Written submission (Part 3) from Brian Inkster, Inksters Solicitors

I have already submitted two previous sets of submissions on the Crofting (Amendment) (Scotland) Bill. This third set of submissions provides my comments on some aspects of the evidence given to the Rural Affairs, Climate Change and Environment Committee on 15th May 2013.

Crofting is not a perfect world

At the evidence taking session on the Crofting (Amendment) (Scotland) Bill on 15th May there was an exchange between Tavish Scott MSP, Richard Frew (Scottish Government) and Rob Gibson MSP that was quite enlightening on the Government's stance on the problems associated with decrofting applications by owner-occupiers as opposed to by owner-occupier crofters. It would appear that the Government does not consider, as Tavish Scott perhaps does, this to be a "significant" issue.

I rather think this is because the Scottish Government has simply not thought through the consequences of the Crofting Commission's stance on this issue. As I have indicated before now, owner-occupiers are, in certain circumstances, being quite simply prevented from decrofting. Furthermore it is arguable that decrofting directions issued by the Crofting Commission between 1 October 2011 and 18 February 2013 to owner-occupiers are, in certain circumstances, invalid with all the consequences that flow from that not only for those owner-occupiers but also for third party purchasers and lenders who have relied on the decrofting directions in question. That is not significant?!

Richard Frew appeared to suggest that the matter was perhaps adequately covered by the fact that "people who were, in effect, owner-occupiers prior to the 2010 Act can apply jointly to the Commission, as long as they do it collectively as landlords."

Tavish Scott quite rightly rebounded that:-

> "The point is that those people are not agreeing to act jointly in that way. If that was happening, I would agree with you entirely."

The quite surprising response by Richard Frew to this was:-

> "I would hope that everybody would be able to work together at some point to recognise the benefits."

To which Tavish Scott replied:-

> "We do not live in a perfect world, Mr Frew".

Indeed we do not. If we did then perhaps we would have the Crofting Commission working together with crofters by interpreting crofting legislation in a way that was to their benefit rather than to their detriment!

Richard Frew's response does, of course, ignore the question of the potentially invalid decrofting directions that may be out there.

On the question of when will this issue be dealt with Richard Frew stated:-

> "When and whether we address that, and whether particular legislation is introduced at any time is really a matter for the minister, rather than for civil servants, to determine."

We all know that the minister will base his decisions on advice received from civil servants and it is somewhat worrying if the civil servants are not up to speed with what the problems actually are. In particular Rob Gibson asked:-

> "That is an interesting issue that might affect some crofters. We do not know how many—unless Mr Frew can give us a ballpark figure at the moment."

The response from Richard Frew was:-

> "I am not aware of the exact figures, but I am sure that the Commission has a list of the different types of crofter."

How can the Government state that this is not a significant issue when they have no figures at their fingertips regarding the number of people affected by it? Surely this should have been fundamental research in deciding whether or not to include this issue in the Crofting (Amendment) (Scotland) Bill?

The Crofting Law Hydra

At the evidence taking session on the Crofting (Amendment) (Scotland) Bill on 15th May Alex Fergusson MSP stated:-

> "The whole thing seems to me to be a bit like the Hydra—you cut off one head and two others appear. With crofting, we get rid of one problem and two others appear in its place. What other issues have been identified during the process for the 2010 Act and the recent process, and what timescale might the Government have in mind for addressing them?"

Richard Frew responded:-

> "I am certainly aware that there are other issues, albeit that they are not of the scale of the one that is dealt with in the bill. There are issues not just with the 2010 Act, but with the 1993 Act and of course, the Crofting Reform etc Act 2007, which came between them. It is everybody's responsibility, from the development of draft legislation—in this case, in the Scottish Government—and as it passes through Parliament to ensure that legislation is fit for purpose when it is passed and that it delivers what it is intended to deliver. We all need to work closely to ensure that that is the case with this bill, focused as it is.
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> There are problems. One that I would like to have a look at, as I mentioned earlier, is the definition of "owner-occupier crofter" in section 19B of the 1993 Act. Some people do not necessarily fall within that definition in the legislation. Whether they need to fall within it could clearly be considered. Other issues in the legislation are mostly to do with cross-references and how various sections interact, an example being the register provisions. It would be useful to look at those issues but, as I said, when and how that happens is a matter for ministers."

Alex Fergusson asked further:-

> "As a brief follow-up question, what priority do those issues have and how important is it to address them? I am afraid that I genuinely do not understand that. I presume that, if the problems are important, they ought to be addressed fairly soon."

Richard Frew responded again:-

> "As I said, it is for ministers to decide when such matters are addressed. I am sorry if I sound repetitive. Before we introduce any legislation, we have to consider carefully what it would do and what issue we are trying to address. If something is highlighted as being a particular problem, we would clearly want to consider not just legislation, but other ways of resolving it. For example, that might be done administratively, which I think would be the first choice."

It is a pity that as part and parcel of introducing the Crofting (Amendment) (Scotland) Bill the Government has not given a commitment to resolve all other problems associated with crofting legislation with a timetable for so doing. Much effort is going into a Bill which I believe was not necessary in the first place. There are many other problems with crofting law that have more unanimous support for being issues where the law is indeed flawed. Richard Frew has his work cut out if he is going to kill the Crofting Law Hydra as Heracles managed to kill the Hydra of Lerna. But the sooner Richard and the ministers he advises tackle it head on the better.

Are owner-occupier crofters a sub-set of owner-occupiers?

At the evidence taking session on the Crofting (Amendment) (Scotland) Bill on 15th May the Convenor, Rob Gibson MSP, asked whether there were any views on my argument that the Bill is not needed?

Richard Frew stated:-

> "Yes—we have considered Brian Inkster's view. It is not surprising that different people reach different conclusions on the issue, as a number of people who are involved in this have done. It is clear to us that, although that issue is worth considering, section 23(10) of the 1993 Act clearly sets out that a croft is not vacant if an owner-occupier crofter is on the croft."

Unfortunately, Richard Frew ignores any exploration of section 23(12A) of the 1993 Act but there again that has been a continual failing of both the Crofting Commission and the Scottish Government throughout this process. However, Derek Flyn took up the cudgel on section 23(12A):-

> "When I brought the matter to the Crofting Commission's attention, Brian Inkster's response was pretty immediate. However, having looked very closely at the Crofters (Scotland) Act 1993, as amended, I think that he has missed one thing. The requirement for an owner-occupier to report to the Commission within a month of becoming an owner-occupier is contained in section 23(12) of the 1993 Act, but there is also section 23(12A), which seems to talk about an owner-occupier crofter as a subset of owner-occupiers.

> I am sorry—I realise that the issue is complicated, and I know that most people's eyes glaze over when I start to talk about it. The point is that owner-occupiers are not entitled to occupy their crofts, which can therefore be held to be vacant, and they can be asked to take tenants. However, owner-occupier crofters are entitled to occupy their crofts and must intimate to the Commission the fact that they are owner-occupier crofters. Instead of their being persons who have to give notice, they are persons who give notice as owner-occupiers as well as intimating the fact that they are owner-occupier crofters. I think that Brian Inkster has missed the fact that owner-occupier crofters are a subset of owner-occupiers. The matter is very complicated but, having looked at it many times since Christmas, I cannot see how one can be persuaded that an owner-occupier crofter could have a vacant croft.
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> The two things that are needed for decrofting are an application by a landlord or landowner and a vacant croft. Although an owner-occupier crofter could be seen as a landlord under the legislation, he certainly could not have a vacant croft."

If your eyes have not glazed over and you are still reading this then I do not believe that owner-occupier crofters are a sub-set of owner-occupiers. Indeed to the contrary an owner-occupier crofter appears to have received special status by way of the Crofting Reform (Scotland) Act 2010 setting them into a category of their own that is very distinct from owner-occupiers. You need look no further than the current controversy over problems associated with applications to decroft by owner-occupiers as opposed to by owner-occupier crofters.

Section 23(12A) is one of those deeming provisions in the 1993 Act which often seem to cause difficulties in understanding and interpretation. It quite simply deems an owner-occupier crofter to have a vacant croft for the purposes of decrofting under section 24(3) of the 1993 Act. If that is not the purpose and intent of section 23(12A) what does that section actually do and why was it introduced by the 2010 Act?

However, as Sir Crispin Agnew diplomatically put it:-

> "I think that the Bill will solve the particular problem by making it clear that the Crofting Commission can decroft owner-occupier crofts. Brian Inkster might well be right but Derek Flyn might well be right that he is wrong. Until a case has gone to the Land Court and it has made a determination, it is sensible to clarify the situation for the avoidance of doubt."

That is indeed where we are at and we shouldn't, at the moment, whilst some redrafting of the Bill is necessary and hopefully in hand, spend much time debating whether or not the Bill was necessary. There may be a place for a post mortem after the Bill becomes an Act to see if things could have been done differently by the Crofting Commission and or the Scottish Government when the 'problem' first manifested itself. From that lessons may be learned for the future to hopefully avoid such a situation arising again.