1.0 Introduction

This paper has been prepared to examine the perception and the reality of crofting regulation within the Shetland Islands in the present day, and to explain the prevailing attitude among Shetland crofters, which is a product of their frustration with the system. In the opinion of the authors, the overall attitude to crofting regulation has hardened, and become considerably more hostile over the period since the 2010 Act became the basis of regulation. This hostility may be as a consequence of more attention being drawn to regulation rather than to the actual changes, though the fact that these changes have led to: less discretion, more prescription, significant additional statutory time being added to the process is evidently significant.

It is, in our submission, necessary that issues which now prevail be analysed and dealt with in a manner which all involved can accept as constructive, practical and rational. We also think that much more could be achieved in crofting in the Northern Isles, at far less cost to the Scottish Government, if regulation was relaxed considerably.

The paper is not an attempt at a detailed critique of crofting regulation either in terms of its historic role, nor of the 2010 Act. For the former, there are many sources, including the books of Jim Hunter, for the latter, the Crofting Sump has made a spirited effort over some 150 pages or so.

2.0 The Authors

First, a brief note about the authors. Drew Ratter is a crofter, and currently a member of Shetland Islands Council. He is also a journalist, and has held a number of positions in public bodies, including 13 years with the Crofters Commission, the last five as Chair, to March 2012.

Ronnie Eunson is a crofter and organic farmer, producing lamb and beef from Shetland breeds for a number of top end outlets in England and Scotland. He has also served on the Crofters Commission, as well as on other public bodies.
3.0 History and Development of Crofting in the Islands.

The history of crofting up to the 1886 Acts was probably very similar to that in the Hebrides, but with an even greater emphasis on fishing. The small crofts created over the 19th century, principally through fishing tenancies, and to a lesser extent and much later, through clearances, continued to be occupied, by families, until the post WW2 period. Following the extreme stagnation of the 1950s (Shetland experienced no post war boom), a general ethos of development became a motive force in Shetland, during the 1960s. As far as crofting is concerned, that seemed entirely in tune with successive UK Governments’ emphasis on agricultural production, with consolidation of units, multiple croft occupation, and development through apportionment and extensive steading development.

Crofting in Shetland (likewise in Orkney and Caithness) quite quickly developed away from the model which is still maintained on the Western seaboard and in the Hebrides and Skye. As stated, a huge interest in apportionments grew up, along with amalgamation schemes, and folk began striving to create larger units, units upon which a family could live. Generous grants and a feeling of optimism and of going with the grain and taking opportunities was prevalent, and several new generations moved into crofting, as it still continued to be called (almost all of the agricultural land in Shetland is still croft land). The discussion at the Cunningsburgh meeting, along with research carried out by the Orkney and Shetland MSPs suggests that this attitude still prevails in the islands, along with a strongly-expressed desire to participate fully in the Cabinet Secretary’s recently expressed view on Scotland’s productive agricultural future.

Along with this development movement, there was the very general Shetland view, which had always prevailed, that your family's land was your own, and that the community had no stake in it. Of course, this did not hinder the collective activities associated with Common Grazings where cooperation was essential. This “ownership”, although not based on legal principles, was recognized as an acknowledgement of the security of tenure.

This view appears to differ from that which prevails in the west of Scotland. It is interesting to note that not one expression of interest in land reform has ever appeared in Shetland.

This view of land as private continues to be the great majority view in Shetland, and it is now coupled to a strong understanding that making a living simply from the land is really very difficult and precarious, and that hence diversification is essential to supplement that living. It is here that the current implementation of crofting regulation has become seen as an anachronism by many, and as an obstacle to potential forms of croft diversification in the ever-changing landscape of rural development.

In order to illustrate the general difficulties that have arisen we would like to concentrate on five examples of issues that are causing so much frustration and are hindering development in crofting communities. These issues are:

- Part Croft Decrofting
• Whole Croft Decrofting
• The New Croft Register
• The Inability to Raise Capital using Croft land as Collateral
• Identifying and defining the Public Interest

4.0 Decrofting

The Minister will note that this is only one of the operations under the aegis of the Acts and of the Crofting Commission. It is, however, and always has been a very significant part, the majority, indeed, of the work done by the Crofting Commission, and the Crofters Commission, over the decades. The attention decrofting has drawn from the crofting community here is, it is suggested, because of its effective hindering and blocking of any development intended by the crofter, whether it be building a house or developing a business diversification. Where in the past, this could be expedited to some extent, there are now significant periods of time built in by statute for consultation and advertising, which make it a very extended process, often well beyond the accepted legal timescales.

Other regulatory processes, assignation, apportionment, division, and all the rest are much more occasional, and, it seems to the authors, less likely to cause business and other opportunities to be missed. They all, as a matter of fact, contain significant and irresolvable contradictions, but, again, this is all discussed exhaustively in the Crofting Sump.

5.0 Part Croft Decrofting

The majority of part croft decroftings are carried out to facilitate the building of a family home. This again is a consequence of the impossibility of securing a loan on croft land, in this case the normally necessary mortgage. The point to be made here is that almost all of these decroftings are granted on first application. Therefore, the argument from Shetland is that decroftings for a family home should simply be statutory, as per the decrofting of the croft house and garden ground. It is submitted that no loss to the public interest would be created by doing so, and in fact, by facilitating new, quality housing in fragile areas, the public interest would be served.

There has been a great deal of campaigning against the building of houses on croft land in the west of Scotland in recent times. There is very little evidence of any such campaign in either Orkney or Shetland. When opposition has occurred, at a minimal level, the motivation often has little to do with crofting regulation. The general support for building on croftland in the North Isles should suffice to permit a variation or discretion to allow the provision of a family home on a croft outwith the rigidity of Crofting Regulation. The argument in Shetland would certainly be extended to other aspects of croft development, including the sale of house sites to fund business development. Shetland crofters tend to be entrepreneurial and development minded. Confidence in the desirability of such an entrepreneurial attitude has been encouraged by successive governments. Crofting regulation should encourage the ambitions of young crofters not stifle them.

6.0 Whole Croft Decrofting.
The prevailing position among those crofters affected by the new restrictive regulation is that (see the 2014 questionnaire) whole croft decrofting in Orkney and Shetland should likewise be statutory and automatic on application. The case, as understood by the authors is: “This is my croft and my family’s croft. Nobody else has an interest in it. How is either my own, or the public’s interest served by forcing me to stay within a system I wish to leave?”

It is understood that this argument is not quite as put in the west of Scotland and the Hebrides, where these writers’ view is that the attitude to land is still coloured by ideologies developed through the extended clan system. Such a system never existed in the Northern Isles, where immediate family and the land you live on is the prime source of personal identity.

The authors feel that these questions require examination and an answer from Scottish Government in terms of defining the presence of the public interest, and its weight insofar as imposing a status which is not desired.

7.0 The New Crofting Register

This register is part of the 2010 Act, and was introduced at that time. It requires that all crofts and common grazings be added to a map-based register, maintained by the Registrar for Scotland. It is a consequence of a slightly muddled but fervent campaign for an accurate crofting register. It was also justified by the intention of creating securable leases, which would have permitted borrowing against croft land. This intention was dropped due to a poorly conceived campaign against that particular proposed measure, which would have been one of the very few opportunity-creating aspects of the 2010 Act.

We assert that the campaign was muddled insofar as the current Register of Crofts held by the Crofters Commission was and is inaccurate. This was and will remain an accurate perception. The Crofters Commission register was, as it stood, invariably inaccurate because crofters do not, although legally required to do so, notify the Commission of changes of status, ownership, etc.

This, however, although it might seem a serious matter, is actually just an inconvenience. In fact, it is only an issue for entries when no regulation is actually happening concerning them. If anybody should propose and apply for a regulatory function to be carried out, by the time that is completed, all the necessary information concerning the particular land will be added to the register and will have been used in making the decision on the case.

Two further problems exist with the new register. First, the fact that it is expected to take some forty years to complete, given that completion for any given croft is triggered by a regulatory application. Second, it is based on a basic misunderstanding of what a croft is. A croft occupies land, certainly, but is far better understood not geographically, but as a bundle of rights and obligations on a piece of inbye land, and within a common grazing. Most of these: peat rights, rights to graze, rights to apportion, say, by definition cannot be expressed on a map. For these reasons, the longevity of its execution, and the fact that it
is unable to carry necessary information to permit the Crofting Commission to fulfil its function, there will certainly be a requirement for two registers, as long as crofting regulation shall last.

8.0 Diversification and Business Development on crofts

The fundamental requirement to develop a business as part of a land-based enterprise is control of the land proposed. This does not, and can not exist on croft land, understood as land which comes under crofting legislation (a croft has always been understood as a small area of land surrounded by miles and miles of either legislation or regulation, depending on the taste of the speaker). This is principally because any lender approached will note that the land, even the very holding of the land, is legally tied to decisions of the regulatory body.

This means that no financial institution will accept croft land as collateral. The stark fact, that is surfacing as an issue in Shetland, with changes in public sector funding and declining agricultural income is that, more and more, people wishing to stay in crofting need to develop related business to support their living. That should be acknowledged as an overall public good, and supported and encouraged, rather than hindered.

After all, diversified income streams, with the croft as a base, have always been the key strength of “crofting” – the most flexible means of maintaining populations in naturally challenging, isolated areas. This flexibility to adapt to differing circumstances has been severely curtailed by an ill-conceived piece of legislation.

All this means that more and more people are saying that they have looked at the advantages and disadvantages of being within crofting regulation, and decided that they would prefer to be outwith it. The Crofting Commission appears to have met this aspiration with a strong, apparently ideologically based, resistance, which has been manifested in extended foot dragging and, in terms of the legal process, weakly grounded decisions. It is understood that some of these are soon to be tested at the Scottish Land Court. Depending on the outcome of pending appeals, it is the view of the authors that there will be very many new applications for whole croft decrofting. The Scottish Land court will uphold the law, but also has a strong record of upholding the interests of crofters. Will that body fail to notice that a crofter is being discriminated against because he is a crofter, while his or her non-croft neighbour invests in his future?

It is suggested that the Scottish Government makes its own assessment of the situation in the Northern Isles regarding this matter, and if it is, as we believe, that a significant body of crofters believe that their being within regulation should be voluntary, that must oblige a reinterpretation of the legislation to make whole croft decrofting statutory just the same as the decrofting of the croft house and garden grounds.

9.0 The Public Interest
The whole thread which passes through the entirety of the foregoing issues is the public interest. Here, we will confine ourselves to an assertion that any use of public money must be supported by analysis of the reason or reasons why it is in the public interest that such money be spent on the preferred outcome.

We also consider that that public interest has not been considered, probably since 1955, explicitly, in terms of crofting regulation. The Shucksmith Commission is a case in point, where it should have been the first question asked and answered; instead of this it was simply asserted that the regulation of crofting served the public interest, rather than that assertion being debated and upheld or not, based on reasoning.

We believe that it is the duty of the Scottish Government to tackle the question of the public interest, and where it lies, in an open minded and transparent fashion, and come to a conclusion in which it is confident. Our suggestion is that the Scottish Government should be asking what outcomes are actually being achieved in the crofting community in the Northern Isles by the use of large sums of public money for regulatory purposes through the Crofting Commission.

10.0 Summary

We would again thank the Minister for her attention to this matter, and would request a meeting to discuss her responses to the points made in this paper

Points addressed

- A view of croft land as being private prevails in Orkney and Shetland
- Part croft deccrofting. We urge that this becomes statutory.
- Whole croft deccrofting. We urge that this becomes statutory.
- New Crofting Register. This needs to be justified as deserving of public funds.
- Requirement to raise capital for diversification and development. It is currently impossible to use croft land as collateral
- The Public Interest. This requires to be examined and defined.