

# Cross-Party Group on Crofting

14 June 2023

## Minutes

### Present

#### MSPs

Rhoda Grant MSP (convener)  
Alasdair Allan MSP  
Ariane Burgess MSP  
Beatrice Wishart MSP

#### Invited guests

Ewan Jenkins  
Gordon Cumming  
Mark Reed  
James McDougall  
David Findlay  
Karen Macrae  
Ian Davidson  
Bill Barron  
Michael Nugent

#### Non-MSP Group Members

Patrick Krause (Secretary)	Donald Murdie
Fiona Mackenzie	David Balharry
Sandra Lindsay	Lynne Hendry
Duncan Glen	Ross Lilley
Alexander Southall	Michelle Henley
Aileen Rore	Bill Barron
David Cameron	Hew Edgar
Sandra Holmes	Donald Macsween
Andrew Holt	Gillian Walker
Darren Laing	Siobhan Macdonald
Lena Horch	Janette Sutherland
Bill Dundas	Murdo Mackay
Donna Smith	Brian Inkster
Iona Hyde	Brady Stevens
Iain Carmichael	Phil Knott
Fiona Mandeville	Miranda Geelhoed
Russell Smith	Heather Mack
Alastair Culbertson	Anna Sellars

Niall Evans  
Cornelia Helmcke  
James McPherson  
Alasdair Macnab  
Maria de la Torre  
Ian Davidson  
Iain Carmichael  
Lynne MacMillan  
Donald MacKinnon  
Michael Foxley

Eleanor Garty  
Lucy Rothenberg  
Iain Maciver  
Mairi Mackenzie  
Bob McIntosh  
Arthur Macdonald  
David Skene  
John Maughan

## Apologies

Edward Mountain MSP  
Andrew Thin  
Donald Murdie  
Becky Shaw  
Eilidh Ross  
Morag Jardine  
Josh Doble

Philip Coghill  
Jamie McIntyre  
Donald Meek  
Maryanne Freer  
David Muir  
Eleanor Arthur

## Agenda item 1

### **Welcome and apologies**

The convener welcomed everyone to the meeting and apologies were noted. Thanks were given to NatureScot for providing the venue and refreshments.

## Agenda item 2

### **Agreement of the minutes of the last meeting and matters arising**

The minutes of 17 March were agreed, with the following edits: change 'form filling' to 'record keeping' in the section on FAS and delete comment about nonactive shareholders claiming BPS.

MA: a letter was sent from the group to the Cabinet Secretary for Rural Affairs concerning common grazings. A reply has been received from Ms Marin (Minister for Energy) on 4 July 2023 and it was circulated to the CPG with these minutes.

## Agenda item 3

### Carbon trading and crofting

**i. Mark Reed** (Professor of Rural Entrepreneurship and Director of the Thriving Natural Capital Challenge Centre at Scotland's Rural College SRUC) talked about research being undertaken on carbon trading.

Main points included:

- Reference to an ongoing Scottish Government-funded project with crofters on Skye looking to find new ways to fund peatland restoration.
- Carbon markets are expanding fast, particularly in Scotland. This raises questions as to how crofters can share in the benefits of carbon markets.
- Many crofters may sense that they are losing out whilst their landlords are benefiting. Concerns include impact on land prices with knock on effects on rents and the of eviction of tenants.
- Crofters are protected from some of these risks, but questions remain as to who is to benefit from carbon. Landlords hold mineral rights whilst crofters hold peat cutting rights.
- In theory, benefit-sharing agreements between landlord and crofter are possible. From delivering restoration work or the maintenance of that work but they could also include revenue-sharing agreements. Landlords will be keen to not only share the benefits but also the risks as markets cannot be predicted.
- Idea behind some of Scottish Government's projects such as Peatland ACTION currently is to use public funding to de-risk funding coming in from the private sector, as this would guarantee a minimum level of return.
- Some crofters are interested in these markets because they would like to use carbon management alongside other enterprises as a way to demonstrate active use of their land.
- Advice is being given to Scottish Government at the moment on how to potentially develop other markets including for agricultural soils (arable, grassland), soil marsh and biodiversity.
- Practical advice: it is important not to enter contracts where you forward-sell at a lower price. You want to hold on to it and sell it at a good price, to give a steady income also to do maintenance over many years with the average length of a Peatland Code agreement being 88 years. For food producers it may be worth reducing your own emissions first before you sell to outside parties as buyers may prefer to buy from net-zero suppliers.
- Greenwashing is an issue and regulatory work is being undertaken to bring integrity to these markets, to avoid companies continuing business-as-usual.
- There will be winners and losers, and, at the moment, the biggest losers are rural communities, tenants and crofters. Advice back to Scottish Government is that we need to do something about it, but question remains 'what?'

### *Discussion*

Comment: There are one or two estates in Scotland which are looking to replace agricultural tenancies with environmental contracts. There is no precedent in

legislation, so this is done on a cooperative basis. Where tenants are looking for diversification in these uncertain times, these contracts may be part of the solution.

Response: I am not sure if they are part of the solution, but it depends on whether they are land-sharing or land-sparing activities. In case of peatland restoration, or markets regarding agricultural soils etcetera, the agricultural use will not be a problem, but this is not the case for forestry. The latter is permanent, and it will never go back to crofting.

Follow-up: In these examples it is not forestry; it is more land-sharing. The projects are about identifying sub-optimal areas of land which could be better use including environmental benefits but also benefits for businesses.

Comment: As a crofter who has planted 30.000 trees and the Woodland Trust has registered part of those for carbon trading, I ran into the problem that if you are a crofter, hill farmer or tenant you cannot sign the legal agreement to access the carbon credits. Having done it with the estate's consent, they are now claiming ownership of the carbon credits. Legal reform is necessary.

Response: The problem is that tenancies usually do not last for the length of the carbon contract. We need to look for and present possible solutions.

Comment: There is a question about who puts carbon into the ground and who owns the asset of carbon. Is it a tenant's improvement, and if you loose carbon is it a dilapidation? Caution needs to be taken as it is a very complex legal issue.

Response: The British Standards Institute are developing a 'Nature Markets Standard'. They have the power to require the carbon markets to change the way they treat tenants and crofters. This could be a market-based route for change.

Comment: In Skye, carbon trading has been an obstacle to peatland restoration. It would have been done by now if it was not for unclarity about the credits. Also, it is the landlord's decision when to sell even if crofters are involved. Giving the common grazings to the crofters might well be the solution.

Response: Civil servants are under pressure to deliver carbon markets for their Minister. They need to identify the barriers but presenting solutions might help.

Question: Many common grazings are run by shareholders as a sheep stock club. Can the environmental impact of the sheep be offset against the carbon in the common grazings, and only after that there will be any carbon left to sell?

Answer: There is in-setting and off-setting. Buyers such as supermarket may ask that their suppliers are net zero and they will pay a premium for this, and only after farmers reach net zero, they can then sell the sequestered carbon on the market. But it may be that the off-setting is so lucrative that it will override the potential of in-setting. For crofters the main issue is, however, who can make these decisions.

**ii. David Findlay** (Crofting Commission solicitor) gave the crofting law perspective on carbon credits.

Main points included:

- Crofting and carbon credits fundamentally go to the heart of the question of crofters' rights. In the recent *Stornoway Windfarm* case it was made clear that rights of graziers on common grazings are in principle limited to agricultural rights, although there are rights to take a share in the development value.

- In *Ross v Graesser* it was also established that the legal relationship between crofters and landlords on common grazings is not a tenancy. The rights to graze are only pertinent to the tenancy in relation to croft land. This means that a lot what appears in the Peatland Code is not relevant as we are not dealing with landlord-tenant relations in relation to common grazings. Everything on the common grazings belongs to the landlord except for the rights that burden the common grazings, such as crofters' grazing rights according to their soumings plus various statutory rights when the land is resumed and rights in relation to a scheme for development – which take the crofters' rights beyond agriculture.
- The Peatland Code places onerous conditions on the landlord for restoration projects. Whilst landlords may be able to do some restoration work without crofters' permission, contracts under the Peatland Code are long-term contracts and the exercise of crofters' rights may impact of the viability of the project under the Peatland code and the ability of the landlord to sequester carbon. Degradation may be partly caused by the exercise of grazing rights.
- Three options: 1) The landlord can resume the land and negotiate payment of part of the value of the development that it has proposed to the crofters; 2) A scheme for development which potentially restricts souming rights for an extended period of time. This would require consultation of the crofters and the Land Court will give the crofters a right to object and a right to be heard and recompense will be given; 3) Outside the legislation, the landlord and tenant can voluntarily negotiate a venture to restore peatland. Yet, the obligation to maintain the project and sequester carbon would fall on the crofter. This will be difficult for a landlord to do if new crofters come in which are not bound by the contractual obligations of their predecessor.

### *Discussion*

Question: Can a landlord enter into contractual agreements over grazings? I read somewhere that the 1993 Act does not allow this, even through a Scheme for Development, or other agreements for collaboration.

Answer: I do not think that is correct. A landlord can enter into various contracts, such as for shooting rights. A landlord cannot give third parties rights that may interfere with crofters' rights. With permission of the landlord, third parties are allowed to do certain things on the common grazings, as set out in statutory reserved rights. There is a question whether these statutory rights include peatland restoration work. The rights were not written with a view to include carbon sequestration projects.

Question: For a Scheme for Development or resumption, is the current definition of reasonable purpose in the Crofting Act a barrier to going down those routes?

Answer: Yes, it could be. However, as far as I am aware the list of reasonable purposes is not exhaustive so the court may be satisfied that it is in the public interest. Peatland restoration may be deemed to be in the public good. It would, however, be easier if it was explicitly listed as a reasonable purpose, similarly to how the generation of energy was added.

Follow-up: This might be something for the Crofting Bill Group to take on board.

Question: Would the options that you have described also apply to a Woodland Carbon Code Project?

Answer: No, because the Crofter Forestry Act 1991 that has now been incorporated in the 1993 Act gives crofters various rights with regard to forestry and woodland creation. And there are lots of issues around carbon forestry and how it interacts with crofting.

**iii. Ewan Jenkins** (Research fellow, St Andrews University) talked about his research 'Democracy for Peatland Restoration'.

Main points included:

- Research questions were focused on whether peatland carbon offsets offer a viable or attractive investment opportunity for communities and crofters in the Outer Hebrides; How carbon credit schemes interact with crofters' rights, common grazings, land management practices and community ownership; And what Scottish Government support for nascent carbon markets signal for the future of land reform and rural communities. The research involved a field trip to Lewis where 20 interviews were recorded.
- There are different levels of restoration work (e.g., rewetting, revegetating, reprofiling and control of management practices) depending on the state of peatland (near natural, modified, drained or actively eroding).
- There are 160 registered Peatland Code projects. Yet, projects are still small and the narrative is changing towards landscape-level action.
- Finance options include public grants, private finance, or a hybrid option.
- Restoring land and waiting to sell may be best option for many producers considering uncertainties around agricultural reform.
- Every peatland project will need a level of financial governance. Reference is made to examples of poor (where credits are sold straight away) and good financial governance (which include operation payments and gradual sale of credits, which after 20 years are expected to be verified as Peatland Carbon Units and therefore worth more) in a blended-finance context.
- The timescale of investments might immediately appear unattractive to the demographic of crofters today, where in good financial governance returns may take 20 years to materialise after initial investment. This is further complicated by the fact that decision-making power is likely concentrated with the landlord and there is uncertainty about future carbon credit prices as well as about who will be making decisions in 20 or 30-years' time, and how benefits are shared.
- Conservatism and scepticism overwhelmingly are feelings of the crofters interviewed in Lewis.
- Messaging from carbon investors have changed – initially sold as a financial opportunity, now threats of future financial liability are made if crofters do not engage with propositions for carbon projects.
- Issue of 'diminishing returns of restoration' – you will get most financial reward for restoring that are actively eroding, compared to very little financial reward for near natural peatlands. Those that damaged the peatland the most historically, will be able to achieve biggest returns through carbon credits. This is an inequitable situation that does not fit the Just Transition narrative.
- Community buy-outs are pushed to the horizon due to significantly inflated land prices, e.g., offers over 25 million pounds sought for Dunbeath Estate.

- There is speculation that beyond 2050 there may be a preference for emission removal credits (such as woodland carbon credits) over emission reduction credits (such as peatland carbon credits) which may lead to market anxiety. This could lead to bad financial governance as credits may be sold prematurely. Frontloading of benefits in the short-term may saddle the next generation with a stranded asset – which is no longer generating a financial benefit, but which next generations are still locked into in very long-term agreements.

### *Discussion*

Question: What happens with the ownership of the carbon when things go wrong, e.g., in case of wildfires?

Answer: The responsibility will always lie with the landowner to ensure that the carbon credits exist. They are promised to be permanent commodities. But I am not the expert.

**iv. James McDougall** (Woodland Trust) gave a brief update on the work WT has done establishing what the barriers are to tree planting for croft tenants and introduced **Gordon Cumming** who gave a case-study.

Main points included:

- Woodland Trust is a landowner which sequesters carbon, but it also advises on these topics, mostly to landowners including owner-occupier crofters.
- Woodland Trust, through a third-party offer, insists on a standard security which may become an issue for tenants and graziers. There are very few opportunities where the landowner is not responsible for that security.
- Example of the Garbh Allt Community Initiative – community owned common grazings which wants to undertake a forestry project with public paths. Significant deficit of total expense using FGS grant, but there would be an excess of 132,000 pound income if carbon credits were included.
- Issues: Cash flow – would need at least part of carbon income at start of the project to cover the total costs, but there was an issue of standard security. Common grazings has limited capacity and no ability to raise finance/offer standard security, whereas GACI (landlord) was unable to apply for FGS.
- There are some workarounds in crofting legislation. ‘Joint Forestry Venture’ (Section 50A of the 1993 Act) used in the case study. Agreement would have to be submitted to the Crofting Commission and included in the register.
- One fundamental barrier is that carbon is not mentioned in the 1993 Act.

### *Discussion*

Question: How do you perceive a woodland scheme going forward in the carbon trading market, if the woodland project fails, which happens often?

Answer: It comes down to the question who is responsible for the project, and this is creating difficult relationships between landlord and tenant. Where there is a straightforward situation with just a landlord, the onus will be on the landlord (and subsequent landowners) as developer to ensure that sequestration is delivered.

Follow-up: in the case of community trusts, will they be able to accept this liability?

## Agenda item 4

### Work at the Commission

i. **Karen MacRae** (Development Officer with the Crofting Commission) and **Ian Davidson** (Scottish Land Matching Service) gave an update on the development of a service to help bring unused crofts and aspiring crofters together.

Main points included:

- The development work of the Commission restarted in 2021, around the time the National Development Plan for Crofting came out.
- One action point in the Plan was to pilot a Land Matching Services, to facilitate the transfer of crofts through assignation or sublets.
- Discussions happened with the Farming Opportunities for New Entrants (FONE) group on how this might work for crofting, and how to tailor the Land Matching Service (LMS) to crofting.
- The LMS was started in 2019 as a free facilitation service for people looking to pursue joint ventures particularly matching young people with current generations.
- LMS has been working together with the Commission to develop an online form specifically for crofting. This includes signposting to regulatory aspects.
- LMS will contact anyone who fills in the form, and the Crofting Commission's Development Team will be kept informed.
- The service may help connect older generations who are no longer able to work the croft with younger, local people. It may also help with community development and the facilitation of mentoring from the old to the young.
- This service will also help make sure new entrants have all information relevant to crofting before they get involved, including regarding the duties of crofters. It may also help the Commission measure the demand for crofts.

### *Discussion*

Question: If people are clueless about crofts, how did they get the croft in the first place?

Answer: They will come across the croft through a real-estate website, but it is not always clear if they themselves fill in the assignation form. On the ground, it seems like people are not always aware of all the intricacies involved in crofting. This service may help address this.

ii. **Bill Barron** (Crofting Commission CEO) gave an update on the work of the Commission.

Main points included:

- The Crofting Commission no longer uses the word 'assessor'. They recently appointed 19 Crofting Commission Areas Representatives (CCARs), initially for three years.

- The backlog of regulatory applications is getting better. However, the number of cases that are more than 18 months olds have grown. Turnaround for cases is going in the right direction but there is still an accumulated backlog.
- The Crofting Commission's online application system is live again.

## Agenda item 5

### Crofting law reform

**Michael Nugent** (Scottish Government - Crofting Policy and Legislation) will give an update on crofting law reform.

Main points included:

- The Crofting Bill Group has met ten times since the group was reinstated twelve months ago.
- In May 2022, a list of 42 issues and proposals was sent around the Bill Group and members were given an opportunity to provide feedback.
- Consensus has been reached on 25 out of 42 proposals and a further 7 issues are currently being discussed. The remaining 10 issues will be discussed this year.
- It has been agreed to grant owner-occupier status in cases where this would make sense due to historical circumstances, e.g., when landholdings were not purchased as crofts, but they were entered into the register post 1955. It has been agreed that there should be a mechanism for landholders/owner-occupiers to make an application to the Commission who will be given the appropriate power to correct the status. This will encourage active use of croft land and it will provide many crofters with access to grant schemes.
- It has been agreed to amend the annual notice/census to three years.
- It has been agreed to abolish the current reporting requirements for grazing committees to report on the condition of every individual croft of every individual crofter in the common grazings.
- It has been agreed to make it easier for crofters to use the common grazings for other purposes than cultivation.
- It has been agreed to make it easier for the Crofting Commission to refuse an application for decrofting when someone is making repeated applications for decrofting including for housing or is in breach of their crofting duties.
- Some outstanding issues: introduction of a standard security provision, streamlining the process when a crofter is in breach of their duties.
- There is no fixed schedule for the Bill yet. There is a commitment to reform crofting law by 2026 subject to agreement by Scottish Parliament.

### *Discussion*

Question: Will the National Development Plan for Crofting be reviewed?

Answer: An update on actions under the NDP for Crofting was provided at the Stakeholders Forum on Crofting. This will be provided to the CPG, and I am happy to provide an update at a future CPG.

Questions: For a third-party like a local authority, it is a challenge to report a breach of duties to the Commission. The common grazings and local crofters want to avoid the confrontation, but they are the only ones that can report a breach.

Answer: Under Section 26(A), the Commission can receive information in writing from a member of the crofting community. There may be more than one definition of crofting community. This definition will be looked at by the Bill Group.

Questions: Can the area representatives not oversee that crofters carry out their duties on the croft?

Answer: They are currently still classed as assessors so they would be able to do this under the Act.

Follow-up: But if you send an email and get no reply, what do you do?

## Agenda item 6

### **AOB**

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### **Actions:**

Circulate overview of proposed and agreed changes to crofting law as per discussions in the Crofting Bill Group.

Circulate update on actions under National Development Plan for Crofting.

## Agenda item 7

### **Date Of Next Meeting**

After summer recess, September, date TBC