The Rural Economy and Connectivity Committee are seeking views on the priorities for crofting law reform and how these might best be delivered.

Biography

I have spent 25 years working as a solicitor on crofting law matters and that has become my speciality and main focus of work today.

I am the Hon Secretary of the Crofting Law Group, a member of the Crofting Group of Scottish Land & Estates, the Cross-Party Group on Crofting at the Scottish Parliament, the Scottish Government Crofting Stakeholder Forum, the Crofting Register Stakeholder Forum and the Crofting Legislation Stakeholder Consultation Group. My firm, Inksters Solicitors, provide a crofting law helpline to members of the Scottish Crofting Federation.

I appear regularly before the Scottish Land Court and was involved in three reported decisions of the Court this year alone and several other unreported cases.

I organise and am a regular contributor at Crofting Law Conferences. I write extensively about crofting law at www.croftinglawblog.com and tweet at www.twitter.com/croftinglaw.


Priorities for Crofting Law

I can do no better than endorse the views of Derek Flyn and Keith Graham as set out in the Crofting Law Sump Report. This must form the basis for any reform of crofting law moving forward. I would also highlight and endorse the proposals put forward by the Crofting Legislation Stakeholder Consultation Group to the then Scottish Government on 10 February 2015. It should be noted that point 3(4) thereof has been superseded by the decision of the Land Court in MacGillivray v Crofting Commission (see below).

Since the Crofting Commission came into being (replacing the Crofters Commission) much ado has been made firstly over decrofting and more recently over common grazings. The former resulted in the commissioning of The Sump Report and a pledge by the Scottish Government to resolve the anomalies that exist in crofting law. The latter has resulted in a review of the governance of the Crofting Commission.
My view is that there was not a lot wrong with the provisions in the crofting acts concerning decrofting or common grazings. The problem was how the Crofting Commission decided to interpret and implement the law. Yes there are things that could be improved in the legislation to make these areas clearer but fundamentally decrofting and common grazings had operated without much difficulty over many years until the Crofting Commission decided otherwise.

Section 53 of the Crofters (Scotland) Act 1993 gives the Land Court the power to determine, either on the application of any person having an interest or on a reference made to it by the Commission, any question of fact or law arising under the Act.

I was instructed by the Crofters Commission to refer some 30 related questions to the Land Court under this provision about the implications of potential division of crofts by way of purchase of parts and about the nature and status of grazing shares. The Court issued its determination on 3 August 2012 (SLC 121/11) providing clarity in the law that enabled the Crofting Commission (who had by then just replaced the Crofters Commission) to move forward with some certainty with various regulatory applications before it.

The Crofting Commission have not to date made a reference regarding any matter of law to the Land Court under the said section 53. Instead the Crofting Commission have made unilateral decisions on what it considers the law to be and ignored any reasoned argument to the contrary. Cognitive dissonance kicked in. The Crofting Commission also successfully sought to prevent the Land Court considering their legal position (Calum Maclean & others v The Crofting Commission - SLC 54/16).

In 2013 when the decrofting debacle (as it was often referred to) was in full swing I recommended the matter would best be resolved by a section 53 reference. That would, however, possibly have shown the Crofting Commission to be in the wrong. Thus instead of that route a much more expensive process was followed by introducing a new Act to remedy a ‘problem’ that possibly never existed (see www.croftinglawblog.com/decrofting-bill). This fact was subsequently exemplified in MacGillivray v Crofting Commission - SLC/99/13 - 18 December 2014 (see www.croftinglawblog.com/decrofting-uncertainty-continues-as-crofting-commission-take-case-to-the-court-of-session and www.croftinglawblog.com/crofting-commission-make-a-u-turn-on-decrofting-appeal-to-the-benefit-of-many-owner-occupiers).

Likewise the common grazings controversies of the past year could well have been dealt with and resolved by way of a section 53 reference.

This introduction and concentration on the provisions of section 53 of the Act is really to draw the Committee’s attention to a little used provision in the crofting acts that if actually utilised may have saved a lot of time, trouble and expense to crofters, the Crofting Commission, the Scottish Government and the taxpayer.

Even if the law is simplified there will always be scope for different interpretations of it. The Committee should consider ways to ensure that the difficulties that arose over decrofting and common grazings do not arise in the same way again. This of course
may be linked to and form part of the review of the governance of the Crofting Commission.

On a day to day basis the issue that causes most problems is the definition of ‘owner-occupier crofter’ and ‘owner-occupied croft’ introduced by the 2010 Act. This was ill conceived and has clear unintended consequences. Someone who should arguably be an ‘owner-occupier crofter’ but technically is not can turn themselves into one through a conveyancing process that can take many months and cost several hundred pounds. This issue features in The Sump Report and is certainly a priority issue for resolution.

The Sump Report recommends that the matter of using tenanted crofts for mortgage purposes should be reviewed by a committee of practitioners well-versed in crofting law and the law of securities. I wrote an article on this topic: ‘Is it Time for a Crofting Mortgage Bill?’ that was first published by the Firm Online on 31 May 2010 (although that website is no longer in existence – so it is no longer available online). It was reproduced in the Crofting Law Group Newsletter (Autumn 2011) and a copy of that printed version forms the Appendix to this submission. This is an area that I maintain would make a big difference if now introduced as it should have been in the 2010 Act.

How the priorities for crofting reform might best be delivered

Often reference is made to consolidation. If a new Act is to be promoted consolidation should be part and parcel of that so that when the new Act comes into being it not only reforms crofting law but also puts the law affecting crofts from the 1993 Act onwards into one reference point: i.e. one single Act.

If the Scottish Government plans to review its policies on crofting that may of course influence legislative change and the delivery thereof.

However, if we are just for present purposes looking at fixing what is wrong with crofting law (i.e. all that has been identified in The Sump Report and matters arising since the publication thereof) then that should be a relatively straightforward matter in drafting a bill that cures the ills. Indeed that perhaps should simply be the first task before the Scottish Government look at any wider issues concerning crofting law reform from a policy perspective.

Assuming a Bill is promoted the chaos of a huge number of last minute amendments that was encountered in creating the Crofting Reform (Scotland) Bill in 2010 must be avoided. For an analysis of that see www.sln.law.ed.ac.uk/2010/07/06/the-crofting-reform-scotland-bill-and-the-curious-incident-of-the-unopposed-opposition-amendment. Those last minute amendments were possibly partly responsible for many of the issues (not common grazings ones that were not affected by the 2010 legislation) that has led to the current Scottish Government having to tackle crofting law reform so soon again.

Brian Inkster
Inksters Solicitors
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