

Tenant Crofter: residency duty

LAW

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

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.¹ **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 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)***

*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)***

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.

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-occupied croft.

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.

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 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. If the Commission is unable to contact the crofter concerned, it will post a notice on the relevant croft, indicating the reason why it wishes to contact the crofter. The Commission may also place a notice to the same effect in a relevant

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 a crofter sharing in a common grazing is not complying with the residency duty mentioned in section 5AA.

newspaper circulating in the locality of the croft. The Commission will provide the crofter with an opportunity to complete a duty compliance investigation form, giving details of their situation, that of the croft and of 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 a crofter is ordinarily resident.

- (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 await the outcome of that application before issuing any notice.
- (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 representation to the Commission before the expiry of a period of 28 days from when the notice is given. The crofter may make representation 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.¹

- (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 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)

¹ 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.

- (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 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 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.
- (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. To assist its consideration of the interests of the crofting community, the Commission will provide an opportunity for representation to be made from members of that crofting community. It may do this by notifying its intent to terminate the tenancy in a newspaper circulating in the locality and/or by other means. 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.