

## Scottish Parliament Region: Highlands & Islands

### Case TH0014\_03: Crofters Commission

#### Summary of Investigation

##### **Category**

Scottish Executive and Devolved Administration: Crofting; apportionment

##### **Overview**

Mr C complained that as a result of a review of specific grazing regulations<sup>1</sup> initiated by the Crofters Commission (the Commission) he had suffered a reduction of souming<sup>2</sup> which resulted in a lack of grazing for cattle between 6 months and 24 months old.

##### **Specific complaint and conclusion**

The complaint which has been investigated is that the Commission did not adequately explain the effects of the proposed revision of the Grazing Regulations and that this has adversely affected Mr C's use of his croft (*not upheld*).

##### **Redress and recommendations**

The Ombudsman recommends that the Commission:

- (i) in any future work relating to grazing regulations consider providing working definitions of key terms; and
- (ii) pursue with Mr C the scope for them to assist in achieving a mutually acceptable resolution of issues between him and the grazings committees.

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<sup>1</sup> Mr C is a shareholder in two common grazings (referred to in this report as the C Grazings and the L Grazings). For the sake of simplicity, this report focuses on events relating to the L Grazings.

<sup>2</sup> For definitions of this and other crofting terms used in this report see Annex 2.

## **Main Investigation Report**

### **Introduction**

1. Mr C's complaint was originally submitted to the office of the former Scottish Parliamentary Commissioner for Administration in May 2002. That office had made some enquiries about the case but had not reached a conclusion on it when the Ombudsman's office was established and took over the Parliamentary Commissioner's functions in October 2002. The Ombudsman's office, therefore, took over responsibility for consideration of Mr C's complaint. I very much regret that for a variety of reasons the process of considering this complaint has taken much longer than it should have done. I apologise to Mr C and the Crofters Commission (the Commission) for that.

### *Statutory and Administrative Background*

2. Crofting is a system of land tenure, found only in the Scottish Highlands and Islands, which is regulated through a series of Crofting Acts. The first of these was passed in 1886 and the most recent is the Crofters (Scotland) Act 1993 (the 1993 Act). The 1993 Act tasks the Commission with overseeing crofting legislation and developing crofting communities. The Scottish Parliament is currently considering a Crofting Reform (Scotland) Bill.

3. Section 47 of the 1993 Act provides that the crofters who share in a common grazing may from time to time, appoint a grazings committee. A grazings committee is to appoint a person, whether a member of the committee or not, to be the clerk of the committee. Section 48 of the 1993 Act defines the duties of a grazings committee as being:

- (a) to maintain the common grazings and to provide, maintain and, if necessary, replace the fixed equipment required in connection therewith;
- (b) to carry out works for the improvement of such grazings and equipment;
- (c) to make and administer, with a view to their due observance, regulations (in this Act referred to as 'common grazings regulations' ) with respect to the management and use of the common grazings'

Section 49(1) of the 1993 Act requires grazings committees to make regulations for the management of common grazings (the Commission provides a set of draft regulations, which grazings committees may adapt to meet their needs). These are then submitted to the Commission and after confirmation by the Commission the regulations become legally binding on the common grazing

and its shareholders. Among the things common grazings regulations are to make provision for are the number and the kind of stock which each crofter is entitled to put on the common grazings. Earlier Crofting Acts contained similar provisions in respect of grazings committees and common grazings regulations.

### **Investigation**

4. Investigation of this complaint involved reviewing the relevant records, and making written and telephone enquiries of Mr C and the Commission. Issues arising from the complaint have also been discussed with a Member of the Scottish Parliament who acted for Mr C. I have not included every detail in this report but am satisfied that no matter of significance has been omitted. Mr C and the Commission have had an opportunity to comment on the draft report. A summary of terms used is contained in Annex 1. Definitions of crofting terms are contained in Annex 2.

### *Background*

5. Regulations for the management and use of the L Common Grazings were issued in 1957. On 16 October 1990 a Commission official wrote to Mr C, referring to previous correspondence about his application to have part of the L Common Grazings apportioned for his own exclusive use. The letter stated that the Commission had agreed to grant Mr C an apportionment of approximately 8.131 hectares of the said Common Grazings 'subject to the following conditions'. Six conditions were then set out. The third of these was 'The applicant's souming in the said Common Grazings shall be reduced from three cows, three two-year-olds and twenty-three sheep to three cows, three two-year olds and eleven sheep'. This reduction appears to have been confirmed by an order dated 24 November 1992.

### *Review of the Grazings Regulations*

6. On 20 May 1997 a Commission official wrote to Mr C, who was then the Grazings Clerk for the L Common Grazings, stating that the Commission would shortly be reviewing the L Grazing Regulations. The letter said:

'We would appreciate if your Grazing Committee could meet and discuss the contents of this letter and the enclosed proforma. The completed proforma should then be returned to enable us to draft revised Regulations.

It may be advisable to complete the proforma after reading the following:

...

## **Section 2 – Soumings**

....

it is accepted practice that young stock can be retained for replacement purposes and we shall, therefore, be dropping the reference to followers in the new Regulations. It may be possible in some grazings to have some form of substitution for the stock mentioned in the old Regulations. This will depend on the technical advice we receive about the stock carrying capacity of the Common Grazings. It is our intention to drop the reference to followers without substitution.'

7. In correspondence with the Ombudsman's office the Commission have said:

'The updating of the [L] Grazing Regulations was part of a 3 year rolling programme to help grazings committees and grazing constables to review and update their grazings regulations. ... All participants in the programme were asked to confirm and agree inclusion or omission to the reference of 'two year olds' in their new grazing regulations. ... Where Committees confirmed to us that reference to followers was to be retained in the new grazing regulations it remained. Where we received confirmation and agreement that no reference to followers was to be made in the new regulations it was dropped. A proforma was designed to help all grazings committees to decide what regulations and information should be provided or included or omitted in their updated grazings regulations. Appendix 1 provides a copy of the completed proforma from [Mr C], confirming that followers should be dropped from the regulations without substitution.'

(Note: the copy proforma provided by the Commission, which appears to have been signed by Mr C, includes, in a section headed 'Soumings', a statement that 'We agree to the references to followers being dropped from our regulations without substitution'. There is no specific reference to two-year olds.)

8. In further correspondence with the Ombudsman's office the Commission have stated:

'... when the Grazings Regulations for [L] were amended in 1998, [Mr C] in

his capacity as Grazings Clerk was sent a draft of the regulations for his Committee to comment on. Included in these Regulations was a revised Schedule of Shareholders with the up-to-date soumings for each croft. The Schedule clearly showed that the souming was only expressed in cows and sheep and there was no reference to two year olds. [Mr C] made several comments about various sections of the Regulations but did not ask for any amendments to be made to the souming. The Grazing Committee and landlord agreed the revised Regulations and these were adopted on 11 February 1998.'

I have seen that Schedule VI to the adopted Regulations is headed 'Apportionments Granted'. In this schedule entries under 'Apportionment Souming Reduction' are expressed in cows and sheep with no reference to two-year olds. The entry for Mr C's croft is '12 sheep'.

9. In a letter dated 14 December 2001 to his Member of Parliament Mr C wrote, referring to the C Grazings:

'I checked the croft souming in 1998 when I first started working the croft and was told by SERAD [Scottish Executive Rural Affairs Department] that there were 4 no. cows and 4 no. 2 year old cattle.

I have 4 no. cows on the croft & have been told by the Grazings Clerk that the souming for 2 year old cattle has been withdrawn by Crofters Commission.

I did not agree to this reduction at any time ... I think this reduction of souming without notification is unfair & in my opinion illegal.'

10. In a letter dated 8 August 2002 to the Ombudsman's office Mr C wrote:

'The item which is now point of contention is Crofters Commission's statement that 'followers' be omitted from Regulations. In our opinion this could be taken as lambs or calves at foot. After weaning lambs would come under sheep in souming whilst calves would be in the category of 2 year olds.

... I believe we were totally misled by the Commission's initial letter & on finding out their mistake, they have tried to cover up their errors.'

11. In a letter dated 4 May 2005 to the Scottish Crofting Foundation Mr C wrote:

'In 1998 while [I was] Grazings Clerk in [L], it was agreed that followers could be omitted from souming as we were of the opinion that lambs or calves were not counted anyway. It was never agreed that 2 year old cattle be omitted from souming as this would need a request to the Land Court!'

In the same letter Mr C commented 'it seems [the Commission] cannot tell the difference between a follower that needs its mother to look after him & a two-year old which is being bred for replacement of cows in herd or fattening for slaughter'. In correspondence with the Ombudsman's office Mr C has said that he has suffered financially as a result of having to feed two year-olds which he cannot graze on the common grazings. Mr C has also made the point to me that all regulations drawn up must be in accordance with crofting law. In his view the L Grazings Regulations breach section 5(3) of the 1993 Act which states that 'Any contract or agreement made by a crofter by virtue of which he is deprived of any right conferred on him by any provision of this Act (other than sections 12 to 19, 21 and 37) shall to that extent be void unless the contract or agreement is approved by the Land Court'.

12. In correspondence with the Ombudsman's office the Commission have said:

'We concede that confusion has arisen over the definition of the term 'follower' within the Commission. The Sheriff Court case in Stornoway, *MacAulay and Another V Macleod and Others, 1894*, refers to a follower as a calf, until it is 1 year old. The date of this definition – 1894 – perhaps only serves to demonstrate the need to update the regulations and no longer rely on assumptions that the Commission and crofters understand terms in the same way.

The Crofters Commission would clearly wish to apologise to [Mr C] for any inconvenience we have caused him over the misinterpretation of the term 'followers'. We could explain further to him how this situation has arisen. We would be prepared if [Mr C] wished to discuss again with the Grazings Committee if they will amend their Regulations to include reference to the followers. However, it would be for them to decide whether or not to make any amendment. In addition, if the grazings are not fully stocked, then we could also approach the Committee and seek consent for [Mr C] to keep

stock in excess of his souming on the grazings. If the Committee agree to operate the excess stock rule, then the Committee could meet and agree to allow [Mr C] to increase his stock. The Committee may not agree to operate the excess stock rule, it would be up to them. However, I cannot identify any alternative methods of rectifying this situation.'

(Note: the Commission had approached the Clerk to the Grazings Committee in 2001 asking that the Committee consider including two-year olds in their Regulations again. The Committee was not willing to do so. In a letter dated 27 November 2001 to Mr C's MP the Chairman of the Commission wrote 'One suggestion we can make in an effort to resolve the difficulty is that [Mr C] approach the Grazings Committee for the use of unused grazings shares to satisfy his requirements. If he wishes more information on this suggestion, [a Commission official] would be willing to provide it.'

13. As regards the definition of the term 'follower' the former Chief Executive of the Commission commented to the Ombudsman's office '... there are over 600 regulated Common Grazings across the Highlands and Islands ... It strikes me that had we defined the terms precisely before commencing the rolling programme without agreeing the definitions with all grazings committees and we had then effectively imposed our definitions on grazings committees we could have caused even greater confusion to far more committees and shareholders'.

#### *Conclusion*

14. Mr C has referred to soumings for two-year old cattle being removed by the Commission and has suggested that this can be traced to an incorrect definition by the Commission of the term 'follower' which resulted in a misunderstanding of the effect of the omission of followers when the relevant grazing regulations were revised. He has also suggested that the revised regulations are in breach of a specific provision the 1993 Act (see paragraph 11). The latter point is a matter of law on which only the courts could rule. In this investigation I have considered whether there was maladministration by the Commission and if so, whether it has caused hardship or injustice to Mr C.

15. It is clear Mr C's souming in the L Common Grazings was originally expressed as including two-year olds (paragraph 5).

16. It is also clear that in 1998, when Mr C, as Grazings Clerk, was consulted about proposals to revise the Grazings Regulations he agreed that followers should be dropped from the regulations without substitution (paragraphs 6 and 7).

17. The Commission have said that all participants in the programme of updating grazings regulations were asked to confirm and agree inclusion or omission to the reference of two-year olds in their new grazing regulations. I cannot see that this was done in specific terms. The letters I have seen refer to followers, not two-year olds.

18. Should Mr C have understood the term 'followers' as including two-year olds? He has said that in his opinion 'followers' can be taken as lambs or calves at foot, not two-year olds. The Glossary on the Crofters Commission website does not include a definition of 'followers'. The Commission have acknowledged that confusion has arisen over the definition of the term 'follower' within the Commission. They cite an 1894 court case which refers to a follower as a calf, until it is one-year old. Mr C has said that he understands the term as referring to calves still needing their mothers to look after them, not two-year olds. It seems to me that Mr C's understanding is broadly in line with the 1894 definition and I do not consider that he could reasonably have been expected to understand the term 'followers' as covering two-year olds. Additionally, while I note what the former Chief Executive of the Commission has said about the difficulty of arriving at an agreed definition (paragraph 13), I think it would have been both feasible and helpful for the Commission to propose a working definition at the time of the rolling review of grazing regulations.

19. Mr C has said that he was 'totally misled by the Commission's initial letter' (meaning, I assume, the letter of 20 May 1997) and that in his view when the Commission found out their mistake, they tried to cover up their errors. I have seen nothing to suggest that the letter of 20 May 1997 was deliberately misleading or that the Commission have deliberately sought to cover up 'errors'. However, I consider that in their correspondence with those making submissions on Mr C's behalf the Commission could and should have acknowledged more clearly that the fault for misunderstanding over the term 'followers' lay with the Commission.

20. Having said that, I am not convinced that any such misunderstanding can be said to have created a situation whereby Mr C was deprived of soumings for

two-year olds without his knowledge. This is because when the draft regulations were circulated they included an apportionment schedule and in the revised apportionment Mr C's souming is expressed solely in terms of sheep whereas previously there had been specific reference to two-year olds. Mr C has expressed the view (paragraph 11) that for two-year old cattle to be omitted from souming would need a request to the Land Court. I cannot say whether he is correct in that view. However, it seems to me that given that two-year olds were not mentioned in the new schedule it would have been open to Mr C to question that before the new regulations came into force. The Commission have stated (paragraph 8) that Mr C, who was then the grazings clerk, made several comments about various sections of the Regulations but did not ask for any amendments to be made to the souming.

21. It is also important to note that statutory responsibility for making grazing regulations lies with grazing committees, not the Commission – although, clearly draft regulations produced by the Commission have a significant part to play in the process.

22. I have considerable sympathy with the situation in which Mr C finds himself. However, taking all the evidence into account I do not find that it results from fault on the part of the Commission. I, therefore, do not uphold the complaint. I note that the Commission have expressed a willingness to engage in further discussion with the Grazings Committee (paragraph 12). It seems to me that this may offer a way forward.

#### *Recommendations*

23. The Ombudsman makes the following recommendations:

- (i) that in any future work relating to grazing regulations the Commission consider providing working definitions of key terms; and
- (ii) the Commission pursue with Mr C the scope for them to assist in achieving a mutually acceptable resolution of issues between him and the grazings committees.

27 March 2007

**Explanation of abbreviations used**

Mr C	The complainant
The C Grazings and the L Grazings	Common Grazings in which Mr C is a shareholder
The Commission	The Crofters Commission

**Explanation of crofting terms used in this report**

(Definitions taken from Glossary on the Crofters Commission website - [http://www.crofterscommission.org.uk/a\\_glossary.htm](http://www.crofterscommission.org.uk/a_glossary.htm))

Apportionment	Piece of common grazings land allocated to a particular croft and fenced off for its own exclusive use
Common Grazings	Area of grazing land used by a number of crofters and other shareholders
Croft	A holding registered with the Crofters Commission on the Register of Crofts
Crofter	The tenant of a registered croft
Grazings Clerk	Person elected to co-ordinate the functions of the Grazings Committee
Grazings Committee	Elected by the shareholders to administer a Common Grazings
Grazings Constable	A person appointed to administer a Common Grazings in the absence of a Grazings Committee
Shareholder	Person with a right to share in common grazings
Souming	Number and type of stock an individual croft can graze on a common grazings