

Owner-Occupier Crofter: residency duty

LAW

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

Those duties are that the owner-occupier crofter –

(a) must be ordinarily resident on, or within 32 kilometres of, the owner-occupier's croft;
Section 19C(2)(a)

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 –

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(2)**

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)

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 be ordinarily resident. **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)**

*If the Commission decide that a duty is not being complied with, they must, before taking any action under section 26H or 26J¹, give the relevant person a written notice giving the person 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 a 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)***

POLICY

Crofting Commission Policy Plan on "Residency Duty"

If the Commission becomes aware that a crofter is not ordinarily resident, it may give notice of the breach of duty. It will take individual and other relevant factors into account. Legislation requires that an undertaking be given to comply with the duty within a period of time which the Commission considers reasonable. Where the Commission gives consent to a sublet or 'short lease' and the subtenant or short lease holder meets the residency requirement, the duty is complied with for the duration of that period, but the responsibility to ensure duties are complied with remains with the crofter. Discretion may be applied in certain circumstances, on receipt of an application for consent to be absent. Where the Commission approves an application for consent to be absent, the crofter complies with the residency duty.

The Commission will also consider the residency status of anyone making an application to the Commission. The residency duty applies equally to tenants and to owner-occupier crofters. Crofters are required by law to submit an annual return to the Commission advising whether they are meeting their residency and other crofting duties.

¹ 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-occupier's croft.

Where it is assessing non-compliance with the residency duty, there are a number of practical requirements on which the Commission must be satisfied:

- For the purpose of determining whether a crofter is ordinarily resident in a crofting context, the Commission requires that the crofter must show some degree of continuity and settled purpose – notwithstanding some accidental or temporary absence – at their abode. It is expected that a house on or within 32 kilometres of the croft will be the main residence of the crofter.
- Where a number of individuals have joint ownership of a whole croft and thus constitute the owner-occupier crofter, as long as one of those individuals is ordinarily resident the duty is complied with. This is not the same as where there are owners of different parts of a croft, where all the owners are collectively the landlord of the whole croft. This situation is covered elsewhere in this Plan.

The Commission will also take into account the circumstances for non-residency and may consider 'good reasons' not to take action to include, for example, where there are medical reasons or family obligations that prevent current residency at the croft for a limited period, or where the Commission consider that the croft is in a particularly remote location and there is no expressed demand for the croft.

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 be ordinarily resident on, or within, 32 kilometres of their owner-occupied 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 be resident on, or within, 32 kilometres of their owner-occupied croft, it will investigate whether that owner-occupier crofter is complying with their duty. As part of its investigation, the Commission may seek further information from those informing 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 ordinarily resident on, or within, 32 kilometres of their croft by writing to the owner-occupier crofter at their last recorded address or to any new address provided. If the Commission is unable to contact the owner-occupier crofter concerned, it will post a notice on the relevant owner-occupied croft, indicating the reason why it wishes to contact the owner-occupier crofter. The Commission may also place a notice to the same effect in a relevant newspaper circulating in the locality of the owner-occupied croft. The Commission will provide the owner-occupier crofter with an opportunity to complete a duty compliance investigation form, giving details of their

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 does not comply with the residency duty of section 19C(2)(a)

situation, that of the owner-occupied croft and any mitigating circumstances which may be preventing them from being ordinarily resident. The Commission may carry out other checks as necessary in the course of investigating whether an owner-occupier crofter is ordinarily resident.

- (4) Following the Commission investigation or having determined by some other means that an owner-occupier crofter may not be ordinarily resident, 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) The Commission will not issue a notice to an owner-occupier crofter who is not ordinarily resident where it has given consent to the let of the owner-occupier's croft on a short lease under section 29A. Where the owner-occupier crofter's tenant is ordinarily resident the duty is fulfilled. Where the Commission receives a short lease 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 an owner-occupier crofter to whom it has given consent to be absent from the owner-occupied croft under section 21B. Likewise it will not issue a notice where an owner-occupier 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 owner-occupier crofter may make representation to the Commission before the expiry of a period of 28 days from when the notice is given. The owner-occupier crofter may make representation in writing, but also has the right to require, within the same timescale, that he or she is afforded an opportunity to be heard by a person appointed by the Commission.
- (8) The Commission will take account of any representations received within the 28 day period and may take account of any representation received after the 28 day period has expired.
- (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 owner-occupier crofter in writing of its decision.

- (10) 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.
- (11) 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 be ordinarily resident on, or within, 32 kilometres of the croft. The Commission will determine a reasonable timescale within which an undertaking to comply with the duty must be given.
- (12) The Commission must 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 it considers appropriate.
- (14) 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.
- (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 require the letting of the owner-occupied croft unless it considers there is a good reason not to do so.

- (16) The Commission cannot take action to have the owner-occupied croft let 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 short lease of the owner-occupied croft under section 29A(4) and the short lease tenant complies with the residency duty, or where it has consented to the absence of the crofter under section 21B. Neither will the Commission require the letting of the croft where the owner-occupier crofter has applied for a short lease and the application awaits determination. Nor will it take action where the owner-occupier 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 require the letting of the owner-occupied croft, 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 owner-occupied croft, and other matters that the Commission may consider appropriate.
- (19) The owner-occupier crofter may appeal to the Scottish Land Court against a Commission decision to divide the owner-occupied 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 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 may consider taking action to let the tenancies of any or all of the new crofts created by the division, as and when it considers it appropriate to do so.
- (21) Where the Commission has determined that an owner-occupier crofter is not ordinarily resident on or within, 32 kilometres of their owner-occupied croft, it will direct the owner-occupier crofter to submit a proposal for letting the owner-occupied croft unless there is a good reason not to.

- (22) The owner-occupier crofter may appeal to the Scottish Land Court against the Commission direction to submit a proposal for letting the owner-occupier's croft before the expiry of the period of 42 days beginning with the day on which the direction is made.
- (23) 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 of the proposals submitted within 8 weeks of the date of the direction being given.
- (24) Should the Commission accept a proposal for the letting of an unregistered owner-occupied croft, an application for the first registration 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.
- (25) 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 three 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.
- (26) If either:
- (i) no proposals are submitted; or
 - (ii) the owner-occupier crofter has submitted proposals¹ which the Commission has rejected.
- then the Commission shall take over the letting process.
- (27) The Commission shall, by public notification², invite applications for the tenancy of the croft within a specified period of time set out in the notice.³

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 Rules of Procedure on *Public Notification*.

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

(28) 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 its specific policy on letting as contained in its Policy Plan.

***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.*

(29) The Commission shall decide:

- (i) to which of the applicants (if any) to let the owner-occupied croft; and
- (ii) following consultation with the owner-occupied crofter, on what conditions to let the croft.

(30) 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 these conditions, and any variation made by the Court shall have effect from the date of the letting.

(31) If the letting relates to an **unregistered owner-occupied croft**, the letting will take effect on 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.

(32) If the letting relates to a **registered owner-occupied 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 owner-occupied croft takes effect on the date of registration.

(33) 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.