

THE GLENGARRY MODEL

Crofting Tenancies for the Benefit of Communities

Guidance Notes

This document comprises guidance notes to accompany the model minute of agreement.

Please note, this document contains general information on crofting law and cannot cover every eventuality and users should take their own legal advice before proceeding to ensure that they have guidance tailored to their own individual circumstances.

These notes are offered on a no-liability basis.

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THE CROFTING SYSTEM – HISTORICAL BACKGROUND

The system of crofting, at its inception in 1886, bestowed on small-scale farmers in the former Crofting Counties of Inverness, Ross and Cromarty, Argyll, Zetland, Caithness, Sutherland and Orkney secure, heritable agricultural tenancies with controlled rents and compensation for permanent improvements.

This legal protection was introduced following a lengthy period of economic, social and political turmoil in the Highlands and Islands. The Government of the day recognised the gravity of the situation and appointed Lord Napier to chair the Royal Commission of Inquiry into the Condition of Crofters and Cottars in the Highlands and Islands (the *Napier Report*), which heard evidence in every township across the Crofting Counties, beginning in Braes Village Hall in 1882. The Report was published in 1884 and led directly to the Crofters Holdings (Scotland) Act 1886.

There have been numerous new crofting acts over the years, the most significant in 1911, 1955, 1976, 1976, 1993 (consolidating the 1955, 1961 and 1976 Acts), 2007 and 2010. Throughout, the backbone of the system has always been the principles of (1) security of tenure, (2) controlled rents, and (3) compensation for improvements carried out to the land.

Current crofting legislation is generally accepted to be in desperate need of restating, redrafting, and / or consolidation. The Scottish Government have recently issued a consultation on new crofting legislation; this was initially intended merely to address some problems which currently exist but more recently some new provisions have been proposed, prompting some to voice concerns that the legislation will become even more cumbersome and difficult to decipher than at present.

THE CROFTING SYSTEM - OVERVIEW

Crofting tenancies are quite distinct from “agricultural tenancies”. The crofting system gives crofters additional sources of financial assistance because of the remoteness from markets etc, and the other challenges of agriculture in the Highlands and Islands. Therefore in addition to the usual streams of agricultural subsidy which form an integral part of agriculture in the UK, crofters also benefit from finance directed specifically at them, currently the [Croft House Grant Scheme](#) and the [Crofting Counties Agricultural Grant Scheme](#).

In addition, most crofters (with full crofting tenancies) enjoy greater benefits than their agricultural counterparts. Such a crofter has the right to work the land, live on it, use it for any purpose which does not adversely affect the land or any adjoining land, they may bequeath it to a successor, they will have security of tenure, the right to compensation (50% of market value) if the landlord resumes (removes) any part of it for development, and they will have the right to apply to decroft part of the croft. Crofters also have the right to assign the tenancy to a suitable person of their choice, and the *almost* absolute right to obtain a title deed from the landlord (often referred to as purchasing the ‘landlord’s interest’ or an ‘owner’s title’) in exchange for 15 times the annual rent.

In exchange for these benefits, crofters are required to comply with certain statutory conditions and statutory duties. The former are enforced by the landlord and the latter are enforced by the Crofting Commission.

When the Act was amended in 2007 to (amongst other things) allow the creation of new crofts, a provision was also enacted to allow for different conditions of tenure; the thinking was that without the ability to vary statutory conditions, the prospect of creating new crofts would be unattractive to landlords.

Therefore the Act now provides that if a landlord wishes to exclude from a new tenancy certain rights, they can do so by simply entering in to an agreement with the proposed tenant and then proceeding with the letting process in the usual way. The rights will remain absent when the tenancy is assigned and the terms can only be changed if the tenancy is renounced or terminated and a fresh tenancy created. The restriction of certain rights requires the prior approval of the Scottish Land Court.

It can be helpful to consider that the nature of a crofting lease is a statutory lease; the terms of the lease are contained entirely within the crofting acts (at the moment for all practical purposes the 1993 and 2010 Acts) and any other document cannot correctly be referred to as a “lease” in relation to a croft. What *is* now possible is for landlord and prospective tenant to enter in to a “minute of agreement” to vary the statutory terms of the crofting lease.

Summary of rights which require / do not require Land Court Approval before variation / restriction:-

Rights which can be excluded or varied without prior approval of the Scottish Land Court:-

- The right to assign the tenancy
- The rights to purchase the croft land or croft house and garden ground.
- The right to share the value of land resumed by a landlord
- The right to share in the value of land taken compulsorily.

Rights which can be excluded or varied if prior approval is obtained from the Scottish Land Court:-

- Enlargement
- Use of a croft
- Residency
- Rent
- Division
- Bequest
- Intestate rights
- Consent to be absent
- Decrofting
- Sublet
- Compensation for permanent improvements
- Use of common grazings for another purpose
- Apportionment
- Any of the statutory conditions

Appendix A

Statutory Conditions of Tenure

If a landlord considers that a croft tenant is in breach of one or more statutory *conditions*, it may be possible to have the tenancy terminated and the crofter removed.

An application to the Scottish Land Court is required by the landlord. If a breach is established, and the crofter does not remedy the breach in the required timescale, the Court could be asked to remove the crofter. It is important to note that a croft tenant will be given the opportunity to remedy any breach other than bankruptcy.

In the case of a 'full' croft tenancy which is terminated by the Land court, a crofter is entitled to claim compensation for permanent improvements. Appendix gives further information on compensation. A crofter may also be required to compensate the landlord for damage to and deterioration of the croft.

Where a croft tenancy varies from the statutory norm, the position may be different.

Variation of statutory conditions requires the prior approval of the Scottish Land Court.

Schedule 2 to the Crofters (Scotland) Act 1993

Statutory Conditions

(FULL TEXT)

1. *The crofter shall pay his rent at the terms at which it is due and payable.*
2. *The crofter shall not, except in accordance with the provisions of this Act, execute any deed purporting to assign his tenancy.*
3. *Repealed*
4. *The crofter shall provide such fixed equipment on his croft as may be necessary to enable him to cultivate the croft.*
5. *The crofter shall not, to the prejudice of the interest of the landlord, persistently injure the croft:*
 - a. *by the dilapidation of buildings;*
 - b. *where the croft is cultivated, by allowing, after relevant notice, the deterioration of the soil;*

- c. *where the croft is put to some other purposeful use, by actings prejudicial to that use being actings carried out after relevant notice.*

5A. *In sub-paragraphs (b) and (c) of paragraph 5 above, “relevant notice” means notice given by the landlord to the crofter not to do, or not to allow, a particular thing or not to engage in a particular course of conduct (being a thing or course of conduct specified in the notice and relevant to the deterioration of prejudice in question).*

6. *The crofter shall not sublet his croft or any part thereof otherwise than with the consent in writing of the Commission and in accordance with such conditions (which shall not include conditions relating to rent) as the Commission in giving their consent may impose:*

Provided that nothing in this paragraph shall be construed as debarring a crofter from subletting any dwelling-house or other building forming part of his croft to holiday visitors.

7. *The crofter shall not, except in accordance with the provisions of this Act, subdivide his croft.*
8. *The crofter shall not, without the consent in writing of the landlord, erect or suffer to be erected on the croft any dwelling-house otherwise than in substitution for a dwelling-house which at the commencement of this Act was already on the croft:*

Provided that, if at the commencement of this Act there was no dwelling-house on the croft, the crofter may erect one dwelling-house thereon.

9. *The crofter shall not violate any written condition signed by him for the protection of the interest of the landlord or of neighbouring crofters which is legally applicable to the croft and which the Land Court shall find to be reasonable.*

10. *The crofter shall not do any act whereby he becomes apparently insolvent within the meaning of the Bankruptcy (Scotland) Act 1985.*

11. *The crofter shall permit the landlord or any person authorised by the landlord in that behalf to enter upon the croft for the purpose of exercising (subject always to the payment of such compensation as in case of dispute the Land Court may find to be reasonable in respect of any damage done or occasioned thereby) any of the following rights, and shall not obstruct the landlord or any person authorised as aforesaid in the exercise of any of such rights, that is to say—*

- a. *mining or taking minerals, or digging or searching for minerals*
- b. *quarrying or taking stone, marble, gravel, sand, clay, slate or other workable minerals*
- c. *using for any estate purpose any springs of water rising on the croft and not required for the use thereof;*
- d. *cutting or taking timber or peats, excepting timber and other trees planted by the crofter or any of his predecessors in the tenancy, or which may be necessary for ornament or shelter, and excepting also such peats as may be required for the use of the croft*
- e. *opening or making roads, fences, drains and water courses;*
- f. *passing and re-passing to and from the shore of the sea or any loch with or without vehicles for the purpose of exercising any right of property or other right belonging to the landlord;*
- g. *viewing or examining at reasonable times the state of the croft and all buildings or improvements thereon;*
- h. *hunting, shooting, fishing or taking game or fish, wild birds or vermin;*

but nothing in this paragraph shall be held to preclude the crofter from recovering any compensation for damage by game which is recoverable under section 52 of the Agricultural Holdings (Scotland) Act 1991, by a tenant, and that section shall apply accordingly, with the substitution, however, of the Land Court for arbitration.

11A Nothing in paragraph 11 above shall be held to allow, or require the crofter to allow, the landlord, or any person authorised by the landlord, to exercise unreasonably a right enjoyed by virtue of that paragraph.

12. The crofter shall not on his croft, without the consent in writing of the landlord, open any house for the sale of intoxicating liquors.

13. In this Schedule—

“game” means deer, hares, rabbits, pheasants, partridges, grouse, blackgame, capercaillie, ptarmigan, woodcock, snipe, wild duck, widgeon and teal.

Appendix B

Statutory Duties

Sections 5AA, 5B and 5C of the Crofters (Scotland) Act 1993.

In the case of a standard, full croft tenancy, the following statutory duties apply, and are enforced by the Crofting Commission:-

1. Obligation to be ordinarily resident on or within 32 km of the croft (s. 5AA of the 1993 Act)

The crofter does not require to live on or near the croft as a ‘main’ residence, and it is possible to be ordinarily resident in more than one place at any time. International students, for example, can be said to be ordinarily resident in any given academic year, both in their home countries, and also in their university town or city. However, they will require to have a settled presence on or within 32 km of the croft, for most of every year, in order to comply with this condition. Their application will be viewed far more favourably if they exhibit concrete and realistic plans to move quickly and permanently to the croft on a full time basis.

2. Obligation not to misuse or neglect the croft (s. 5B of the 1993 Act)

“Misuse” is defined as not cultivating the croft or putting it to another purposeful use (terms defined in previous paragraph) and “neglect” is failing to meet the standards of good agricultural and environmental condition (in terms of regulation 4 of, and the schedule to, the Common Agricultural Policy Schemes (Cross-Compliance) (Scotland) Regulations 2004).

Refraining from using a croft, for planned environmental reasons will not be classified as misuse or neglect.

3. Obligation to cultivate the croft or else put it to another purposeful use (s. 5C of the 1993 Act)

“Cultivation” is the use of the croft for agriculture, horticulture, the keeping of animals, bees or poultry, and the use of the land for forestry. These are fairly self-explanatory and the majority of crofts will be put to this type of use, usually small scale agriculture.

Other purposeful uses can be any planned or managed use which does not adversely affect the croft or any nearby land. Other purposeful uses include equestrian use, holiday chalets or cottages, retreats, yoga centres, museums etc.

Where a croft tenancy varies from the statutory norm, the position may be different. For example, a landlord might wish to restrict the use to which a croft can be put, in which case section 5C of the 1993 must be varied. A further example might be where a landlord wishes to stipulate that a crofter lives in a particular house; in which case section 5AA of the 1993 Act must be varied.

Variation of statutory duties requires the prior approval of the Scottish Land Court.

Appendix C

Rent

S. 6 of the Crofters (Scotland) Act 1993

In the case of a standard, full croft tenancy, a landlord is entitled to receive a “fair rent” from a crofter. If agreement cannot be reached as to what that fair rent should be, either party can apply to the Scottish Land Court for a determination.

In modern times, these fair rents tend to be so low in comparison to other costs, that it is rarely cost effective to go to court to have a fair rent set and rents are invariably just agreed between parties, with private landlords increasingly looking for higher than what would be classified as “fair”, in the knowledge that even a comparatively high rent is still less expensive than going to court.

Where a tenancy is to be varied, it is sometimes appropriate for parties just to agree at the outset what the rent will be, which removes any uncertainty. If this is the wish of parties, then s. 6 of the 1993 Act must be varied and the rent figure must be stipulated in the minute of agreement.

Variation or restriction of the fair rent provisions requires the prior approval of the Scottish Land Court.

Appendix D

Assignment

S. 8 of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy, a crofter is entitled to apply to the Crofting Commission of consent to assign their tenancy. These applications are usually granted but landlords do have a right to object on certain grounds.

The right to assign a tenancy can be restricted or varied without obtaining the prior consent of the Scottish Land Court.

Appendix E

Division

S. 9 of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy, a crofter is entitled to apply to the Crofting Commission of consent to divide their tenancy. Landlords do have a right to object on certain grounds.

Variation or restriction of the right to divide a tenancy requires the prior consent of the Scottish Land Court.

Appendix F

Bequest

S. 10 of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy, a crofter is entitled to bequeath their croft tenancy on their death. There is no right for any party to object. Variation or restriction of the right to bequeath a tenancy requires the prior consent of the Scottish Land Court.

Appendix G

Intestacy

S. 11 of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy, a crofter is entitled to have their croft tenancy treated as part of their intestate estate if they die without leaving a will. Their confirmed Executor can then transfer the tenancy and there is no right for any party to object. Variation or restriction of this right requires the prior consent of the Scottish Land Court.

Appendix H

Purchase

S. 12-19 of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy, a crofter enjoys two quite distinct rights to purchase:

1. A crofter is entitled to obtain a title deed to his croft house and garden ground.
2. A crofter has the right to apply to the Scottish Land Court for an order authorising him to acquire his croft land (if agreement cannot be reached).

The croft house and garden ground need not be a new house, but it must be where the crofter resides or resided, and must be fit for human habitation (i.e. no ruins). The garden must allow for the reasonable enjoyment of the house as a dwelling house, and ideally should have been decrofted by the Commission under the appropriate procedure (that is, as the croft house and garden ground, not as a 'part croft' decrofting).

Only one house per croft qualifies for this special treatment, and any further houses are treated as having been built on croft land, rather than built on the croft house and garden ground. The crofter still has certain rights to purchase this land, but it is not an absolute right (see distinction 1 and 2 above). A crofter's right to purchase his croft land is not absolute, but is slightly qualified by the availability of two objections which are available to the landlord, namely (1) that sale would be detrimental to the sound management of the estate, and (2) that the sale would cause a landlord hardship.

The remedy, in each case, if agreement cannot be reached, is for the crofter to apply to the Scottish Land Court. If the crofter wins his case, expenses are likely to be awarded against the landlord; and vice versa.

However, if the sale itself can be agreed (by far the most sensible solution), then the conveyancing process provides an opportunity for the control mechanisms to come in to play.

1. Landlord's claw back

A landlord is entitled to a further payment if the crofter conveys the croft land or part of it to a person out with his family.

The payment is said to be 50% of the market value of the land which has been conveyed.

Landlord's claw back is payable whether or not any consideration is paid, or whether the land is gifted. It is the value which is taken in to account, not the price paid.

A landlord is only entitled to landlord's claw back in respect of the croft land (i.e. not the croft house and garden ground), and the crofter is only obliged to agree to claw back affecting his title for a period of ten years from the date of purchase.

2. Shooting / sporting leases

A crofter is usually obliged to let the sporting rights to his landlord, for a period of not less than 20 years. In practice, many estates suggest long periods, 99 years being common, but there is no basis in law for this, and a diligent crofter's solicitor would question that.

A landlord is only entitled to the lease of the sporting rights in respect of the croft land (i.e. not the croft house and garden ground).

3. Mineral rights

Minerals are excluded from the definition of "croft land", being the land which the crofter may purchase. Accordingly, landlords invariably reserve these and there is seldom any argument about the terms of any such reservation.

4. Title conditions

Title conditions are notoriously tricky to enforce. Some outgoing landlords do try to impose such conditions, prohibiting, for example, building, or non-agricultural use. However, a diligent crofter's solicitor would not accept such prohibitions, because there is no basis in law, in general terms, for landlords to impose them.

5. Rights of pre-emption

A crofter is not obliged to accept a right of pre-emption on further sale, but in a few cases these have been agreed. They can be a useful tool for estates and there may be mileage in encouraging crofters to accept such rights, in exchange for some other benefit (which may change from case to case) if need be. Pre-emptions can be created so that they apply to all onward conveyances, or only to some. It is common, for example, to have a pre-emption which operates only when a conveyance to a non-family member is contemplated.

6. Servitudes

Servitudes can be helpful to outgoing landlords in that a crofter, or former crofter as the case may be, whose croft does not border a public road (or in any event whose croft is located so as to require an access road or services to cross land remaining in the estate's ownership) will require a servitude for access and perhaps also for services.

If at the time of purchase there is one house requiring a servitude, then it would be entirely reasonable for a landlord to grant servitudes to serve that one house, and also for agricultural purposes. If the crofter decides, in the future, to develop his croft for housing plots which he will decroft and sell, and if access and services are not feasible over any other route, then he would need to negotiate with the estate for a further grant of servitude. The existing grant would not be sufficient.

In summary, a crofter who has purchased his croft can develop it as he wishes, subject to the 6 qualifications described above. Some are more useful than others, and the landlord may find that if they were to offer a sale on even more favourable terms than the legislation provides for, then crofters may be willing to agree to further restrictions, for example, a right of pre-emption.

Variation or restriction of the rights contained in sections 12-19 of the 1993 Act does not require the prior approval of the Scottish Land Court and these rights are probably the most frequently removed or varied.

Appendix I

Resumption

S. 20 and S. 21 of the Crofters (Scotland) Act 1993

In the case of a standard or full croft tenancy, a landlord has a general right to apply to the Scottish Land Court to resume tenanted crofts (and indeed common grazings), or parts of them, for reasonable purposes. The proposed reasonable purpose must relate to the good of the croft, the estate, the public interest or the interests of the crofting community in the locality of the croft.

An application to the Scottish Land Court is required, even if the consent of the crofter has been secured. Furthermore, the consent of the crofter does not necessarily lead to approval of the application. The Court will require to hear evidence from the landlord as to the purpose, and the Crofting Commission are also entitled to support or oppose the application. In my view the Commission are likely to oppose any application to resume a large area of croft land; although such opposition is not necessarily the end for the application.

Reasonable purposes (s. 20 (3) Crofters (Scotland) Act 1993):-

- a. The building of dwellings.
- b. Small allotments.
- c. Harbours, piers, boat shelters or other like buildings
- d. Churches or other places of religious worship
- e. Schools
- f. Halls or community centres
- g. Planting
- h. Roads for vehicular traffic from the croft or township to the public road or seashore
- i. Generation of energy
- j. Any other purpose likely to provide employment for crofters and others in the locality.
- k. The protection of ancient monuments or objects of historical interest.

The benefit of this method is that the land would be entirely removed from the scope of the crofting acts. The Commission would have no further remit, and the landlord could do as it wished, encumbered by planning legislation, environmental legislation and a myriad of other restrictions, but not by crofting law.

The downside to resumption would be the necessary input in terms of time and expense, and also the possible negative publicity the estate would receive, even if the crofters were agreeable. An application to the Scottish Land Court is a matter of public record, and a public hearing would likely be required before the Court were able to reach a decision. This route is unlikely to be straightforward.

Crofters are entitled to be compensated if a resumption order is to be granted; they are entitled to receive 50% of the market value of the land being resumed.

Restriction or variation of s. 20 does require Scottish Land Court approval but the restriction or variation of s. 21 does not.

Appendix J
Sections 21B, 21C and 21D of the Crofters (Scotland) Act 1993
Consent to be Absent

In the case of a standard full croft tenancy a crofter may apply to the Commission for consent to be absent. Variation or restriction of these rights does require the prior approval of the Scottish Land Court.

Appendix K
Decrofting
Sections 24 and 25 of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy a crofter may apply to the Commission for consent to decroft in various ways. Variation or restriction of these rights does require the prior approval of the Scottish Land Court but even if the right to decroft is not removed *per se*, any decrofting direction granted will be conditional upon the land being purchased within a 5 year period. Therefore if the right to purchase is removed, effectively so is the right to decroft (even if it is not specified). Best practice is to specify, for clarity and to avoid misunderstandings.

Appendix L
Sublet
Sections 27 and 29 of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy a crofter may apply to the Commission for consent to sublet. Variation or restriction of these rights does require the prior approval of the Scottish Land Court.

Appendix M

Compensation

30, 31 and 32 of the Crofters (Scotland) Act 1993

In the case of a standard, full croft tenancy, a crofter may claim compensation if their tenancy is terminated or renounced. This is one of the original principles on which crofting law was established.

Compensation is seldom claimed these days because most croft tenants prefer to assign their tenancy for a consideration, rather than to renounce their tenancy. However, where a tenancy is let on varied conditions, compensation becomes more important.

It is important to note that the compensation provisions, which can be found at s.30-32 of the Crofters (Scotland) Act 1993, do not apply on assignation of a tenancy.

Schedule 3 to the Crofters (Scotland) Act 1993

Permanent Improvements

(FULL TEXT)

1. *Dwelling house (not a second house);*
2. *Improvements under notice of final resolution under Part IV of the Housing (Scotland) Act 1987;*
3. *Farm offices;*
4. *Subsoil and other drains;*
5. *Walls and fences;*
6. *Deep trenching;*
7. *Clearing the ground.*
8. *Planting trees other than under Section 48(4) of the Act;*
9. *Making piers or landing stages;*
10. *Roads from the croft to the public road or sea shore;*
11. *All other improvements which the Land Court judge as adding to the agricultural value of the croft as an agricultural subject.*

12. Buildings or other structures erected under Section 5 of Crofters (Scotland) Act 1961 or Section 31 of the Act, being buildings or structures which are fixtures on the land, or works executed under the said section 5 or 31.

All of the above can be improvements providing that the improvement is suitable to the croft*, was paid for or executed by the crofter or any predecessors in tenancy, and either was executed not in pursuance of a specific written agreement (under which the Crofter was bound to execute it) OR it if was executed in pursuance of such an agreement, the crofter has not received any reduction in rent or other fair compensation.

*Beware, a large modern house may not be suitable to a croft of very low agricultural value.

Other Points to Note

- Improvements carried out by a sub tenant can be claimed by the tenant.
- Compensation has no place in relation to owned or owner-occupied crofts.
- Moveable equipment and farm machinery are not permanent improvements
- Although generally permanent improvements must be on the croft itself, there is case law to the effect that the crofter should be compensated for a peat road out with the croft.
- Equipment provided wholly or in part by a landlord is not classified as a permanent improvement – this would be fixed equipment.
- Compensation cannot be claimed in respect of improvements made in relation to putting the croft to another purposeful use (i.e. a use other than “cultivation”) UNLESS the landlord confirms in writing that the exclusion does not apply.

Variation or restriction of the compensation rights require the prior approval of the Scottish Land Court.

Appendix N

Compulsory Purchase of Croft Land

Section 37 of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy a crofter is entitled to compensation when land is taken by compulsory purchase. Variation or restriction of these rights does not require the prior approval of the Scottish Land Court.

Appendix O

Common Grazings - Use of for Other Purposes

Section of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy a crofter may apply to the Commission for consent to use the common grazings for a different purpose. Variation or restriction of this right does require the prior approval of the Scottish Land Court.

Appendix P

Apportionment

Sections 52 (4) of the Crofters (Scotland) Act 1993

In the case of a standard full croft tenancy a crofter may apply to the Commission to apportion an area of common grazings for their own exclusive use. Variation or restriction of these rights does require the prior approval of the Scottish Land Court.