

## Tenant Crofter: residency duty

### LAW

Crofters (Scotland) Act 1993, sections 5AA & 26A to 26K

*A crofter must be ordinarily resident on, or within 32 kilometres of, that crofter's croft.*

#### **Section 5AA**

*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.<sup>1</sup> **Section 26A(4)***

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

*(a) a crofter is not complying with any of the duties mentioned in section 5AA*

#### **Section 26B(1)(a)...**

*The Commission must, unless they consider there is a good reason not to, give the relevant person<sup>2</sup> 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,<sup>3</sup> decide whether the duty is being complied with.*

#### **Section 26C(5)**

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<sup>1</sup> 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 be ordinarily resident. **Section 26A(1-3)**

<sup>2</sup> 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)**

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

*If the Commission decide that a duty is not being complied with they must, before taking any action under section 26H or 26J<sup>1</sup>, give the relevant person a written notice giving the person an opportunity to give an undertaking 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)***

*If the Commission are satisfied that it is in the general interest of the crofting community in the locality of the croft, the Commission must make an order terminating the tenancy of the crofter unless they consider that there is good reason not to. **Section 26H(1)***

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<sup>1</sup> 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 (Paragraphs 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)<sup>1</sup> which includes information that a crofter is not complying with their duty to be ordinarily resident on, or within, 32 kilometres of their croft, it will investigate whether that 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 a crofter is not complying with their duty to be resident on, or within, 32 kilometres of their croft, it will investigate whether that 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 a crofter is not ordinarily resident on, or within, 32 kilometres of their croft by writing to the 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 a crofter is ordinarily resident.

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<sup>1</sup> A Common Grazings Committee is obliged to provide the Commission with a report which amongst other matters must include whether the Committee considers that a crofter sharing in a common grazing is not complying with the residency duty mentioned in section 5AA.

- (4) Following the Commission investigation or having determined by some other means that a crofter may not be ordinarily resident, the Commission, unless it considers that there is a good reason not to do so, will provide the crofter with written notice informing that it considers the duty is not being complied with. The notice will normally be sent by recorded delivery mail. In certain circumstances the Commission may deliver the notice to a responsible person on the croft, or attach the notice, or a copy of it, to an object on the croft. The Commission will also provide the landlord with a copy of the notice.
- (5) The Commission will not issue a notice to a crofter who is not ordinarily resident but has received Commission consent to sublet the croft under section 27. Where the subtenant is ordinarily resident, the residency duty is considered fulfilled. Where the Commission receives a sublet application while in the process of investigating a possible breach of residency duty, it will not issue any notice until that application has been determined.
- (6) The Commission will not issue a notice to a crofter to whom it has given consent to be absent from the croft under section 21B. Likewise, it will not issue a notice where a crofter has applied for consent to be absent and that application awaits determination.
- (7) The Commission will explain in the notice why it considers that the duty is not being complied with. It will also advise that the crofter may make representations to the Commission before the expiry of a period of 28 days from when the notice is given. The crofter may make representations in writing, but also has the right to require, within the same timescale, the opportunity to be heard in person by an appointee of the Commission.<sup>1</sup>
- (8) The Commission will take account of any representations received within the 28 day period and may take account of any representations received after the 28 day period has expired.

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<sup>1</sup> Refer to Rules of Procedure on *Hearings and the opportunity to be heard following representations*. On account of the legislative requirements, representation of this nature will generally have to be made at the Commission headquarters within the stipulated 28 days.

- (9) 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 crofter in writing of its decision.
- (10) Should the Commission decide that the duty is not being complied with, the crofter is entitled to appeal that decision to the Scottish Land Court.
- (11) Where the Commission has decided that the duty is not being complied with, it will give the crofter written notice allowing the crofter an opportunity to give an undertaking to comply with the duty to be ordinarily resident on, or within, 32 kilometres of the croft. The Commission will also provide the landlord with a copy of the notice. The Commission will determine the timescale within which an undertaking to comply with the duty must be given.
- (12) 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)**

- (13) 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.
- (14) A 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.

- (15) Where the Commission has decided that the duty is not complied with and no appeal has been made or upheld, if made, it will take action to terminate the tenancy of the crofter unless it considers there is a good reason not to.
- (16) The Commission cannot take action to terminate a crofter's tenancy 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 action where the undertaking has been complied with.
- (17) The Commission will not take such action where it has consented to the sublet of the croft under section 27 and the sublet remains in place, or where it has consented to the absence of the crofter under section 21B. Neither will the Commission take action to terminate a crofter's tenancy where the crofter has applied for a sublet and the application awaits determination. Nor will it take action where the crofter has applied for consent to be absent, to extend the consent, or to vary any conditions for consent, and this application awaits determination.
- (18) Before taking action to terminate a crofter's tenancy, the Commission will consider whether to divide the croft. In determining whether it is fair to do so, the Commission will consider the use and occupation of the croft; the interests of the estate in which the croft is located, the sustainable development of the crofting community in the locality of the croft, and other matters that the Commission may consider appropriate.
- (19) The 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.
- (20) Should the Commission divide the croft it will make an application to the Keeper of the Registers of Scotland to register the new crofts in the Crofting Register. Once registered the Commission will advise the landlord in writing that the division has taken effect. Following registration the Commission may consider taking action to terminate the tenancies of any or all of the new crofts created by the division, where it considers it appropriate to do so.

- (21) Where the Commission has determined that a crofter is not ordinarily resident on or within, 32 kilometres of their croft, is also satisfied that it is in the general interest of the crofting community in the locality, and that there is no good reason not to, it will make an order terminating the crofter's tenancy. The Commission will make its decision in line with its policy on what it considers to be relevant to the general interests of crofting communities.
- (22) The Commission will normally send the order by recorded delivery mail to the crofter and also send a copy of the order to the landlord. The order will state the date on which the termination takes effect, which will be at least 28 days after both crofter and landlord have been notified. In certain circumstances the Commission may deliver the order to a responsible person on the croft, or attach the order, or a copy of it, to an object on the croft.
- (23) The crofter may appeal to the Scottish Land Court against the Commission order terminating the tenancy of the croft before the expiry of the period of 42 days beginning with the day on which the order is made.