

Owner-Occupier Crofter: Duty to cultivate and maintain

LAW

Crofters (Scotland) Act 1993, sections 19C & 26A to 26K

*An owner-occupier crofter must comply with each of the duties set out in subsection (2). **Section 19C(1)***

Those duties are that the owner-occupier crofter –

(c) must –

- (i) cultivate¹ the croft; or*
- (ii) put it to another purposeful use²,*

So that every part of the croft which is capable of being cultivated or put to another purposeful use either is cultivated or put to such use.

*(d) must keep the croft in a fit state for cultivation³ (except insofar as the use of the croft for another purposeful use is incompatible with the croft being kept in such a state). **Section 19C(2)***

¹ Cultivate includes the use of a croft for horticulture or for any purposes of husbandry, including the keeping or breeding of livestock, poultry or bees, the growing of fruit, vegetables and the like and the planting of trees and use of land as woodlands. **Section 5C(8)**

² Purposeful use means any planned and managed use which does not adversely affect the croft, the public interest, the interest of the landlord or (if different) the owner, or the use of adjacent land. **Section 5C(8)**

³ Keep in fit state for cultivation (Maintain): includes whether appropriate measures (which may include the provision of drainage) are routinely undertaken, where requisite and practicable, to control or eradicate vermin, bracken, whins, broom, rushes and harmful weeds. **Section 5C(3)**

*The Commission must investigate whether or not the duty to which the report or, as the case may be, information relates is being complied with.*¹ **Section 26A(4)**

... where the Commission consider (whether following an investigation under section 26A(4) or otherwise) that –

*(b) an owner-occupier crofter is not complying with any of the duties mentioned in section 19C(2). **Section 26B(1)(b)**...*

*The Commission must, unless they consider there is a good reason not to, give the relevant person² a written notice informing the person that the Commission consider that the duty is not being complied with. **Section 26C(1)***

*The Commission must, before the expiry of the period of 14 days beginning with the day on which the representation period ends,³ decide whether the duty is being complied with. **Section 26C(5)***

*If the Commission decide that a duty is not being complied with, they must, before taking any action under section 26H or 26J⁴, give the relevant person a written notice giving the person an opportunity to give an opportunity to comply with the duty before the expiry of such period as the Commission consider reasonable. **Section 26D(1)***

*The Commission must decide whether to accept an undertaking before the expiry of the period of 28 days beginning with the day on which the relevant person offers to give the undertaking. **Section 26D(4)***

*The Commission must, unless they consider that there is good reason not to, direct the owner-occupier crofter to submit to them, before the expiry of the period of 28 days beginning with the day on which the direction is given, a proposal for letting the owner-occupier's croft. **Section 26J(1)***

¹ Refers to a report from the grazings committee under section 49(A)1 or information in writing from a grazings committee, grazings constable, an assessor, or a member of the crofting community in which the relevant croft or owner-occupier croft is situated that a crofter or owner-occupier crofter is not complying with the duty to cultivate and maintain their croft. **Section 26A (1-3)**

² Relevant person means the crofter in the case of a croft or an owner-occupier crofter in the case of an owner-occupied croft. **Section 26B(4)**

³ A representation period of 28 days is available from the date the notice is given to the relevant person. **Section 26C(2)(b)**

⁴ Section 26H enables the Commission to make an order terminating the tenancy of a crofter. Section 26J enables the Commission to direct the owner-occupier crofter to submit a proposal to let the owner-occupied croft.

POLICY

Crofting Commission Policy Plan 2022

Policy on croft residency and use of crofts (Paragraph 28 to 30)

The Crofting Commission will work by both statutory and non-statutory means to increase croft residency and to increase the amount of croft land that is cultivated or put to a purposeful use. The Commission's policies on residency and land use apply equally to tenant crofters and owner-occupier crofters. It is the Commission's view that a healthy crofting system consists of crofters who are resident within their crofting communities and are actively using and managing their crofts and common grazings. It is the Commission's view that resident crofters within the crofting community will make these communities more resilient and better able to retain rural population as well as create and generate economic activity within rural, and sometimes remote, populations.

The Commission recognises that much croft land and/or common grazing land is currently neglected because some crofters are failing to comply with their crofting duties. The Commission acknowledges that non-residency and neglect has the potential to undermine the credibility of the crofting system. The policy of the Crofting Commission from 2014 has been to encourage greater voluntary compliance with crofting duties. The development team will reinforce this concept by raising awareness of the duties requirements and the negative impacts on communities and croft land through non residency and underuse of the land. The current policy of the Commission is that this work will continue over the next five years, but Commission policy will also recognise the need for crofting duties enforcement action on non-residency and failure to use the land. Although the Commission's crofting duties enforcement team is small in comparison to the size of the task, the Commission has recently invested additional resources in it, and our policy is to invest further in crofting duties enforcement over the next five years. The Commission will take targeted action on crofting duties enforcement to increase croft residency and active land use. Some of this action will be as a result of reports or information received from grazings committees, assessors and members of the relevant crofting community. The Commission relies upon receiving information from these persons before it is able to investigate a case of potential non-compliance with a crofting duty or duties. Some of the duty enforcement action will be taken where the Commission is aware of potential non-

compliance with crofting duties, for instance as a result of an annual notice return or a failure to return the annual notice.

We have the right to inspect croft land ourselves, or employ a partner agency to do this, as part of gathering evidence about the use to which a croft is being put.

PROCEDURE

- (1) Where the Commission receives a report from a common grazings committee under section 49A(1)¹ which includes information that an owner-occupier crofter is not complying with their duty to cultivate and maintain their croft, it will investigate whether that owner-occupier crofter is complying with the duty. As part of its investigation the Commission may seek further information from the grazings committee. Should the Commission consider the information to be frivolous or vexatious, it will not investigate.

- (2) Where the Commission receives information in writing from:
 - a grazings committee
 - a grazings constable
 - an assessor
 - a member of the crofting community within which the relevant croft is situated

that an owner-occupier crofter is not complying with their duty to cultivate and maintain their croft, it will investigate whether that owner-occupier crofter is complying with their duty. As part of its investigation, the Commission may seek further details from those providing the information and will make them aware that all information is subject to Freedom of Information requests. Should the Commission consider the information to be frivolous or vexatious, it will not investigate.

- (3) The Commission will investigate reports or information that an owner-occupier crofter is not cultivating and maintaining their croft by writing to the owner-occupier crofter at their last recorded address or any new address provided.

The Commission may carry out other checks as necessary in the course of investigating whether an owner-occupier crofter is cultivating and maintaining the croft. It is likely that this will involve a croft inspection and report from a suitably qualified person.

¹ A Common Grazings Committee is obliged to provide the Commission with a report which amongst other matters must include whether the Committee considers that an owner-occupier crofter sharing in a common grazing is not complying with their duty to cultivate and maintain as mentioned in section 19C(2).

- (4) Following the Commission investigation or having determined by some other means that an owner-occupier crofter may not be cultivating and maintaining the croft, the Commission, unless it considers that there is a good reason not to do so, will provide the owner-occupier crofter with written notice informing that it considers the duty is not being complied with.
- (5) Where the Commission has consented to a short lease under section 29A, a notice may only be issued if the owner-occupier crofter's tenant is not complying with the duty. Where the Commission receives a short lease application while in the process of investigating a possible breach of duty to cultivate and maintain, it will only issue a notice if the application has been refused.
- (6) The Commission will explain in the notice why it considers that the duty is not being complied with. It will also advise that the owner-occupier crofter may make representation to the Commission before the expiry of a period of 28 days from when the notice is given. Representation may be made in writing, but the individual also has the right to an opportunity to be heard in person by an appointee of the Commission within the same 28-day period.¹
- (7) The Commission will take account of any representations received within the 28-day period and may also take account of any representation received after the 28-day period has expired.
- (8) Before the expiry of 14 days from the day on which the period for representation ended, the Commission will decide whether the duty is being complied with. The Commission will inform the owner-occupier crofter in writing of its decision.
- (9) Should the Commission decide that the duty is not being complied with, the owner-occupier crofter is entitled to appeal that decision to the Scottish Land Court.
- (10) Where the Commission has decided that the duty is not being complied with, it will give the owner-occupier crofter written notice allowing the owner-occupier crofter an opportunity to give an undertaking to comply with the duty to cultivate and maintain the croft. The Commission will determine a reasonable timescale within which an undertaking to comply with the duty must be given.

¹ Refer to Rules of Procedure on *Hearings and the opportunity to be heard following representations*.

- (11) The Commission will ensure that the notice will:
- (a) *explain that the relevant person must give the undertaking before the expiry of the period of 28 days beginning with the day on which the notice is given*
 - (b) *explain that the giving of the undertaking by the person constitutes acceptance by the person that the duty is not being complied with*
 - (c) *set out what the person must do to comply with the undertaking*
 - (d) *explain that if the person complies with the undertaking, no further action will be taken against the person in respect of the failure to comply with that duty*

Section 26D(2)

- (12) Before the expiry of a period of 28 days from when the undertaking is offered the Commission will decide whether to accept the undertaking. The Commission may impose conditions as considered appropriate.
- (13) An owner-occupier crofter may appeal to the Scottish Land Court against a Commission decision not to accept an undertaking or to impose conditions on an undertaking. An appeal must be made before the expiry of 42 days beginning with the day on which the decision is made. The Commission will await the prospect of an appeal or the outcome of any decision where an appeal is made before continuing with the process.
- (14) Where the Commission has decided that the duty is not complied with and no appeal has been made or upheld, if made, it will direct the owner-occupier crofter to submit a proposal for letting the croft.
- (15) The Commission cannot require a letting proposal where the period for giving an undertaking has not expired, or where an undertaking has been given and the period for complying with it has not expired. Nor will the Commission take such action where the undertaking has been complied with.
- (16) The Commission will not require a letting proposal where it has consented to a short lease of an owner-occupied croft under section 29 and the short lease remains in place. Neither will it take such action where an application for a short lease has been submitted but has not yet been decided.

- (17) Before requiring a letting proposal, the Commission will consider whether to divide the owner-occupied croft. In determining whether it is fair to do so the Commission will consider the use and occupation of the owner-occupied croft; the sustainable development of the crofting community in the locality of the croft, and other matters that the Commission may consider appropriate.
- (18) The owner-occupier crofter may appeal to the Scottish Land Court against a Commission decision to divide the croft before the expiry of a period of 42 days, beginning with the day on which the decision is made.
- (19) Following the outcome of any appeal to the Scottish Land Court, should the Commission divide the owner-occupied croft it will make an application to the Keeper of the Registers of Scotland to register the new crofts in the Crofting Register. Following registration the Commission will consider directing that the owner-occupier crofter submits letting proposals for any or all of the new crofts created by the division, where it considers it appropriate to do so.
- (20) Where the Commission has determined that a crofter is not cultivating and maintaining their owner-occupied croft, and that there is no good reason not to, it will require the submission of a letting proposal within 28 days of this direction being given. The direction will normally be sent to the individual by recorded delivery mail. Before sending such direction, the Commission may seek the view of the crofting community in the locality of the owner-occupied croft by placing a notice in a local newspaper and/or by some other means.
- (21) The owner-occupier crofter may appeal to the Scottish Land Court against the Commission direction to submit a proposal for letting before the expiry of the period of 42 days, beginning with the day on which the direction is made.
- (22) Proposals for letting the croft must be submitted before the expiry of 28 days from the day the direction is given. Up to three proposals may be submitted and the Commission must approve or reject any proposals submitted within 8 weeks of the date of the direction being given.

(23) Should the Commission accept a proposal for the letting of an unregistered owner-occupied croft, an application for the first registering of the owner-occupied croft must be submitted by the new tenant within 3 months from the date of letting. An application is submitted to the Commission to forward to the Keeper of the Registers of Scotland, but where not timeously submitted the letting becomes void.

(24) Where the Commission accepts a proposal for the letting of a registered owner-occupied croft, the registration of the letting must be submitted by the new tenant within 3 months of the letting approval. When submitted within the required period the letting takes effect on the date of registration, which follows the Commission's forwarding of the registration to the Keeper of the Registers of Scotland.

(25) If either:

- (i) no proposals are submitted; or
- (ii) the owner-occupier crofter has submitted proposals¹ which the Commission rejects,

then the Commission will take over the letting process.

(26) The Commission shall, by public notification², invite applications for the tenancy of the croft within a period of time it considers appropriate.³

(27) When the period of time set out in the public notification has elapsed, the Commission will consider all the information available, taking particular account of their specific policy on letting.

N.B. *If no applications are received or none are considered suitable, after an initial sift, wider advertising may be considered appropriate. Any Candidates considered suitable after the initial sift will be interviewed and a report prepared on the croft. The croft report will form the basis for assessing the terms and conditions on which the croft will be let and also for assessing the suitability of applicants' proposals.*

¹ No more than three proposals may be submitted to the Commission in response to a notice. A proposal must name a specific individual and provide any other information required by the Commission.

² For information on public notification refer to separate section on *Public Notification*.

³ Section 26J(7) of the Crofters (Scotland) Act 1993.

- (28) The Commission shall decide:
- (i) to which of the applicants (if any) to let the owner-occupied croft; and
 - (ii) after consultation with the owner-occupied crofter the conditions of let.
- (29) Where the croft has been let on conditions fixed by the Commission, the **owner-occupier crofter** may, within 28 days from the date of the letting, apply to the Land Court for a variation of the conditions so fixed, and any variation made by the Court shall have effect from the date of the letting.
- (30) If the letting relates to an **unregistered owner-occupied croft**, the letting will take effect on a date agreed by the Commission and the new tenant. However, the letting is void unless an application by the new tenant for first registration is submitted to the Commission for forwarding to the Keeper of the Registers of Scotland within 3 months of the date of letting.
- (31) If the letting relates to a **registered croft** –
- (i) any approval of the Commission expires at the end of 3 months beginning with the date on which approval was given, unless an application for registration of the letting of the croft is submitted by the **new tenant** to the Commission for forwarding to the Keeper of the Registers of Scotland before the expiry of that period.
 - (ii) the letting of the croft takes effect on the date of registration.
- (32) A tenant of an owner-occupied croft on a lease (other than a short lease) will be a tenant crofter. As a result, the owner-occupier becomes the landlord of the croft and the provisions relating to owner-occupier crofters will cease to apply.