



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Rural Economy and Connectivity Committee

**Wednesday 16 November 2016**

**Session 5**



The Scottish Parliament  
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - [www.parliament.scot](http://www.parliament.scot) or by contacting Public Information on 0131 348 5000

---

**Wednesday 16 November 2016**

**CONTENTS**

**Col.**

**CROFTING LAW REFORM**..... 1

---

**RURAL ECONOMY AND CONNECTIVITY COMMITTEE**  
**10<sup>th</sup> Meeting 2016, Session 5**

**CONVENER**

\*Edward Mountain (Highlands and Islands) (Con)

**DEPUTY CONVENER**

\*Gail Ross (Caithness, Sutherland and Ross) (SNP)

**COMMITTEE MEMBERS**

- \*Peter Chapman (North East Scotland) (Con)
- \*Mairi Evans (Angus North and Mearns) (SNP)
- \*John Finnie (Highlands and Islands) (Green)
- \*Rhoda Grant (Highlands and Islands) (Lab)
- \*Jamie Greene (West Scotland) (Con)
- \*Richard Lyle (Uddingston and Bellshill) (SNP)
- \*John Mason (Glasgow Shettleston) (SNP)
- Mike Rumbles (North East Scotland) (LD)
- \*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

- David Findlay (Crofting Commission)
- Colin Kennedy (Crofting Commission)
- Joseph Kerr (Crofting Commission)

**CLERK TO THE COMMITTEE**

Steve Farrell

**LOCATION**

The Mary Fairfax Somerville Room (CR2)



## Scottish Parliament

### Rural Economy and Connectivity Committee

Wednesday 16 November 2016

*[The Convener opened the meeting at 10:00]*

### Crofting Law Reform

**The Convener (Edward Mountain):** Good morning. I welcome everyone to the 10th meeting in 2016 of the Rural Economy and Connectivity Committee. I remind everyone to switch off their mobile phones, please. We have received apologies from Mike Rumbles.

Today is the third session in our review of the legislative priorities for crofting. As I have done at the start of all evidence sessions, I stress that we are conscious that some contentious crofting issues are being discussed in the media and elsewhere at the moment. The committee does not intend to stray into those areas, and I urge committee members and witnesses to focus on the legislative priorities today.

Before I welcome our witnesses, Stewart Stevenson would like to make a declaration.

**Stewart Stevenson (Banffshire and Buchan Coast) (SNP):** In view of the membership of the panel, I draw committee members' attention to the fact that, as Minister for Environment and Climate Change, I was responsible for the Crofting Commission (Elections) (Scotland) Regulations 2011.

**The Convener:** Thank you.

I welcome our witnesses from the Crofting Commission: Colin Kennedy, convener and commissioner for south-west Highlands; David Findlay, solicitor; and Joseph Kerr, head of regulations and duties. I understand that David Findlay will make brief opening remarks on behalf of the panel.

**David Findlay (Crofting Commission):** Thank you, convener, that is correct. Let me introduce Colin Kennedy, the convener of the Crofting Commission. Colin is a crofter from the island of Coll. He was elected to the commission in 2012 and he was elected convener in June 2015.

Joseph Kerr is the commission's head of regulation, which is an important role for the commission. He was seconded to the bill team for the passage of the bill that became the Crofting (Amendment) (Scotland) Act 2013.

I am an accredited specialist in crofting law with the Law Society of Scotland, and I am the in-house solicitor for the Crofting Commission.

The Crofting Commission took over from the Crofters Commission in 2012, with a greater emphasis on fair and impartial regulation of crofting as a system. As such, the commission has a vested interest in ensuring that the law and any changes to it are able to deliver effectively for crofters and for the commission, so that it can continue to be an effective regulator.

That is all that I wanted to say by way of a brief introduction.

**The Convener:** Thank you very much. We have quite a few questions to get through. I will give everyone a chance to answer a question if they indicate to me that they want to do so, but it always helps if people can make their answers as succinct as possible.

**Mairi Evans (Angus North and Mearns) (SNP):** As I am sure that the witnesses know, the Scottish Government announced a review of the Crofting Commission on 7 November. Are you content with the review's remit and timescale?

**Colin Kennedy (Crofting Commission):** Yes. We acknowledge the timescales, which we believe are achievable. We will endeavour to do all that we can to ensure that the timeline can be complied with. I think that it is satisfactory.

**The Convener:** Does anyone want to add to that?

**David Findlay:** It is good that there is to be a review, and I am satisfied with the review's terms and scope. I do not want to comment on particular cases because the convener suggested that we should not do so. However, I would not see the review as being integral to the legislative reform of crofting law. It is essentially an internal review and I am happy with the terms.

**Joseph Kerr (Crofting Commission):** In terms of regulation, my staff and I are quite happy to engage and co-operate fully with the review staff.

**The Convener:** Perfect. Thank you.

**Gail Ross (Caithness, Sutherland and Ross) (SNP):** Good morning, panel. Thank you for coming along. David Findlay spoke about the change from the Crofters Commission to the Crofting Commission and explained a little bit about why that was important.

This is our third evidence session on crofting. In previous sessions, we have heard various opinions about the change and whether the regulation of crofting should be more devolved—some people have been for and some against that—about the development of crofting and whether the development function should sit with

the regulation function, and about the merits of elected as opposed to appointed commissioners.

What are the panel members' views about the success or otherwise of the change from the Crofters Commission to the Crofting Commission, especially with regard to whether there should be a more devolved system for regulating crofting; whether the functions to develop crofting and to regulate crofting should sit with the same organisation; and on the pros and cons of elected versus appointed commissioners?

**The Convener:** You will all probably have views on that. Who would like to start? It looks like no one is jumping forward, so we will start with Colin Kennedy.

**Colin Kennedy:** Thank you, convener. I am happy to go first. From being a crofter myself, I have a reasonable understanding of crofting legislation. I have to say that I found the Crofting Reform etc Act 2007 added on to what we had, followed by the Crofting Reform (Scotland) Act 2010, is something that I am still trying to get my head round. I do quite a lot of studying of the crofting legislation for various reasons and it has made it extremely complicated from that point of view.

The development function is not something that I have been involved in a lot, but there appears to be no development function at the moment. Previously, the Crofters Commission had a development function. It is my understanding that that worked reasonably well—people were relatively happy with it and it delivered. Over the past five years, I have regularly heard it said, “Where is the development function?”, “There is no development function—it has gone to Highlands and Islands Enterprise,” and, “There is no money.” I have heard all the conflicting arguments, but the bottom line is that there appears to be little or no development function.

I could not say where the development function would best be situated, although I am sure that the commission could adequately deliver the function as the previous commission did prior to it being removed. However, there is the resource issue to consider—the commission is stretched to the limits, so you cannot just give it another function without proper resources.

I see the question of elected and appointed commissioners as a very serious issue. I see my role as having been elected by the people but I have equal responsibility from Shetland to Arran in the crofting counties. It is as though I were appointed. I have an equal role. I am not there to represent my constituents in Argyll; I am there to deliver for crofting across the spectrum. I am not sure that other elected commissioners see it that way—I do not believe that they do. They feel that

they are there to represent an elected area. Personally, I see that as quite an issue within the commission, if that assists you.

Going forward, I feel that we cannot have a situation whereby some commissioners take the view that they are representing their electorate. A commissioner is there to represent the crofting counties and to endeavour to set strategic leadership to deliver equal policies across the counties—regardless of which county they come from—within the provisions of the legislation. A commissioner is not there to deliver what their constituents require; they are there to deliver what is contained in the act of Parliament. That is how I see it.

**David Findlay:** The points about elections and devolving decision making are connected. It is important that crofting legislation is applied consistently throughout the traditional crofting counties and the areas that have been added since the 2010 act. There is a potential danger in devolving decision making, in that there might be a lack of focus on consistency and fairness. Those who are making decisions at a local level might develop policies and procedures for their regions, but they would be good only to the extent that one system of law and regulation was being applied.

It is important for all crofters to be treated fairly within crofting law. The Crofting Commission is a regulator whose decisions are appealable to the Scottish Land Court, and from there a special case can be made to the Court of Session. From the lowest level of decision making right up to the Court of Session, it is important that crofters, grazings committees and every person subject to crofting legislation is treated within the same legal framework, whatever it is.

On the development function, I personally do not see development and regulation as mutually incompatible. The 2010 act emphasised that the Crofting Commission has an important role in promoting the interests of crofting, and it seems to me that the development function would be integral to that role. As the body that specialises in crofting and which has a great deal of knowledge of crofting through its commissioners, staff and assessors, the commission is best placed to deliver development policies. However, as the convener of the commission said, there is a resource issue in that the commission would not be able to deliver a development function at present unless it got some additional resource.

**The Convener:** Stewart Stevenson has a question about something that might add to the discussion.

**Stewart Stevenson:** Yes. Joseph Kerr might wish to address what I am about to say. I have gone right back to the original Crofters Holdings

(Scotland) Act 1886, and one of the interesting things in it is that section 32 delegated to the Crofters Commission powers under the Fishery Board (Scotland) Act 1882 that were, in essence, development powers. It is therefore clear that right from the outset the principle was that powers over development should be part of what was operated for, and in the interests of, crofters. David Findlay said that his personal view is that it would be appropriate to return to that principle. Has the board taken a corporate view on that subject?

I leave aside the question of resources, because that is clearly a different issue. I just want a fairly concise response, if possible, to my question about that principle.

**The Convener:** Joseph Kerr can respond to that question and to the previous questions, then I will give the other witnesses a chance to respond to Stewart Stevenson.

**Joseph Kerr:** Stewart Stevenson's point about the 1886 act was specifically reinforced by the Crofters (Scotland) Act 1955, which focused on development.

On development, I have to declare a double interest because although I have been head of regulation for three years, prior to that I was the crofting grants and development manager with the commission for about 15 years. However, that job disappeared when the 2010 act took away the development function. Even during that period, I always felt that there was an artificial separation, as David Findlay suggested, between development and regulation. I have certainly found that to be the case in practice, having worked in both areas for the commission.

10:15

In my time, the five principal areas that we were in charge of were capital improvements, housing, encouraging young entrants, community support and various livestock improvement schemes. Irrespective of how the schemes operated, they had the same essential objective of maintaining and improving populations in remote areas. We also had a very direct link to the regulation in a number of areas, one of which was enforcement action in cases of absenteeism. However, instead of just going in with the stick of being able to terminate a tenancy, because we also managed the young entrants scheme we could talk to people about what their options were and there was the possibility of support. We played a more positive role in encouraging people to look at the whole package, and there were benefits in that.

Equally, the work that we did to encourage the setting up of crofting committees assisted the wider community, because the crofting communities scheme encouraged the grazings

committee to work with other elements of the community in putting forward a diversifying plan that not only focused on the traditional agricultural side of things—although that was clearly a key element for the grazings committee—but brought in historical societies, hall committees, war memorial committees and so on. Those bodies work well together. In many ways, the commission's best development tool was regulatory powers, and I think that there is a link there.

**Stewart Stevenson:** Is that your individual view or a corporate view?

**Joseph Kerr:** That is my individual view.

**The Convener:** Does David Findlay want to respond on that before I ask Colin Kennedy to comment?

**David Findlay:** My understanding is that the board has not reached a position regarding the development function but that it may do so in the context of the discussions that are taking place on reform of the law. Is that correct?

**Colin Kennedy:** That is my understanding. We have had various discussions and various communications have been sent to other agencies. I would not say that the matter is under review, but it is on our radar and we are discussing it. At the moment, we have no function in that regard but we have had discussions and I think that it would be fair to comment that it appears that there is a reasonable will among the board that the function should, potentially, be returned to the commission. However, that is not an agreed corporate view—that is my reflection on the discussions that we have had, not a considered and agreed corporate view.

I will make a couple of comments to follow up my initial comments on elected versus appointed commissioners. When I became a commissioner, one of the key drivers was the aim of bringing in delegated decision making because there were commissioners in this or that area who were making decisions here or there. I am personally somewhat uncomfortable about an elected member in an area—including me in Argyll—being approached by people to deal with “my application”, “my this” and “my that”. In introducing delegated decision making—which I think is working well; my colleagues may be able to expand on that—we are well down the road of achieving a much more balanced, equitable delivery of service. We have set parameters and it is no longer the area commissioner who makes the decisions. About 20 per cent of functions are still to be delegated—perhaps Joseph Kerr can help me on that—and we may never get 100 per cent of functions delegated, but matters have been moved forward considerably, in my view.

Going forward, a matter for consideration might be whether the commissioner for Argyll, for example, should make decisions in another area. I am very uncomfortable with the idea of the area commissioner making decisions on behalf of his elected people, as that leads to inconsistencies.

**The Convener:** In a previous evidence session, an example was given of someone who was delivering a child to nursery having to meet a person who they had a disagreement with. My question follows on from what Colin Kennedy said. Is it better for the staff in the commission to make the decisions—I am being careful to phrase this in generic and not individual terms—rather than the commissioners, with the commissioners having more of an overview of strategic policy making?

**Colin Kennedy:** It absolutely is. When I joined the commission, I believed that our role was to set the strategic overview, but it turned out that we were making decisions. People phone me up and I say, “I can’t make a decision on that.” I have to declare an interest when people speak to me—that is my position. When I stood for election, I did not fully understand that people would phone me on a Friday night when a decision was potentially going to be made on the Monday. That does not sit comfortably with me.

**The Convener:** Does your position reflect the views of other commissioners? Perhaps the other witnesses will comment on that.

**David Findlay:** The board has agreed to a system of delegated decision making—that has been a process, which will continue. The board has very much agreed that that is the way forward. As Colin Kennedy pointed out, there has been quite a steep learning curve—particularly, perhaps, for commissioners who have been elected.

I think that the commission is the only public body of its kind that has directly elected members. That is something to celebrate in a public body for which issues of accountability and democracy are very relevant.

If there are robust systems in place for delegated decision making, whereby the board has a supervisory role and is informed of decision making but does not get involved in individual decisions, the approach enhances the commission’s ability to regulate efficiently and fairly.

**Joseph Kerr:** Before there was any delegation, something had to happen with the new commissioners. As David Findlay said, I was seconded to work in the bill team for the bill that became the 2013 act. When I came back, I did not go back to my post as head of regulation. Instead, I spent a few months on a working group with Colin Kennedy, Derek Flynn, Susan Walker, who

was the previous convener, and our policy manager. We reviewed all the commission’s policies and procedures in light of the changes that the Crofting Reform (Scotland) Act 2010 introduced, to ensure that they were fully compliant. Before we could delegate anything, we had to go through that process.

Since then, we have rolled out delegation. That is an active process: at our most recent board meeting, we agreed to delegate a further two functions, and in a board paper that will go to the next meeting, I propose that a further four functions should be delegated. The programme is on-going and all the commissioners are signed up to it.

It is important to emphasise that, although the staff now make the decisions on a majority of functions, they do so within parameters that the board sets. The board sets the parameters under which we, as officials, operate. It still has an important role, but it is moving away from the individual case decision role.

**Colin Kennedy:** When all this began way back in early 2013, Susan Walker, the former convener, and I had difficulty in getting some commissioners even to consider accepting the idea. She did an enormous amount of work—as did I—to get us to where we are today. This is probably the biggest step that we have taken in the past four years to bring impartiality, fairness and equality into the overall picture of crofting commissioning, for our customers. That we are where we are is a credit to the staff who delivered that.

I feel strongly that things are not yet in the public domain for people to fully appreciate the difference that taking that step has made. I do not know whether Joseph Kerr and David Findlay agree, but that is how I see it.

**The Convener:** Having worked with Susan Walker, I know that she is good at finding a clear line and doing so gently, so that is a valid comment.

**Peter Chapman (North East Scotland) (Con):** I am finding it slightly difficult to hear David Findlay. I do not know whether it is possible, but is there any way that we can up the volume slightly? I know that it is my problem because I spent far too many years in noisy tractors in my youth and my hearing is not the best, so I apologise to everyone else if the volume gets too loud, but I am struggling with his answers.

My questions are about the register of crofts. We have heard that there are concerns about the costs that are involved in registering crofts and that the mapping of common grazings has ground to a halt. What are the witnesses’ views about the operation of the register and particularly the costs that are involved? Why has the mapping of

common grazings ground to a halt? Might a mediation service be useful in cases in which parties dispute information that is on the crofting register, possibly as an alternative to going to the Scottish Land Court?

**The Convener:** Would Joseph Kerr like to lead on that? I do not always want to put Colin Kennedy up first; I am keen to have Joseph Kerr's opinion first.

**Joseph Kerr:** We should differentiate between the register of crofts and the crofting register. There has been a register of crofts since 1955. It is maintained by the Crofting Commission and contains the history of the croft, every regulatory phase through which it has gone and every individual who has held it.

**Peter Chapman:** Am I right to say that every croft is on that register but there is a new register that is partially complete?

**Joseph Kerr:** That is correct. There are more than 20,000 crofts on the register of crofts, which the Crofting Commission maintains. The crofting register, which has about 3,500 registered crofts on it, is coming up for its fourth birthday, and registration has been compulsory in only three of those years. In the first year, it was voluntary and hardly any crofts were registered, because people were aware that registration would become compulsory and be linked to trigger events. Therefore, most people held fire.

There have been many issues with the crofting register. I was involved in a number of the roadshows on it and one of the biggest surprises that people had was when they realised that the £90 fee was not a one-off but was incurred every time a trigger occurred. That was not fully understood at first. People thought that there would be one fee and the croft would be registered, but it is now recognised that crofters will have to live with the fee all their crofting lives when they engage in certain activities.

The commission works closely with the Registers of Scotland team. With my staff who work in croft registration, I was down yesterday for a day with the ROS croft registration team. We had a good day working together and considering issues that we have worked through.

In fairness, the fact that there have been 3,500 registrations is to the credit of crofters, who have engaged in the process. That has been positive. The register's purpose was to give crofters greater legal certainty over what they occupy, because the Crofting Commission's register is not map based at all and the Land Court judged in previous decisions that any areas that we held could not be taken to be authoritative. At least the crofting register establishes more certainty about what crofters occupy.

However, there are issues with the crofting register, one of which relates to deemed crofts. A deemed croft is when someone tenants a croft land and an associated share and they purchase the croft but not the share. The Land Court has confirmed that that share becomes a separate legal entity.

If a person is to assign or do something with that share, it has to be registered. A person can see the benefits of croft land being registered but, for their grazing share, registering a deemed croft does little more than is done by the register of crofts that we hold.

There is an issue with deemed crofts and with processing. In the vast majority of cases—I think that there is only one exception—a person does not have to submit a registration application at the same time as the regulatory application. That is a nightmare for administrators, because they get an application but cannot do anything with it until the croft is registered.

There are practical difficulties, but we have been working through them together with ROS, which has regular roadshows that the commission tries to attend to deal with people's concerns and enquiries.

10:30

**Peter Chapman:** What about mapping the common grazings?

**Joseph Kerr:** We have mapped about 333 common grazings. We were still engaged with between 90 and 100 common grazings when we ran out of money. We got a sum of money from the Scottish Government for a project to map the grazings; we do not have that resource any more.

**Peter Chapman:** Would the commission like to have such a resource? Is it an important part of the regulation process for all the common grazings to be mapped?

**Joseph Kerr:** Very much so. Common grazing land is by far the biggest area of crofting land, so we want to continue the mapping.

**The Convener:** I would like to clarify the figures. You said that 333 common grazings have been registered and that between 90 and 100 were under discussion with the commission.

**Joseph Kerr:** Between 90 and 100 grazings were at some stage of engagement—some discussions were at a very initial stage and some were well developed.

**The Convener:** How many more are there that the commission has not engaged with?

**Joseph Kerr:** There are about 400 to 500.

**The Convener:** Is that 400 to 500 common grazings still with no engagement?

**Joseph Kerr:** Yes.

**Peter Chapman:** The problem is that there is no money to continue that process.

**Joseph Kerr:** That is correct.

**The Convener:** I ask David Findlay to cover that and to deal with mediation, on which he may have views.

**David Findlay:** Can Peter Chapman hear me better now? I am leaning closer to the microphone.

**Peter Chapman:** I can hear you fine now—thank you.

**David Findlay:** Joseph Kerr has set out the commission's main issues with the crofting register, which are to do with the deemed croft registration that many people think is unnecessary and an unnecessary expense. The advertisement costs that are associated with registration also add expense that some people consider to be over the top.

Mediation is a good idea. It is a way to bring together people in a potential dispute and reach pragmatic, practical agreement that avoids the expenses of litigation. If some kind of mediation role could be set up to consider croft boundaries and common grazings boundaries in the context of crofting register disputes, that would be a great step forward for crofters and for grazings committees.

However, the Land Court is often referred to as a layman's court—a person does not need a solicitor to go to it. It deals with croft boundary disputes effectively, efficiently and fairly. Those who go to the court get a good service, but I agree that mediation is a pragmatic way forward and would avoid the need to litigate.

**Colin Kennedy:** I come to the question from a slightly different perspective. I am a crofter and I hear from crofters who are on the ground. The cost of £90 to register a croft and of advertising for two consecutive weeks in a local newspaper—in my area, *The Oban Times* charges 240 quid for two weeks—comes to about £350. The average crofter cannot grasp what exactly is required in the registration. A person can read the legislation 20 times and not be sure, so they have to pay a fee to a solicitor to be sure that they get it right. One man on my neighbouring isle—Tiree—has 14 crofts and thinks that it will cost him more than 5,000 quid to register them. He told me that he just cannot do that.

Does registration require to have the complexity that is attached to it? I believe Joseph Kerr to be the authority on it. I have had a number of helpful discussions with him, but I go away and do not

remember half of what he said. I am dead serious. I ask myself what I was going to do, so I go back to the legislation and I struggle. Your average crofter—more than your average crofter—really cannot make any sense of it, so they have to go to a solicitor to get advice.

The cost of the registration is one thing. I am familiar with the case of a croft that is declared on the crofting register as a croft and has a boundary, a landlord and a tenant, but the Land Court ruled that it ain't a croft that can be bought, so I am not sure what value the crofting register has brought. That is a separate issue.

There is another practical issue. We have deemed crofts within the common grazings. They are marked by an X on the map. Is that correct, Joseph?

**Joseph Kerr:** Yes.

**Colin Kennedy:** The court has ruled that all the statutory definitions of a croft have to apply to a deemed croft. That was on the commission's reference in 2012, so all the statutory definitions apply. We have crofter A with a deemed croft, we have crofter B with his croft and his right in grazing, and we have an integrated administration and control system—IACS—map. Does the deemed croft take precedence over the right in grazing? We draw the boundary around the grazing on the IACS map and, to put it briefly, people just do not understand it. I have a reasonably good understanding of it, but something has to be either a common grazing or a croft—it cannot be both. However, here we have a legal entity that is known as a cross somewhere in 7,000, 5,000 or 50 hectares. How does your average crofter understand that? They do not. I struggle to understand it and I have a reasonably good knowledge of it.

The point that I am making is that crofting registration needs a complete revisit and to be simplified so that people can understand it. Crofts need to be registered to give certainty, but the current system is creating more confusion than I can comprehend.

**The Convener:** We will definitely ask later whether crofts should be separated from common grazings or the common grazings share that was allocated to the croft. That is a separate issue.

**Stewart Stevenson:** Because of what I am going to ask about, I declare that I have a 3-acre agricultural holding from which I derive no income and which is registered under IACS. I observe that the IACS map is quite different from the one that is in my title deeds.

Do the witnesses agree that we will not get anywhere unless we have maps that cover ownership of land, entitlement to rights in that land

and access to rights that come under various pieces of crofting legislation? Unless there is one set of maps, we will always have difficulties. From previous experience, I know that there was a dispute between the airport on Benbecula and the adjacent crofters, which derived entirely from the fact that the map was of a tiny scale—I saw it. When the chalk line that had been drawn on the map was put into real life, it was 100m wide, and the dispute was about which edge of the line was the real line.

Many disputes will arise because we do not have maps that cover the whole situation, so do the witnesses think that getting a consistent, universal map that is legally enforceable in all contexts ought to be an objective in terms of registering all interests in land and landholdings in relation to crofting?

**The Convener:** Does David Findlay want to head off on that one?

**David Findlay:** Yes, but I will first quickly address a previous point in connection with common grazings registration and concerns that that process has stopped. Future legislation could consider allowing grazings committees to apply to register common grazings. Some of the present impasse could be overcome if that were to be considered.

On registration and map-based registration, I agree that it is important that crofting interests and interests in land are registered. Mapping is an imperfect science. The scale of mapping in much of the rural Highlands is 1:10,000, which is a very imperfect scale. When you get down to precise croft boundaries, you are talking about a very considerable margin of error. Also, the topography of the land is not reflected on the map. The combination of the 1:10,000 base map from Ordnance Survey and undulations in the land, such as deeply sloping ground, makes it very difficult to register that land accurately. Both the land register and the crofting register have to grapple with those technical difficulties.

On the broader point about mapping all crofting interests comprehensively, I agree that it would be good for general public transparency to show who owns land, who has interests in land and what the status of land is.

**Stewart Stevenson:** I will engage on the issue that David Findlay has raised—that mapping is an imperfect science. I put to Mr Findlay the question whether the world geodetic system 1984 standard could be used. It is one of more than 100 mapping standards that there are internationally, but it is now the most generally used one. Aviation is now mapping in three dimensions—height as well as terrain—to within 500mm. Is that not good enough for our purposes?

**The Convener:** I understand Stewart Stevenson's point, but I am concerned that the Government, having not been able to fund mapping previously, may not want to go down to that level of detail.

**Stewart Stevenson:** No, but I want a principled—

**The Convener:** Given the generality of accurate mapping and the field identification system maps that we have, is there a way of making that work without going down to the last decimal point?

**David Findlay:** Yes. I would emphasise that mapping is the responsibility of Registers of Scotland, not the Crofting Commission. Mapping would be developed by Registers of Scotland, using whatever technologies are available.

At the moment, the margin of error is quite considerable. Notwithstanding that, I consider that, purely from a crofting perspective, mapping gives greater certainty about the status of land. For individual crofters who want to know what they own, and for their solicitors who want to know what crofters own in the context of buying, selling or assigning croft tenancies, a map-based register provides an element of certainty—it is not perfect but it may be an imperfect element of certainty that is good for crofters and for crofting.

**The Convener:** Does Colin Kennedy want to add anything about mapping?

**Colin Kennedy:** In broad terms, I feel that it is to the advantage of every crofter to map their croft. For the sake of £350 to register and advertise their croft, crofters get certainty and security about what they have or occupy. From that point of view, I think that mapping is excellent and should be done. The issue is all the layers on top of that, where every time there is a transaction—a sale or whatever it may be—there is another trigger point. That is where a bit of simplicity needs to be brought in.

10:45

I think that a blanket mapping exercise should be carried out on common grazings. We have a lot of maps going around, including rural payments and inspections division—RPID—maps and IACS maps. There should be a blanket form of mapping. We should get the whole thing mapped and there should be an amnesty. After all that is done, people should have 90 days to check the map. If they have not come back to say that the map is wrong within 90 days, that is it—end of story. We would then have the system all mapped.

The problem that I have with the map is that it does not answer questions of who, what, why and where in relation to rights. Some folk own the rights; some folk have rights as part of their croft

tenancies; and some have deemed crofts. There are various types of rights. The issue is how we record them.

One of the problems that I see at the commission—we have not even looked at it yet—relates to applications that come in. For some people, rights are in their title deeds. In its answers to the reference in August 2012, the court declared that, by separate inclusion in the disposition, a crofter can purchase his right. Therefore, provided that it is in a separate inclusion in the title deed and does not come under parts, privileges and pertinents, he owns it. It is impossible for the commission to record all that and to look at title deeds when we get applications.

The map is one issue; where rights are vested is a much more difficult issue, and quite how to address it is beyond me. I do not know whether the gentlemen beside me have any comment to make on that, but it is a serious issue.

**The Convener:** Joseph Kerr is going to give us the answer.

**Joseph Kerr:** Mapping is just one of the issues. At least with a croft, we can refer to our register of crofts and know who the principal parties are—the tenant, the owner-occupier crofter, the landlord, the sub-tenant or the short-term lettee.

The problem with a crofters' common grazings is that there simply needs to be a plurality of crofting interests for it to be a crofters' common grazings. Every one of the rest of us could be non-croft shareholders in that grazings. We do not regulate that.

The other thing that we have to capture is who actually holds rights in grazings. There is an awful lot of work involved in that as well, especially since the people concerned come within the scope of the legislation for certain purposes but are outwith it for others. That makes it very difficult.

**Colin Kennedy:** Before we could get an accurate account, we would need to check every title deed to see who owned what. It is a monumental task.

**The Convener:** If there is nothing else on that issue, I will move on to the next question.

One thing that has become absolutely apparent over the years is that if crofting is to continue, it needs a future and it needs new crofters and younger crofters to come in and work their way up. We have heard evidence on that.

Has enforcement of regulations on absenteeism and neglect led to the freeing up of crofts? Are there concrete examples of crofts becoming available to young crofters because of the regulations? Who would like to lead on that?

**Joseph Kerr:** I have a couple of points. Before the 2010 act, there was just a right for the commission to take action where someone was not in residence. The 2010 act introduced a specific duty to be resident and gave the commission enforcement powers. However, the provisions are very convoluted. I think that there are about four separate appeal provisions. Therefore, although the commission uses the 2010 act, we put the emphasis on encouraging someone who is in breach to resolve the breach themselves, through taking up residency, starting to use the land or making the croft available through assignation, a short-term let or a sub-let. Certainly, that approach has been successful. After the first crofting census, we wrote to everybody who was in breach of the duty and set out various options. Since then, we have had a lot of applications, principally for sub-letting and short-term letting rather than assignations, although there have been assignation cases as well.

Last year, we dealt with about five cases where we have continued with action against people who refused to resolve matters after they had been asked to do so. A young crofter on Skye—they were one of the Scottish Crofting Federation's young crofters—obtained a croft because of that. The commission has terminated tenancies on a number of crofts and will be advertising those in the new few weeks and months.

**David Findlay:** As Joseph Kerr said, there are stories of new crofters who have entered the system. The commission cannot promote age discrimination; whether a potential crofter is in their 70s or 20s, there cannot be discrimination based upon age. The emphasis has to be on bringing new people of whatever age into active crofting, and there are good-news stories on that front.

As a lawyer, the problem that I have is that the duties sections of the 2010 act are really complicated, time intensive and resource intensive. That means that the commission cannot take the action in relation to duties that it would otherwise take if the legislation was much simpler and more straightforward. The underlying principles and the policy are quite simple, but the process set out in the legislation is anything but.

**Colin Kennedy:** I endorse what David Findlay has said. The process is very convoluted and difficult; it is time consuming and onerous. The commission has engaged in the process with limited success. From memory, I think that at one stage the commission terminated about 44 tenancies; some two years later, 30-something of those crofts—to take a random figure—were still vacant.

We talk to young people and know that there is demand for crofts. There are two scenarios. First, if a person is fortunate enough to obtain the tenancy of a croft, they get free land—they have access to land and can build a house and so on. Secondly, a substantial number of crofts, assignments and owner-occupier crofts are for sale. We are told that there is great demand for crofts—we hear that all the time. People can get a croft tenancy for £20,000 and an owner-occupier croft with a house for maybe £100,000, but to someone on the outside looking in, it looks as if people do not have the funding to buy crofts. The real demand that I see, as a crofter living in the islands in the heart of it all, is that people cannot get money to buy the croft—they cannot borrow it or get a mortgage—but if they can get a tenancy free of charge, they are going places. That situation has to be examined and a solution found, because there are any amount of crofts out there on the market. The issue is with people getting the means to buy them. Only recently, I spoke to someone in the financial industry who had an application but, although he tried, he could not give the crofter the money.

My answer to you, convener, is that there is demand for crofts—new crofts and old crofts—but the issue is money. The crofts are there. Most councils have a presumption in favour of building on bare land crofts, so people will get planning permission. The grant system is much appreciated—with £40,000 or so, a person can be on their way to getting somewhere. However, if they could borrow the money at reasonable rates, they could be there much more quickly.

The real issue that needs to be looked at is the fact that the drive for duties to free up crofts is really aimed at freeing up free land, whereas if the focus was more on—or equally on—making money available to people, we could satisfy a lot of the demand. That is how I see it.

**The Convener:** That echoes a point that has been made before, so thank you for that.

I think that Richard Lyle has a question.

**Richard Lyle (Uddingston and Bellshill) (SNP):** I have a number of questions.

What about Highlands and Islands Enterprise giving loans to people to encourage what you are talking about, which we also heard about last week? Could or should HIE do that?

**Colin Kennedy:** Do you want me to comment again?

**Richard Lyle:** Yes.

**Colin Kennedy:** My understanding is that, every time we have spoken to HIE about the matter, its board has said that that has nothing to

do with HIE because it deals only with crofting communities, not with individual crofters.

**Richard Lyle:** I worked for a bank for 10 years, so I know the problem—I will not name the bank.

I am a lowlander, but I think that crofting is an integral part of Scotland and we have to help it. You have laid before us evidence that there is confusion all over the place. I respect the point that you made about people being elected. The Crofting Commission is basically like a council; you are elected to that council not only to represent your area but to see the bigger picture and to represent the whole area that the commission covers. I agree with and respect your earlier comments.

What would be the final cost of getting all the mapping done? I say with the greatest respect that X marking the spot is not good enough. If we do not get all that done, we will be nowhere.

I have yet to ask the question that I should be asking.

**Joseph Kerr:** Colin—was the budget £100,000?

**Colin Kennedy:** We have £400,000.

**Joseph Kerr:** We have £400,000. If we extrapolate that from—

**Richard Lyle:** We will call it about half a million. Thank you very much.

My question is about owner-occupiers. Again, I will use the terminology of the council. When people were council tenants, they did what the council told them; when they bought their council houses, under the right to buy, they became owner-occupiers. Therefore, when somebody buys their croft, they become an owner-occupier. We have had several different views on that. Patrick Krause and others have argued that all those who occupy crofts should be subject to same rights and responsibilities. On the other hand, Murray McCheyne said that he does not understand why owner-occupiers are subject to the same conditions as tenant crofters—he has argued that there is no good reason for that and that changing the situation would be a big step in simplifying crofting legislation.

Is the legislation on owner-occupier crofters clear and simple to apply or is it as confusing as you have painted it this morning?

**Joseph Kerr:** The 2010 act introduced a good provision. The right to buy was awarded by the Crofting Reform (Scotland) Act 1976, under which crofters had an absolute right to buy their house site and a qualified right to buy the whole croft. Quite a few people—in the low thousands—took advantage of that. However, even though the tenant had purchased and was an owner-occupier,

the croft's status was "vacant", so the former tenant immediately lost their status as a crofter. Therefore—at least in theory—the commission was capable of requiring the owner-occupier to let the croft to a tenant. Whether the commission did that would be a policy decision, not a legal question, and the owner-occupier would be a landlord in the same way as anybody else who owns land is a landlord, even though many of those people purchased the land to occupy and work it. The good thing about the 2010 act was that, for the first time, it recognised those folk as crofters. It also removed the "vacant" status of such crofts, which was a very good outcome.

11:00

The problem with the definition of "owner-occupier crofter" is that it has left about 1,100 crofts that are held in ownership but do not meet the owner-occupier crofter criteria. There are tenants, there are owner-occupier crofters and there are landlords with tenants—and there is now a new category of landlords who do not have tenants but whose crofts are vacant because they do not meet the criteria. It is very confusing, and people do not know exactly where they stand.

**Colin Kennedy:** There are deemed crofts as well.

**Joseph Kerr:** Yes, there are deemed crofts, too.

The first thing to do is look at whether owner-occupier crofters are subject to the same terms as tenants. They are not throughout the 2010 act: there is inconsistency. A person who qualifies as an owner-occupier crofter is subject to the residence part and the land use part. However, there are other things that they are not subject to, and there are rights that a tenant has that an owner-occupier does not have. There is inconsistency in that only some of the provisions that relate to tenants relate to owner-occupier crofters. They share some things and they have their own path in others.

**Richard Lyle:** So all the things that we have done and all the changes that we have made over the past number of years have made the situation more confusing instead of making it easier to understand.

As I said, I respect the crofting tradition, and "crofter" was the term that was used when a landlord, a laird or whoever gave the land to the local folk. The local folk paid a fee and became crofters, and they tended and worked the land to feed their families and so on. I do not need to go through it all—you know the tradition better than I do. Yet, here we are in 2016, with all this confusion over what is happening with crofts. I really do not envy you guys for the problems that

you have. Should owner-occupier crofters be taken out of the scenario now because they are not lairds or landlords? They own their piece of land, so they are like any other farmer in Scotland. Do you agree?

**The Convener:** I think that the question that is being asked is whether an owner-occupier is a landlord and a tenant, and, if they are, whether they should no longer be a crofter. Is that correct, Richard?

**Richard Lyle:** Yes.

**David Findlay:** I argue that there are higher-level policy issues to address. Should owner-occupied crofts as well as tenanted crofts be subject to absentee action, and should crofts be subject to action where there is neglect?

**Richard Lyle:** With the greatest respect, we are going down a road that is going to confuse people—the tentacles seem to be growing every five seconds—although the situation is simple. The person is an owner-occupier: they were a crofter, they bought their land and now own it, so they can do as they want. The Crofting Commission cannot tell them what to do. End of story—they now own that land. That is it.

**David Findlay:** The land is, however, owned subject to a scheme of regulation. Crofts under the old system of landholding formally became crofts under the Crofters (Scotland) Act 1955 and, once created, a croft can never disappear from the crofting system unless it is resumed or decrofted—it can be taken out of crofting only by one of those two processes. It would then potentially be subject to re-letting, and it would be subject to duties action under the Land Registration etc (Scotland) Act 2012.

There is a high-level question as to whether it is a policy objective to ensure that all crofts—however they are owned—are subject to regulation on absenteeism and neglect, or whether only some crofts should be subject to that scheme of regulation.

**Joseph Kerr:** Richard Lyle's question is a difficult one. One thing that the 2010 act tried to bring was a degree of parity between owner-occupier crofters and tenant crofters.

The commission used to have a presence at the Black Isle show every year, at which a particular gentleman used to come and speak to me in the afternoon. He said that what was then the Crofters Commission had been up and down the country, encouraging people to buy their crofts. He had exercised that right, then when he tried to claim a grant he was told that he was not a crofter and would not get a grant. The 2010 act says that grant schemes must have the same access facility for owner-occupier crofters and tenant crofters.

CAGS—the crofting agricultural grant scheme—was brought in through a new statutory instrument to provide exactly that. Are we going to take away the support system for owner-occupier crofters if we take away regulation of them?

**Colin Kennedy:** Section 3 of the Crofters (Scotland) Act 1993, entitled “Meaning of croft and crofter”, says:

“in this Act ‘crofter’ means the tenant of a croft.”

So, prior to the 2010 act, the 1993 act said that a person who bought a croft was not a crofter because they were not a tenant. The 1993 act now says that the meaning of crofter is “Subject to subsection 3ZA(2)(c)”, which says:

“from the date of registration, any person for the time being entered in the registration schedule of the croft as the tenant of the croft is a crofter.”

That was introduced by the 2010 act, but from 1976 to 2010, if someone had bought their croft they were not a crofter.

If you were the landlord of a vacant croft, the provision in section 23(2) of the 1993 act meant that if you did not comply with it you were potentially a criminal, which is not a great position to be in. From my crofting perspective, I see all the difference in the world between being an owner-occupier crofter and being a tenant crofter.

Only last week I was asked a simple question by a man. He said, “That’s a croft on that side of the road, Colin. Somebody wants to buy that corner off me so that they can build a house on it. What do you think?” I said that he would need to make an application to the Crofting Commission. He said, “But they’ll refuse it.” I said that I could not guarantee that we would accept it, and that it had to go through a process. He said, “The man on the other side of the road doesn’t have a croft and he can do what he likes with his land. I own my land and I can’t do what I want with it.” I—Colin Kennedy—on the island of Coll, talking to that man, saw a very serious issue there. I must emphasise that I say that not with my Crofting Commission convener hat on. I told the man that he had to go through the proper process. However, there is a serious issue that must be addressed. There is all the difference in the world between owning your croft and being the tenant on a croft. That is my view.

**Richard Lyle:** That is the point that I am driving at: the difference and the confusion. People are not being treated fairly and the onus is on you to try and solve the problem and try to be Solomon.

**Colin Kennedy:** I will move the discussion forward. There is a presumption against decrofting at all times: croft land is sacred. However, there are fewer and fewer animals on crofts. The point was made that crofting was set up in 1886 to feed

a family, with a cow, a sheep, a goat and a hen—all the things that a family required to live. It was not about making money. Today, there is no requirement in the 2010 act to keep a goat, a hen, a sheep or what have you.

What is so sacred about crofting land? From my perspective it is sacred because it is about communities; it is about keeping people in rural areas. It is about infrastructure, schools and all the other things that I do not need to name. We need to look at the wider picture and the bigger context. What are we trying to preserve? Are we trying to preserve people and communities, or are we preserving land that is going wild in the Highlands?

**Richard Lyle:** Just to be clear: I totally agree with you. I want to keep crofting; it is a great tradition. However, I want to see fairness and a better system for crofters and the people of the Highlands.

**Colin Kennedy:** I could not agree more.

**Richard Lyle:** Thank you.

**The Convener:** I will leave that issue there, because it goes to the crux of the problem and we will be looking for some guidance on it from the Government.

**John Mason (Glasgow Shettleston) (SNP):** I confess that I, too, am from the city—from Glasgow—and I do not have an intimate knowledge of crofting. However, I am getting into it a bit more.

We have mentioned common grazings; I want to ask about grazings committees. Without getting into any specific cases, is the legislation that the crofting commission has to apply to grazings committees fit for purpose? As I understand it, the whole picture has become more complex with subsidy regimes, environmental obligations and renewable energy opportunities, sometimes, on common grazings.

I have been told by experts to read the Shucksmith report, which I have dipped into. Its recommendation was that, at community level, grazings committees should be modernised to become crofting township development committees with a broader remit and more inclusive membership. Their primary function would be to develop and agree strategic plans for local crofting development, which I assume has not happened. I would like your comments on that.

**The Convener:** I will let Colin Kennedy answer first. I reiterate that I and the committee are considering the big picture, not specific examples.

**Colin Kennedy:** What the 1993 act provides with regard to common grazings now is relatively simple. If people want to change it, that is a

separate issue. I will address what the act provides for. When crofting was set up back in 1886, there were large numbers of crofters in crofting townships. It was appropriate to make small committees—perhaps three, four, five or six people—to manage the grazings and take their term in office to deal with matters and make grazings regulations that were approved by the commission as fit for purpose for that area and, in broad terms, compliant with the law.

The powers that were given to the committees to maintain the common grazings are vested in section 48(1) of the Crofters (Scotland) Act 1993. If a fence needs to be repaired or a ditch needs to be fixed, the powers are vested in the committees and it is clearly set out that moneys for such maintenance should come from the crofters. There is provision for improvements; if improvements are not agreed by all shareholders, the provision exists to call in the commission as the final arbiter of whether the improvement is required. If the commission approves it, the improvement is made and the crofters all have to pay their moneys.

**John Mason:** That is a scenario in which individual crofters have to pay into the fund. What happens if the common pot has money in it? Is that clear in the legislation?

**Colin Kennedy:** The only provision in the legislation on where money would come in, other than from the crofters, is in section 21(4) of the 1993 act under assumptions, where a landlord or landowner—as the case may be in the common grazings—wishes to resume land from the crofters. Section 21(4) has a provision—I can read it if members so wish—whereby money is payable by the landlord to the grazings clerk for onward payment to the crofters. There is also a provision that, should the crofter not wish the clerk to handle the money, it may be paid direct to the crofter.

**John Mason:** That is the scenario that the law has at the moment. What happens when somebody wants a wind turbine?

**Colin Kennedy:** I was coming to that. That is the only provision that I am aware of in crofting legislation whereby moneys come in to crofters; the moneys usually come from crofters to the grazings clerk.

Section 50B was introduced to the 1993 act later. I cannot be precise about when; David Findlay may know.

**David Findlay:** It was in 2007.

**Colin Kennedy:** Section 50B of the 2007 act has a provision whereby there is a process for doing other things in common grazings that have to involve the owner, the crofters, the committee and the commission. It is a fairly reasonable and not too onerous provision. It is my

understanding—maybe my colleagues can assist me—that the commission has never received an application under section 50B.

**Joseph Kerr:** We are dealing with a couple of applications at the moment.

**Colin Kennedy:** A couple have come in now, but we had previously never had an application under section 50B. To answer John Mason's question, there is no provision that I am aware of, other than resumption money, for a grazings committee to make money.

**John Mason:** You used the word “reasonable”, which suggests to me that the present system is working. You also said, “If they want to change it” and I am not sure who “they” might be. We are here partly to see whether the present legislation is working, but also to listen to recommendations for how it should be improved. We will then need to decide whether there should be new legislation.

I am interested to know whether you are happy with grazings committees.

11:15

**Colin Kennedy:** Out of respect for the convener, I do not want to touch on current liabilities. I want to keep as far away from that as I possibly can.

From my perspective, in the majority of the crofting counties the legislation regarding common grazings is working adequately; we have no issues of which I am aware. In certain specific areas there are problems or issues that may arise from the law as enacted being deviated from—if that is a fair way of describing it.

**John Mason:** My key point is: do we need to be pushing to change the law? I am getting the answer that we do not.

**Colin Kennedy:** If the law is complied with, I do not personally feel that the law on common grazings—sections 47, 48 and 49 of the 1993 act—is far away from the mark.

**David Findlay:** It seems to me that there are two issues here. The first is the present legislation and the second is proposals for reform. It is really important to appreciate that a grazings committee is essentially managing an individual crofter's right to graze. It is intimately connected with crofters and their pertinent right to graze their animals over an area of land together with other crofters.

If it is the Government's view that there should be wider social, cultural and environmental benefits associated with common grazings, a completely different system of regulation and law would be required. That would detach the common grazings and the benefits that can be derived from them from the crofters, who are the ones entitled

to a wider community. It would require a change in the law and I do not want to provide any view as to whether the law should be changed, but, from the commission's point of view, I would say that sections 47 through to 49 of the 1993 act are fairly clear.

To be honest and frank, some grazings committees are carrying out activities over which there are question marks as to whether the commission can regulate them under the 1993 act—that is a situation that has arisen. I do not want to comment on individual cases, and I think that that is an area for debate, but it is clear that grazings committees are there to manage the grazings for the crofters. They also have a role to improve the common grazings and there is a particular procedure for doing that. The law at the moment is not as unclear and out of date as some people might be suggesting.

**John Mason:** Are individual grazings committees pretty clear as to what they can and cannot do?

**David Findlay:** More or less. Sometimes the situation is complicated by the fact that although the legislation is pretty clear, there are also grazings regulations that are applied in addition to, and as part of, the legislation. Sometimes those regulations may add layers of complexity and uncertainty. One thing that the commission is currently working on is to simplify regulations. To come back to Mr Mason's question, the crofters who are sharing in the grazings and the committee members are clear as to their rights and responsibilities and how far they can go in their role as a grazings committee.

**John Mason:** That is helpful, thank you.

**The Convener:** Does Joseph Kerr have something to add to that?

**Joseph Kerr:** The only thing that I would add is that there is an element of confusion in cases where the grazings committee and the shareholders in the grazings are engaging in something other than simply grazing the land. We know that because of how few applications we have had to use the common grazings for something other than cultivation, which is a requirement under the 1993 act—we see very few applications.

Until very recently, the Scottish Government rural payments and inspections division had in its guidance for the Scotland rural development programme that the Crofting Commission had to give its approval to any project that was applied for. That is not true: there is nothing in the 1993 act that says that. A grazings committee does, however, have to come to the commission for approval—not of SRDP funding, that is not our role—if it wishes to engage in something other

than cultivation, and such applications are not happening as a rule.

**The Convener:** I would like to weave in another question with John Mason's. We have heard mention of the separation of shares in the common grazings from crofts—and X marks the spot of the croft—and that that might stop young entrants from coming into crofting.

Do you have an opinion on whether it is appropriate for people who are not crofting, or have sold their crofts, to retain shares in the common grazings?

Colin Kennedy has indicated that he wants to speak. Could he weave in an answer to that question as well, please?

**Colin Kennedy:** Absolutely. It's a legal right. If you sell your croft, provided that you comply with the legislation, I think it is section 3(4) of the 1993 act that clearly states that the right has not been sold, it is a separate entity and is to be treated as a deemed croft.

Section 3(5) of the 1993 act states that, if you apply to apportion that right and get an apportionment from the Crofting Commission, it is deemed to be a croft. Before apportionment, the croft is marked by an X. Once you have an apportionment, the croft has a boundary.

**The Convener:** I declare an interest as a farmer. One of the things that I have found quite difficult is slipper farming. I am glad that the regulation has changed and we are getting rid of that.

As was mentioned, someone could have shares in the common grazing and benefit from the income that the common grazing is getting, but they would not be doing anything for crofting and would be stopping young crofters coming in. I understand that it is a legal right.

**Colin Kennedy:** I have questioned on many occasions how the deemed croft marked by an X is eligible on an IACS form which requires a financial investment decision, a field identification number and a map and global positioning system information—all the current regulations that the committee will be familiar with. How does an X square up to the IACS requirements?

No one will address the question. In my view, it does not add up. I could not produce a map and say, there is an X and that is my share in the IACS. There is a grey area that needs to be addressed. I could go further into the point, but I do not know whether that would be helpful.

**The Convener:** Your answer gives us a clear indication. Does Joseph Kerr want to say something? If he is happy to leave it there, I am happy to do so. David Findlay wants to speak.

**David Findlay:** I have one point. The deemed croft situation arises as an integral part of the right to buy the croft. When a person buys croft land, in order to preserve the integrity of the share that was associated with that tenancy, the tenancy has to become an independent entity in its own right.

If the Government is minded to address that issue head on, it would have to go right back to 1976 and look at the fundamental provisions of the right-to-buy legislation, what they mean and whether crofters can buy their grazing rights. All those difficult legal issues would have to be tackled head on.

**Peter Chapman:** I declare an interest as a farmer, as I am going to speak about claiming subsidy from common agricultural policy regimes.

Is there confusion over who claims basic payment scheme and environmental schemes money between the grazings committee and the individual crofters? Is there some confusion that we need to examine? I would like an explanation of how it works in practice.

**Colin Kennedy:** That is the very point that I was going to make. If the matter is going to be resolved, one must first understand the legislation where it all begins and the rights of crofters.

It is my understanding that the rights of crofters are clearly established in statute and in authority. A crofter has a right for his animals—a certain number of sheep, a certain number of cows, a horse or whatever—to eat grass. That is known as a souming in the common grazing. He has a right to cut peat, a right to take thatch for his house, a right to overturn his boat, a right to clean his fishing nets, a right of access to the sea to get seaweed for the land and, in arable and machair, he has a right to crop. Those are the statutory rights of crofters.

If we want to get the matter resolved, the question that arises is: who occupies the land? As I see it, occupancy of the land is the fundamental issue. Does the crofter occupy the X on the land? I am not in a position to answer the question, although I have a view. The answer to Peter Chapman's question relates to who occupies the land. If we want a modern crofting world in which the grazings committee does this or that, we must look at the European Union legislation on who occupies the land and get back to the fundamentals. If that was achieved, the Crofting Commission would have no difficulty in regulating. The difficulty that we have in regulating is, first, that we do not know who occupies the land—we do not know what the boundary of the X is. Mr Chapman and Mr Mountain are farmers; so am I. If you know your way around the integrated administration and control system, you will know exactly where I am coming from—I say that with

no disrespect to members who are not familiar with that system. In my view, the root of the problem lies in who occupies the land.

The Crofting Commission's problem is that we are grappling with an issue that is unclear in legislation. It comes down to how the rural payments and inspections division interprets what is going on. It says, "We give you an SRDP scheme," which impinges on the rights of a crofter. If the crofter comes to the commission under section 47(8)—I think that that is right—and says, "My rights are being violated by this scheme being administered by RPID," we are restricted in our ability to deal with that, because we are restricted to dealing with the rights of crofters; we cannot deal with RPID schemes. The whole issue goes back to occupancy of the land.

I do not know whether that assists in any way.

**The Convener:** I think that it does. I am mindful that this is a difficult area. Your answer was useful.

I am mindful of the time, so we will move on.

**John Finnie (Highlands and Islands) (Green):** Good morning, panel. Much of what I was going to ask about has been touched on, so I would like to expand the discussion. I had planned to ask about a national development plan for crofting. In its programme for government 2016, the Scottish Government commits to beginning work on a national development plan for crofting this year. We have heard from Joseph Kerr that the commission's development function was taken away in 2010, and Colin Kennedy has confirmed that no development function is being exercised at the moment. Significantly, David Findlay said that the development role was integral to the promotion of crofting.

Is there a conflict between the Scottish Government's proposal to draw together a development plan and the existing arrangements? Broadening the discussion, what is the purpose of crofting? That is a fundamental question. Colin Kennedy mentioned property retention. Housing is clearly an issue, crofting has an important role to play in local food production and Colin Kennedy mentioned infrastructure. Will you give us your views on the Scottish Government's proposals for a development plan and how that would dovetail with the existing legislation? Will you also tell us what you think that crofting is?

**Joseph Kerr:** I have always seen crofting from the population side of things—it is about maintaining and hopefully increasing the population. I am aware of one study in which a comparison was made between an area in Sutherland that had been subject to crofting tenure and a very similar rural area outwith crofting tenure. The result that it showed was that being under crofting tenure had slowed down the

depopulation of the area. When I was crofting grants manager, regardless of the scheme that we were operating, I certainly always had that in mind.

One night when we were up one of the straths, a previous convener of the Crofting Commission, Hugh MacLean, stopped the car, looked back and said, “Your job is to keep the lights on in the glen.” I think that that is right.

**The Convener:** Does Colin Kennedy want to come in on that?

11:30

**Colin Kennedy:** Yes. “What is crofting?” is a very good question—I grapple with it as a man who has been heavily engaged in agriculture, crofting and farming. It is slipping down and I see less money in it. Nowadays, it is not profitable; there are payments on the land and fewer animals about.

I hope that you do not mind if I give an example from my own little island. We used to have 1,000 cows and 12,000 sheep. Today, we have 250 cows and fewer than 3,000 sheep. We used to be a dairy island that made cheese. Those changes have happened over my lifetime, and I wonder what the future holds for crofting. I do not see crofting as being about keeping two cows and a couple of sheep on a croft. People now have to go out to work to earn a living, and they do not want to come home at night and feed the cow and do all the other things. There is not enough money in crofting.

I see crofting as a way to keep rural communities alive and to try to maintain them—for example, by keeping the local school open. Crofting will play a part in that. Some people want simply to keep a hen and do other general bits and pieces, but the real key to keeping communities alive—as I see in my area on the west coast—is building for tourism, and that requires land. We need to free up croft land to do that. There is a boy at home just now who wants to put a couple of pods for tourists on his land. An investment of £45,000 is needed, and he is asking me whether he will get his land decrofted. I told him that he needed to apply.

We need to take a more open approach to what we—the Government, not I—want crofting to deliver. I am telling you what I think crofting is delivering. It is delivering people and schools, and keeping the doctor and the pier master on the island—it is doing all those things. Crofting plays a significant role, but we need a clear steer from Government on what it wants crofting to deliver. It can then create the legislation to provide for that.

If you do not mind my saying so, there is a faction out there that does not want decrofting for

house sites, and there is another faction that thinks that it is okay. Where do you sit? My position is that the law provides for decrofting for a “reasonable purpose” and section 20 of the 1993 act includes housing, which is a reasonable purpose. Parliament has enacted the law. Why, then, is it frowned on by some people?

To summarise the situation, we need a clear direction from Government on what it wants crofting to deliver. There is a role for crofting: it is no longer about keeping cows and sheep on the islands, but about keeping people, communities, schools and so on. We need legislation to provide for that, bearing in mind that crofting legislation began in 1886 to keep cows and sheep and to keep people in food. As I see it, the current legislation has a different purpose.

I do not know whether that assists you in any way.

**John Finnie:** It does. I will make just one comment, if I may. I am keen that residents of the crofting counties say what they think the situation should be rather than waiting—with the greatest respect to my colleagues—for any report from this committee or from the Scottish Government. You are right that crofting is part of an evolving situation.

David Findlay said that the development role should be integral. What changed when the development function moved over to HIE? We have heard that HIE does not do anything in that respect. What is it that HIE is not doing that would, if it had been done, have changed how crofting looks in the six-year period since the 2010 act?

**David Findlay:** It has meant that there is no active policy to bring new entrants into crofting; to develop schemes and subsidies that support and revitalise crofting; or to promote township reorganisations. Those are crofting-specific things that would deliver benefits not just for the crofting community but for the wider community of people who live in the crofting counties. There has been no—or very little—focus on those elements, because HIE’s focus is very different.

Back in 1886, legislation was created to give crofters security of tenure and fair rents. The Land Settlement (Scotland) Act 1919 was about settling on land crofters who would otherwise have emigrated abroad. That covers the 1880s to the early 20th century. In 2016, what is crofting about? It is not really about those things any more. It is about the rural economy and connectivity, in the sense not just of ferries moving back and forth and viable transport links but of communities being engaged and having schools and so on.

I also think that crofting is about an enduring relationship with the land. The tenancies of many crofting families go right back to 1886 or even

before to the previous unregulated system of tenure. That enduring connection with the land is an important strand that I see continuing into the future, but it has to be connected with the wider benefits that crofting can bring in the economic, environmental and social sense.

**The Convener:** John, do you want to come back in?

**John Finnie:** No. I am conscious of the time. What has been said is very helpful. I encourage the witnesses to keep telling us what their views are and to tell us if they change as different issues arise, because that would be very helpful.

**The Convener:** Colin, you can come in briefly.

**Colin Kennedy:** We are looking to bring people into the Highlands and Islands as new crofters. We have vast swathes of common grazings that are doing nothing and that are in the ownership of the Scottish ministers and other people. It would be very easy to resume some of that land at minimal cost and create new crofts to meet the demand. In 20 of the main crofting areas where many common grazings shares are not being used, 20 hectares could be resumed, with 10 crofts of 1 hectare that would have planning permission for housing development—that would not be difficult.

The land is there and we should not be chasing people out of their crofts and annoying folk. We could just resume a chunk of common grazings that is doing nothing, and the rest could be delivered without difficulty. A lot of folk have said to me, "That's a great idea, Colin." I am putting it on the table here today for this committee to consider.

**John Finnie:** I am sure that we will consider that. Thank you.

**The Convener:** Jamie, your next question might have been answered, but I would still like you to ask it, please.

**Jamie Greene (West Scotland) (Con):** My question was about how to encourage young people into crofting, but I think that Colin Kennedy covered that quite eloquently and explained that the biggest barrier is funding. We might want to consider further the issue of access to funds to purchase crofts.

Just to take a step back, one of the things that has struck me over the past few weeks as somebody who—to be honest—previously knew nothing about crofting is that we should not look at crofting in isolation, as it is part of the much bigger issue of what we do with our land in Scotland and how we protect and keep together rural communities. One of the biggest learning points for me over the past few weeks is how important that issue is and what part crofting can play in it.

However, if it is not about someone having a couple of sheep or a couple of hens on the land and if the land is not being used, the fundamental question is how we attract new people to crofting. How do we attract young people to crofting if it is not just about giving them somewhere to live in their local community? What I am getting at is what we expect young people to do with the land if it is not about using the common grazings and providing for their families in the traditional sense. I see the importance of crofting in that respect, but I do not understand how it would attract new people, who would have to have some finance to get into it. What is the appeal in that sense?

**Colin Kennedy:** From my perspective, the appeal is that, if someone can get a croft, they have free land. I am not trying to be disrespectful to anyone, but the key is that if someone has nothing but can get a croft, they are going places. Anyone can get a croft tenancy at a rent of £10; 15 times that rent is £150, so they can pay the solicitor and buy it for 450 quid. They then have an asset and can maybe get planning permission that would mean that it is immediately worth £50,000 to sell. If someone can tell me that the position is the contrary, I will be willing to take that on board, but that is what people want a croft for in my area. People come in because they think, "We can get a free bit of land and we can buy it and get planning permission. And if we're lucky enough, we'll go to the commission so we can divide it, get planning for a second house and we'll sell that site, build our own house and we're in business." I do not know if there is a contrary view, but that is what I see in our part of the world. Nobody comes on to our island and puts on a herd of cows or a flock of sheep. That just does not happen.

**Jamie Greene:** That is the point. There seems to be a misconception about what people want crofts for. Is it to develop cottage industries? Is it to graze? Is it to have hens that feed their families? It does not sound as though that is the case. It sounds like there is a more fundamental and modern need to build a house and have somewhere to live and bring up your family in a community that has a good school.

My area is the west of Scotland, which includes Arran. We should not really be looking at crofting in isolation. It is the fundamental problem of keeping young people on our island communities and in our rural communities and stop them heading off to the big cities. Providing them with a bit of land where they can build a nice house to live in seems to be not a bad idea.

**Colin Kennedy:** It is a good idea. Convener, if I may, I will make a personal comment. My son is at university and trying to return to my native island. I have a bare land croft. The problem that we have got is getting planning permission from the local

authority. The issue that needs to be looked into when looking at the big picture is planning and how the system is working or not working. People do not have the money to fight the system to get planning. If you want to get people into the rural economy, the planning system has to be looked at.

I could preach about permitted development rights because I am up to here in it. I cannot get planning permission. I have outline consent on my croft that I want my son to return home to, but the problems with the planners are just—well, you think that crofting is bad. Crofting is simple compared to planning.

**The Convener:** Colin, I do not think that we are going to allow you to sort out the planning problems for your son here. We are trying to identify what is needed to be done for young people coming into crofting.

**Colin Kennedy:** That is my point.

**The Convener:** I understand. David Findlay, do you want to come in on that?

**David Findlay:** Crofts are used for diverse purposes, but a substantial number of them are still used primarily for agricultural purposes. I know many very fine crofters who have brilliant herds of cattle or sheep and who use the common grazings to their full extent. Some common grazings are run as sheep stock clubs and they are also very effective businesses that deliver a dividend for the members of the club and have substantial flocks.

We have to remember that crofting was born within the context of agricultural tenancies and that is still an important part of what crofting is about—in some areas more than others—and will continue to be about. Where crofters are engaged in agricultural activities, depending on what happens with European Union subsidies and so on, they will be able to continue to claim subsidies that will sustain them in years to come.

**The Convener:** I want to stop the discussion on that issue there. We have quite a few questions to get through, all of which are important. The next one will come from Peter Chapman, and it is fairly straightforward, so you could start your answer by saying either yes or no and then have one sentence after that, if possible.

**Peter Chapman:** I will be brief in my questioning. Under the small landholders legislation, a group of landholders occupy areas that are similar to crofts. Is there merit in bringing the legislative system for small landholders and crofters together? Could that be part of a simplification of the crofting law?

**Joseph Kerr:** I do not really know enough about the small landholders legislation to be able to comment.

**The Convener:** Thank you for that simple answer.

**David Findlay:** Lawyers never say yes or no.

**The Convener:** Nor do politicians.

**David Findlay:** There are small landholdings throughout Scotland, including a number in highland Perthshire, which is where I come from, that act like crofts, but they are not regulated. There is merit in looking at the idea, yes.

**Colin Kennedy:** I endorse Mr Findlay's comments.

11:45

**The Convener:** The next question is from Rhoda Grant.

**Rhoda Grant (Highlands and Islands) (Lab):** We are looking at this because legislation is upcoming and we are considering what kind of legislation the Scottish Government should bring forward. Should it consolidate the crofting acts, should it bring in a brand new crofting act, or should it put right what the sump report has identified as being wrong with the crofting acts, plus or minus any other aspects?

**The Convener:** That is a big question and I am happy to give time to it, but I would appreciate it if responses could be as brief as possible.

**Joseph Kerr:** I was part of the 2013 crofting bill team. The Crofting (Amendment) (Scotland) Act 2013 was a very narrow act that looked at one particular problem: the inability of owner-occupier crofters to decroft because of a specific flaw in the legislation. Because the bill was very limited, the consultation period was very short and the minister at the time, Paul Wheelhouse, made it clear that we would not look at any other issues. However, other issues came in and the minister said at the time that those would not be forgotten about but that they could not hold up the bill, because people were waiting for decroftings or were holding pieces of paper that had questionable legal validity—the piece of paper being our decrofting direction—so the focus was on that issue. My understanding at that time was that the issue would be revisited and it came to be revisited through the crofting sump. The Crofting Commission proffered an extensive contribution to be made to the crofting sump, which was administered by Derek Flyn and Keith Graham. I still think that to identify the principal areas in the legislation that need to be revisited is a good strategy.

**Colin Kennedy:** Crofting law was set up in 1886 and the principles—to give security of tenure et cetera—are sound. However, my position is that we now live in a different day and age. We need to

get a new act that retains the basic principles to give people security of tenure and so on. To quote our vice-convenor, I G MacDonald, crofting law is like a shed that has had 10 layers of felt put on the roof. We need to take off a lot of the layers of felt and get back to the six, eight or 10 basic principles that are in the act, look at the day and age that we are living in and decide what is required to make the legislation work for the 21st century. Crofting law needs to be simplified to a tenth of the size of the book that we have got.

**David Findlay:** From a lawyer's perspective, I would say that to work within the existing legislation to simplify it, address the problems that have been identified and filter in whatever policy directions the Government wants for the future of crofting would be a much more effective solution than the so-called clean-slate approach. My concern about that approach is that it would simply replace one system with another system that would have its own complexities and anomalies. It would be difficult to see how the new system would relate to what had gone on previously and to people's rights under the previous system.

In many ways the cleanest and—in some ways—most radical solution is to work from within to simplify and amend the legislation. A huge amount of intellectual and practical work has gone on through the crofting law sump—to which Joseph Kerr referred—to identify some of the main practical problems with the legislation. The approach would be about using what is there and simplifying it. I think that that would require the repeal of a large part of what is currently in the existing 2010 act, but it would not be about replacing it with another piece of legislation.

**The Convenor:** Jamie Greene has a quick follow-up question.

**Jamie Greene:** Just so that there is clarity for us, would it be best if we considered a completely new act that is a clean slate, fit for purpose for the modern day, and takes into account the initial considerations of what crofting is all about and what it means today, or should we work with what we have and, as Mr Findlay suggests, try to simplify the existing legislation? Perhaps there is a third suggestion. We have heard various views over the past few weeks from various people and it would be helpful to get a summary of your view on the policy for legislation.

**Joseph Kerr:** I manage crofting regulation on a day-to-day basis and, largely, it works. It was introduced to bring in a series of protections and those have stood the test of time.

The other important thing about the sump is that, as well as identifying the issues, it sought to establish a consensus and get the various parties that participated to go forward with the priorities

that had been identified and agreed. That was an important achievement.

**Rhoda Grant:** The 2010 bill was introduced at the end of a session of a Parliament and we have been told that this bill will come at the end of this session of Parliament. Is the timing right or should we allow more time so that more conversations can be had?

**Colin Kennedy:** The fundamental issue that should be established is what the new act will deliver; the issue of when the bill is introduced is secondary to that. I hear what is being said about the sump, but the sump addresses issues stemming back to 1886. If there is a consensus about what the act is intended to deliver, it may shift the dynamic of what is to be delivered. It would be ideal to have the bill next year, but I have an open mind about whether it takes until beyond the end of this session of Parliament to get something that is fit for the modern day and age.

**David Findlay:** If there is clarity from a policy point of view, that will be important in shaping the legislation clearly. If there is a lack of clarity about what crofting is and what the new act will be about, there is the potential for some of the mistakes that happened in 2007 and 2010. That would be unfortunate, particularly given the amount of work that has gone on with the sump, and the commission's contribution to that, to identify the specific problems that there are and relate those to the bigger issues that the Government will be considering in due course.

**Peter Chapman:** I like what Colin Kennedy just said. We need to get back to basics. I would love the act to be a tenth of the size of the current one, as he suggested, but there seems to be a wee bit of a difference of opinion. My gut feeling is that the legislation should be far simpler, smaller and more easily understood. How big a job would it be to start with a clean slate, go back to basics and produce a set of rules that is a tenth of the size that it is now? Is that a huge job or is it something that is doable in a reasonable timescale?

**The Convenor:** I encourage you to give very brief answers. The temptation will be to give a long answer.

**Colin Kennedy:** Establish what you want to deliver and then make the legislation. It is what you want to deliver that is crucial to how you set out the bill.

**Joseph Kerr:** A system of protections is, by its very nature, going to be complex.

**David Findlay:** Simplifying is the most difficult process of all. It is much easier to tinker with legislation. Simplification is incredibly difficult, but it is achievable.

**The Convener:** Stewart Stevenson wants to ask a very quick question.

**Stewart Stevenson:** It is an observation. When I was planning minister, we reduced planning guidance to a tenth of its previous size without losing any of the policy content. It is possible.

**The Convener:** Thank you for that observation. The final question will come from Richard Lyle.

**Richard Lyle:** I thank you for your evidence, which has been impressive—especially the evidence from Mr Kennedy. I wish you well in your planning, as planning is a problem in my area, too.

You have given us examples of where the Crofting Commission is unable to effectively carry out its functions due to a lack of resources. I believe that we need a renaissance—a new era—in crofting, with Highlands and Islands Enterprise providing the loans that you have talked about. What else does the Crofting Commission need, now that we are facing tight budgets and hard times?

**The Convener:** Do you need more money?

**Richard Lyle:** They will always say that they need more money.

**The Convener:** And what for?

**David Findlay:** If the objectives of the 2010 act and the Government were made clear, that would assist the commission greatly. It could then budget appropriately for what it could deliver year on year. The legislation needs to drill right down to the level of what the commission is going to be able to achieve in its regulatory role and how that relates to the wider benefits—the renaissance in crofting, as you call it.

**Joseph Kerr:** We will always take more resources if they are being offered.

Some key changes are required in the legislation so that the resources can be deployed most effectively. A lot of that is to do with enforcement, new crofts and the status of owner-occupier crofters.

**Richard Lyle:** Basically, we need to sort the mapping problem.

**Joseph Kerr:** Yes.

**Colin Kennedy:** My position is clear. When I study the 2010 act, I do not see it as being that complicated. We work on a daily basis and do not have any major issues. However, I see vast resources filtering away when we have customers who do not like the legislation. They ignore the legislation and phone up the Crofting Commission, where a member of the team has to sit and try to talk to them on the phone. They do not like it, and maybe an hour is lost. Then somebody else

phones from the other side of the fence, and we do not like it. If people recognised the legislation and complied with it, that would make the commission's job much simpler, the regulation would be simpler and our resources would go much further. Dealing with issues that are not in the legislation is a key drain on the Crofting Commission.

**Richard Lyle:** If new legislation addresses the five principles that you mentioned—if the crofter stays on the land, they can turn over their boat, clean their nets, go fishing and so on—and if we can bring in a new era for crofting, that will release all the time that you guys are spending on going into the nitty-gritty.

**Colin Kennedy:** Yes. However, in this day and age, they would not be turning over the boats and cleaning the nets; they would be putting on the caravan or whatever.

If I was to make one comment, it would be that, in general, common grazings give the commission a lot of problems and grief. Shetland has a model in which there are planned schemes, and I have not heard of a problem with common grazings in Shetland for five years. The Shetland model is commendable, and the common grazings aspect of it should be fundamental to the functioning of any new legislation and to the Crofting Commission going forward. Do we hear of problems in Shetland? I have not heard of a problem in five years.

**The Convener:** It is always nice to end on a positive note. It is a convention that I give each witness the chance to say anything else that they want to say, although there is only a very short time in which to do it. Is there anything that any of you would like to say that has not already come up in the conversation?

**Colin Kennedy:** No. Thank you for listening to us.

**David Findlay:** I think that there is a bright future for crofting. If the legislation is amended in a way that matches that ambition, we can all look forward to crofting continuing to the end of the 21st century.

**The Convener:** On behalf of the committee, I thank you all for your evidence and for keeping to the big picture. That has been incredibly useful for the committee. The evidence that you have given today will help us in our deliberations.

*Meeting closed at 12:00.*



This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

---

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

---

All documents are available on  
the Scottish Parliament website at:

[www.parliament.scot](http://www.parliament.scot)

Information on non-endorsed print suppliers  
is available here:

[www.parliament.scot/documents](http://www.parliament.scot/documents)

For information on the Scottish Parliament contact  
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: [sp.info@parliament.scot](mailto:sp.info@parliament.scot)

---



The Scottish Parliament  
Pàrlamaid na h-Alba