own part of a croft. In order to be an owner-occupier crofter, one must own a croft.

This problem has a few potential remedies.

How to Spot a Croft which has been Cursed by S. 198(2)
1. The first place to look is the copy entry from the Commission's Register of Crofts. This should be exhibited in all croft sales by the selling agent.

2. If the copy entry lists no owner-occupier, but instead a landlord, or multiple landlords, you have a problem.

3. Equally, even a copy entry showing the croft as an owner-occupied croft, must be investigated further. The ROC is only as good as the information provided to the Commission, and an area of the croft may have been conveyed without having been removed from the croft. This would result in a 'clear' copy entry, but a cursed, non-owner-occupied croft.

4. Whether the copy entry is 'clear' (i.e. showing the croft as an owner-occupied croft), or whether it is 'goosed' (a term usually reserved for problematic PI 6 reports; the two having many similarities in terms of their effect on a solicitor's state of mind), you have some further work to do.

5. You need to match the titles with the land removed from the croft. By noting the titles and the terms of the search provided by the selling agent, one can see whether there have been any split offs since the original split off when the croft was purchased from the estate to which it originally belonged.

6. If there have been any split offs, you must then obtain from the Commission copies of all decrofting directions in respect of that croft.

7. If the decrofting directions do not match the areas split off, you must then approach the Scottish Land Court to determine whether there are any resumption orders to assist you in your jigsaw puzzle.

8. If you are able to obtain evidence that land split off has been removed from the croft by way of either decrofting or resumption, you may have escaped the curse.

9. If an area or areas have been conveyed but not decrofted or resumed, the croft is cursed by S. 19B (2).

The Effect

A. You cannot apply to decroft without obtaining the consent of the other 'landlords' of the croft; i.e. those to whom the area has been conveyed. Their signature/s is required on the application form.

8. You will experience a similar problem with any letting application you submit to the Commission.

C. You cannot benefit from the Crofting Counties Agricultural Grant Scheme (CCAGS); one of the main benefits of being a crofter.
D. You will not be able to benefit from the Croft House Grant Scheme (CHGS), even if the Scottish Government enact the regulations necessary for owner-occupier crofters to access that fund.

E. The Commission could regulate you as the landlord of a vacant croft; the Commission not doing so requires the Commission to take the same stance as the Crofters Commission took in respect of the original owner-occupiers. It would be helpful if the Commission would consider issuing a statement of their stance on this.

F. The value of the croft is lower (in my view considerably lower) than it would be as an owner-occupied croft, for the reasons I have outlined.

The Remedy

It is essential to obtain the cooperation of all parties owning any part of the croft; whichever remedy you wish to pursue.

You could either:-

A

i. Transfer title in to the names of all parties jointly (rather than parties owning discrete pieces of the croft themselves). The croft is then one whole owner-occupied croft.

11. All joint owners then submit division application(s) (as required by S. 190 of the 1993 Act) to the Commission. There is no guarantee that the Commission will approve such applications, particularly if they are in respect of small areas of ground which are being used for 'amenity' ground, rather than for any crofting purpose. It would be helpful if the Commission could consider issuing a statement of their position (in general terms, of course) in respect of such applications.

m. If the application(s) were approved, it would be open to the new owner-occupier crofters to apply to decroft their newly formed crofts, if appropriate. Even if they do not decroft, they will at the very least have obtained sole control of their own land, and will not be reliant on the cooperation of neighbours.

OR

B

i. Owner A applies to let the tenancy of her part of the croft to Tenant A, with the consent of Owner B (and C, D etc as if more than 2 owners).

ii. Tenant A obtains a title deed from Owner A, becoming the owner-occupier.
iii. Here, it is the operation of the letting of the tenancy which has the effect of dividing the croft.

OR

c.

i. If the areas involved are small and are being used as amenity ground, it may be more appropriate to apply to decroft or resume the areas or areas.

ii. The signatures of all owners of the croft will be required on the application form lodged with the Commission.

The Curse of S. 198(4)

The croft has been let since it was purchased from the landlord, bringing it foul of s. 19B (4). This is easier to detect than the previous type of curse.

If the copy entry discloses that the croft is not an owner-occupied croft, but instead lists a landlord or landlords of the croft, you should ask the Commission why the croft has not been classified as an OOC. The Commission will tell you if this is because it has been let since the croft was purchased from the estate.

It is worth noting that the reason you can rely on the Commission's records in these cases, is because the Commission controls all letting of crofts; therefore the information held by the Commission is correct and can be relied upon, both by Commission officials and by others.

The Effect

A. You cannot benefit from the Crofting Counties Agricultural Grant Scheme (CCAGS); one of the main benefits of being a crofter.

B. You will not be able to benefit from the Croft House Grant Scheme (CHGS), even if the Scottish Government enact the regulations necessary for owner-occupier crofters to access that fund.

C. The Commission could regulate you as the landlord of a vacant croft; the

Commission not doing so requires the Commission to take the same stance as the Crofters Commission took in respect of the original owner-occupiers.

D. The value of the croft is lower (in my view considerably lower) than it would be as an owner-occupied croft.

The Remedy

This type of croft can never be an owner-occupied croft. There is no way to create an owner-occupied croft from this position. The croft can still be disposed of, of course,
by letting of the tenancy and I or the landlord's interest to a connected person. But it is not disposed of as an owner-occupied croft.

The Curse of S. 198 (3) (c)

S. 198 (3) (c) requires that an owner-occupier must (if they do not fulfil one of the other subsections within section 198 (3)) have purchased the croft from the constituting landlord (being the owner of the land at the time the croft was created under s. 3A).

This provision therefore means that the constituting landlord themselves cannot be an owner-occupier crofter.

The Effect as above the Remedy

You must have purchased the croft from the constituting landlord, or else be that person's successor in title.

Therefore if you own land and have constituted it as a croft because you wish to be a crofter, you will need to convey it to somebody else (with all the risks involved in doing so), and they will need to sell it back to you, before you can 'qualify' as an owner-occupier crofter. There are, of course, risks and expense associated in this course of action, and it does seem grossly unfair that those wishing to become crofters are caught out before they even begin. Indeed, for many people, one of the main reasons they become wish to constitute their land as a croft is because they are able to access CCAGS and CHGS; the very thing they are unable to do because they do not qualify as owner-occupier crofters.
Case Studies

These problems are becoming increasingly common, as more crofts afflicted by these problems come on to the market.

Client 1

Some new clients wanted to buy a house with a small area of croft land as amenity ground, the land having been sold (but not decrofted) by the crofter before the 2010 Act. It was said to be an "owner-occupied croft" and marketed as such, but in fact it was vacant croft land. Not only was this a problem for my client, but also for the other 6 parties who had purchased undecrofted croft land from the same lady - who of course was blissfully unaware of the problems she was creating.

There followed lengthy correspondence between the seller's solicitor and myself, and eventually my clients chose to accept the position. There was a provision in the missives that the seller would cooperate with any future decrofting application or other mechanism to rectify the situation.

Client 2

My clients, a young farming couple, wanted to buy a croft. They identified a suitable croft in their area, described by the selling agents as "owner-occupied croft land". Perhaps the selling agents were trying to be clever in avoiding the term "owner-occupied croft", or perhaps they didn't know the distinction. Either way, the description has no legal meaning, and the croft was actually a vacant croft; a large portion (too big to decroft) having been sold some time before the 2010 Act.

Because my clients in this case operated an agricultural business, and the croft was going to be fully utilised for that purpose, my clients decided that if they were unable to access CCAGS funding for croft improvements, they were not interested in purchasing the croft.

Client 3

Another client of mine has had particular misfortune. He began looking for crofts to buy on Skye a few years ago. He probably thought he would be here, living in a newly built house by now. But in fact he is barely off the starting block.

The first croft he was interested in (a tenanted croft) had boundary problems; or, more accurately, it may have had boundary problems. Neither the tenant nor the landlord appeared to be interested in helping him to locate the correct boundaries, and therefore my client decided to look elsewhere.

The second croft he instructed me to offer for was, we thought, an owner-occupied croft. I lodged an offer a few months ago, and it transpired that this croft was cursed bys. 19B (4). We have agreed with the sellers to use remedy B above.
However, during the period of time between learning the first croft was cursed, and agreeing a way forward, my client also offered on a second croft.

Once again, my offer contained a condition that the seller warrants that the croft is an owner-occupied croft within the meaning of S. 19B and, once again, it transpired that the croft was cursed; this time by S. 19B (2).

It may be unusual for the same client to be cursed twice, but crofting conveyancing is becoming ever more complicated because of the problems associated with s. 19B. Fees need to be significantly higher to cover the increased time spent on these pieces of business, and that is both unpopular and unnecessary.

What Now?

Pending the response of the Scottish Government to the Crofting Law Sump, which response will hopefully acknowledge the problems and outline a positive way forward, there are some measures we can all take to limit the damage inflicted by the curse of S. 19B.

It would be a good idea to obtain copy entries before marketing crofts and, if necessary, carry out some further investigation to ensure that the croft your client wants to sell is of the correct status. Indeed, doing so will assist in all crofting cases, even if owner-occupied crofts are not involved.

If your client seeks to sell a tenanted croft, you obtain a copy entry and if your client is listed as a tenant, you are safe to proceed.

If your client seeks to sell an owner-occupied croft, as I discuss above, you have a bit more work to do. You will need to look at their title deeds, and ask some questions of the Commission and I or the Scottish Land Court, to establish the correct status of the croft.

Clients cannot be expected to know what is, and what is not an owner-occupied croft; they rely on us to tell them that. Such checks would avoid clients (sometimes repeatedly) incurring the expense of offering for owner-occupied crofts when the seller is not in a position to sell such a thing.

The problem of crofting legislation at the moment is apparent on many levels. It is frustrating for clients who cannot purchase what is marketed; it is difficult for practitioners to explain to clients the various problems because of the overly technical nature of it; and it looks to all as if Scotland cannot legislate properly and competently. The law must be better, and fairer, and easier to understand. Not because we are not clever enough to explain it, or because our clients are not clever enough to understand it, but because good law should be accessible and understandable.
There is also the concern that people who sold, perfectly competently and without
decrofting, pieces of their croft before the 2010 Act, only to find now that their asset,
the croft, is worth potentially far less than it was before the 2010 Act.

For these reasons, and for the other reasons you will hear today, I would suggest
that the remedy of s. 19B be assigned the highest possible priority.
My task today is to talk to you about land reform as it applies to crofting law. I have given my presentation the title of "Crofting Reform: The Neverending Story". I originally thought that this was a Disney movie, and so I wasn’t sure that the title would be relevant. However, when I Googled, I learned that The NeverEnding Story is in fact a 1980s West German sci-fi movie, about somebody fighting something called ‘the dark storm of nothing’. Whilst one certainly couldn't argue that nothing has been done in terms of reform of the crofting legislation, sometimes it feels as though we are no further forward than we were in 2003. So perhaps the title is apt, after all.

In the thirteen years which have passed since I began working in the field of crofting law, the world has changed considerably. In the summer of 2003 Tony Blair was the Prime Minister of the United Kingdom, the Scottish Parliament was in its infancy, our Parliament building at Holyrood was not yet built, and it was not yet illegal to drive while using a mobile phone.

In the world of crofting and crofting law, the same period of time has seen an almost constant procession of draft bills, consultations, further draft bills, bills introduced to Parliament and passed by Parliament, commencement orders, a Committee of Inquiry and, at the end of it all, three Acts of Parliament, namely the Crofting Reform (Scotland) Act 2007 and the Crofting Reform (Scotland) Act 2010, and also the Crofting Amendment (Scotland) Act 2013, which dealt only with a decrofting problem.

The statutory framework is cumbersome, to say the very least. Until 2013 it seemed that we were stuck with it; the Scottish Government showed no signs of taking any further action, perhaps being afflicted (like the rest of us) by bl/l fatigue. Quite simply, everybody was tired of trying to reform crofting law. In my own response to the Land Reform Review Group’s call for evidence, in 2012, I believed there to be no appetite for reform of crofting law, although consolidation was clearly going to be required at some point.

The crofting legal community began calling for reform in light of the circumstances surrounding the Crofting Amendment (Scotland) Act 2013. That legislation was deemed necessary due to a perceived problem with the decrofting provisions contained in the Crofting Reform (Scotland) Act 2010. Some argued that there was no problem, but the Commission were convinced that there was, and the amending legislation was rushed through Parliament in the summer of 2013.
It was the further layer of complexity provided by the 2013 Act which prompted many of us to call publicly for the reform of crofting legislation; whether in the form of consolidation, fresh legislation, or redrafting. It was and remains clear that crofting law must be improved.

Crofting Law Group Sump

The Crofting law Group has been at the forefront of calls for change. In 2013 the group established the Sump, administered by two of the Group's most senior members, Derek Flyn and Keith Graham. The Sump is a catalogue of the deficiencies of crofting law and, as you might expect, is a lengthy read. The Sump was submitted to the Scottish Government at the end of 2014, and the then Minister for Crofting Dr Aileen Macleod MSP indicated the Government's intention to reform crofting legislation in the next parliamentary term, in the context of wider consultation with the numerous stakeholders.

The Sump talks (at paragraph 2.1.1(page 7)) of "the present impenetrability of Crofting Law, caused by the "layering" of amendments, one after the other, without refining the accumulated mass of leg/slot/on".

In my own view that "impenetrability" is illustrated particularly well by the succession procedures, where one is obliged to use multiple paper versions of the legislation laid out together on a very large desk or the floor, together with rulers and highlighter pens, to establish what the law is. Subscription services cannot, it seems, keep up.

This "impenetrability" creates hazardous professional risks for solicitors, and the increased complexity means that transactions, particularly crofting conveyancing transactions, are now extremely complex and protracted as a matter of course, with the knock on effect to crofters in terms of the professional fees which result.

The Sump lists 17 "High Priority Propositions". Some are general in nature; others more specific. One has been superseded by the case of MacG;ivroy v Crofting Commission reported 18 December 2014).

The propositions are, namely:-

1. That there should be a simplified crofting code.
2. The term "crofter" should include all who are entitled to occupy a croft - currently the legislation deals separately with "crofters" and "owner-occupier crofters"; a distinction which has caused much confusion.
3. The obligation to notify a change of ownership of croft land should be clarified and extended to include 'statutory house sites' (i.e. croft house sites) and common grazings or part thereof.
4. It ought to be possible for a person to apply to become registered as the "rightful occupier" of a croft, for example in the case of a constituting landlord (who cannot currently qualify as either a crofter or an owner-occupier crofter).

5. Reference to decrofting of "ss 17 & 18 feus" ought to be removed from the legislation. To compensate, all such feus should be issued with a decrofting direction (and without the need to register them as crofts).

6. Subtenants should be obliged to comply with both the statutory conditions and statutory duties (new since 2010).

7. The legal consequences of delay on the part of the Commission should be specified.

8. Succession procedures ought to be reviewed.

9. The possibility of using permanent Improvements to crofts (principally undecrofted houses) as security for commercial mortgages should be Investigated.

10. If the Commission grants an application subject to conditions, the sanctions which apply if the conditions are breached ought to be specified.

11. The question of what happens to a decision of the Commission if it is successfully appealed ought to be "assessed".

12. The matter of public notification should be examined.

13. It ought to be possible to carry out a minor reorganization within a township - without the need to undergo a full reorganization.

14. It would be beneficial if the Commission could consider two applications concurrently, i.e. creation of a croft and letting.

15. A procedure similar to s. 5(3) should be available to owner-occupier crofters.

16. The assignation process should be reviewed. owner-occupier Crofters

The problems which have been created by owner-occupier crofter provisions Introduced by section 19 of the Crofting (Scotland) Act 2010 (hereinafter "the 2010 Act") are examined in some detail in part 5 of the Sump Final Report. Unfortunately, there is no mention within the high priority list of these, and I am, respectfully, of the view that they ought to have been prioritized.

The Sump commented at paragraph 5.2 (page 16) that:-

"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 ."
The label "owner-occupier" has been used since crofters were given the right to acquire their crofts in 1976. Crofters buying their crofts were called 'owner-occupiers' for want of a better label. However, the term was never defined in law, and the legal reality for those crofters who had purchased their crofts was that they were considered to be landlords of a vacant croft.

The Commission could have regulated these landlords in the same way as other landlords of vacant crofts, by asking them for letting proposals, but instead, in a marvellous example of a practical solution to a legal anomaly, the Commission just didn't, so long as the owner-occupier was complying with the principal duties of a crofter, i.e. she was ordinarily resident and she worked the croft.

This wasn't greatly satisfactory, and a desire became apparent to regulate those who had purchased their crofts in the same way as tenant crofters; defining that group was required as a prerequisite.

However, life since the 2010 Act has, in my experience, been considerably more complex for crofting solicitors, and more expensive for clients, than it was previously. The definition of "owner-occupier crofter" excludes many of those whom it was designed to catch, and has resulted in a new category of crofter who is neither a tenant crofter, nor an owner-occupier crofter in terms of the new definition; they are, in crofting law terms, neither fish nor fowl.

There are considerable practical disadvantages in this awkward position including an inability to benefit from the Crofting Counties Agricultural Grant Scheme (CCAGS) and the Croft House Grant Scheme (CHGS); both sources of significant financial assistance available to crofters in addition to 'mainstream' agricultural assistance.

Crofting Mortgages

One area of possible reform which was listed as a sump priority is the concept of mortgages over croft land. This seems to have first been floated (in recent times at any rate) by Professor Mark Shucksmith in his Committee's final report in 2008.

The final report of the Committee, which became known as the Shucksmith Report, made several recommendations regarding the development of the crofting legal and practical framework. I will not detail the findings of the Report here, other than to say that they did include a recommendation that the Registration of Leases Act (Scotland) 1857 should be amended so that a crofting lease could be registered; thus making it possible to grant a standard security against it.

In the wake of that Report, the Scottish Government produced a consultation paper which accepted, in general terms, that crofters should be able to obtain loan finance without having to decroft an area of land to do so. However, at that time the Government was not in favour of reintroducing the loan element of the Croft House Grant Scheme, and therefore other ways had to be identified to secure sufficient funds to build a house, namely private loan finance.
The Government agreed to consult the Scottish Committee of Clearing Bankers with a view to moving forward with the idea of obtaining private sector mortgages over croft land. There was also talk at that time of consultation with the Council of Mortgage Lenders, although the results of those discussions (if they took place) were not, as far as I am aware, made public.

The Government indicated in its consultation paper that private sector lenders would not generally lend on croft tenancies. This does not describe the situation correctly; in my experience any land which is affected by the crofting legislation - whether it is a tenanted OR owner-occupied croft, is of absolutely no interest to a commercial lender.

Although a security could theoretically be granted against an owner-occupied croft, one would be obliged to raise the crofting aspect with the lender and obtain clearance to proceed
• which Inevitably would be refused.

There are undoubtedly situations where securities have been granted over an owner-occupied (or indeed a vacant) croft, but these almost certainly are accidental and as the result of Ignorance on the part of either the client or the solicitor; and almost certainly the lender.

At the time of publishing the consultation paper, the Government considered that the way to encourage private sector lending institutions to lend over croft tenancies was to (1) create certainty over crofting rights by way of the Crofting Register, and (2) ensure that lenders would be able to call up the security in the event of default, thus ensuring their Investment could be recouped.

The Crofting Register is now well underway, and whilst it does certainly provide a degree of certainty regarding Interests in and boundaries of a croft, it is still a work in progress.

Some thought was given in the consultation paper to the calling up of a standard security, and it was envisaged that: "The creditor will have a number of options at his disposal on calling it up: assigning the tenancy, taking possession of it, or, if necessary, taking full title to the tenancy by obtaining a decree of foreclosure".

Matters such as the necessity of obtaining the lender's permission before assigning, enlarging or dividing a croft, were discussed in that paper, as was the position regarding the fulfilment (or not) of statutory conditions. It was envisaged that creditors must be advised of any notice of suspected breach of duty, or any proposal to change the use to which the croft is put, or indeed any notice of termination of the tenancy.
Reaction to the Proposals

Reaction to the consultation paper was generally negative, and ultimately, when the draft Crofting Reform (Scotland) Act 2009 was published, the mortgage provisions had been dropped.

Concerns had been voiced by those responding to the consultation paper that the mortgage proposals hadn't been thought through properly. In my own submission I raised the problem that there are so few crofting households that it would hardly be worth the banks' time and effort - without, of course, encouragement from the Government.

It also seemed to be an issue that little - if any- consultation had taken place with either the Committee of Scottish Clearing Bankers, or the Council of Mortgage Lenders.

A common concern seemed to be that lenders simply would not agree to lend, and a clear preference - perhaps not surprisingly - expressed for the reintroduction of the loan element of the Croft House Grant Scheme.

It is worth exploring that notion a little further: why, specifically, would a lender refuse to lend. The consensus amongst some legal colleagues with whom I have discussed the matter Is that there are simply too many variables which may affect the lender's ability to call up the security. The landlord of a tenanted croft can terminate a tenancy as the result of the breach of a statutory condition of tenure; likewise, and indeed even more so, too can the Crofting Commission.

Moving Forward

Although the recently announced Increase in the Croft House Grant Scheme has been welcomed in general terms, this can only assist those who already have a croft and who require finance to build. The issue of the obtaining funds for the purchase of crofts has never been addressed.

At least those who have a croft or croft tenancy theoretically obtain mortgages to build a house by decofting first. There is no solution, currently, for those who do not have funds to purchase a croft in the first place.

One must be a cash purchaser if one is to purchase a croft. There is simply no other way. Can you imagine the arguments which would be advanced If no mortgages existed for the purchase of other property? It would be seen as grossly unfair that those people at the start of their working life, who could service mortgages but do not have sufficient cash for the whole purchase, were unable to participate in the property market.

For better or for worse, there exists a market in crofts and croft tenancies. Sellers are entitled to be compensated for the sale of their assets In the same way as the owner
of any other heritable property. Accordingly, prospective purchasers of crofts must have enough in the bank (or another property which they can mortgage) to fund their purchase of the land.

Quite obviously, such prospective purchasers tend not to be young people, but people further through their working life who have either sold a property elsewhere, or have substantial savings.

There is nothing wrong with this demographic purchasing crofts, but it is intrinsically wrong for young people to be excluded for purely financial reasons. Communities need people of all ages, backgrounds and abilities, and the lack of mortgages or loans means that as land prices rise and wages continue to stagnate, there will be a decreasing number of young people entering communities in crofting areas.

Young people need loans or mortgages to enable them to purchase crofts. If the Government is serious about encouraging young people into crofting, then creative solutions must be engineered to open up the market in crofts and croft tenancies.

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2 November 2016