

CROFTING REFORM (SCOTLAND) ACT 2010

EXPLANATORY NOTES

THE ACT

Part 3 – Duties of Crofters and Owner-Occupier Crofters

Crofters’ duties relating to residency, use, misuse and neglect of crofts

Section 33: Duties relating to residency, use, misuse and neglect of crofts

65. This section amends the 1993 Act to clearly set out a tenant crofter’s duties in relation to residing within a certain distance of the croft and putting the croft to some form of productive use. It replaces sections 5B and 22 of the 1993 Act with a clear set of duties on the tenant crofter in respect of residency on, and the misuse and neglect of, crofts.
66. There is currently a power in section 22 of the 1993 Act for the Commission to terminate the tenancy of the crofter where they are not currently resident on, or within 16 kilometres of, the croft, where it is in the general interest of the crofting community. Section 22 is repealed by paragraph 3(13) of Schedule 4 to the Act. Subsection (2) of section 33 inserts a new section 5AA into the 1993 Act, clearly setting out the duty of tenant crofters to be ordinarily resident on, or within 32 kilometres of, the croft they tenant.
67. Section 5B of the 1993 Act currently allows for a landlord, or the Commission with the consent of the landlord, to apply to the Land Court for an order terminating the tenancy of a crofter in cases of misuse or neglect. Subsection (3) of section 33 of the Act replaces section 5B of the 1993 Act and places a clear duty on tenant crofters not to misuse or neglect the crofts they tenant. It also inserts a new section 5C into the 1993 Act placing a duty on tenant crofters to cultivate and maintain the croft.
68. Subsection (2) of new section 5B sets out the statutory definitions of “misuse” that the Commission must use to determine whether misuse takes place. These are that the tenant crofter wilfully and knowingly uses the croft other than to cultivate it or put it to an approved purposeful use; fails to cultivate it; or fails to put it to any such purposeful use. Subsection (3) sets out the statutory definition of “neglect” that the Commission must use to determine whether neglect is taking place and identifies the regulations containing the relevant standards. This definition is that the tenant crofter is not keeping the croft in good agricultural and environmental condition.
69. Subsection (4) of new section 5B does, however, permit tenant crofters to act in a way that would otherwise constitute misuse or neglect without that being treated as a breach of the duty, provided such actions are planned and managed and are taken to conserve the natural beauty, or the flora and fauna, of the locality. Subsection (5) of new section 5B also allows tenant crofters to continue using the croft for a subsidiary or auxiliary occupation, if that use was permitted immediately prior to 28 January 2008 (the date section 7 of the Crofting Reform etc. Act 2007 came into force), without that being treated as misuse or neglect.

70. Subsection (6) provides the Scottish Ministers with power to amend, by order, the meaning of neglect so as to substitute different standards.
71. New section 5C places a duty on tenant crofters to cultivate and maintain the croft. Subsection (2) defines the duties as cultivating the croft or putting it to another purposeful use so that every part of the croft which is capable of being so used meets these criteria, and keeping the croft in a fit state for cultivation. Subsection (3) requires the Commission to take into account, in determining if these duties have been complied with, whether appropriate measures have been taken to control or eradicate the items detailed.
72. Subsection (4) requires a crofter to receive the consent of the landlord and the Commission before putting the croft to another purposeful use. Subsection (5) prevents a crofter from applying for such consent from the Commission until the landlord has refused to give consent or has granted it subject to conditions which are unacceptable to the crofter, or 28 days have expired since the crofter sought the landlord's consent, whichever occurs first.
73. Subsection (6) requires the Commission to consult the landlord and members of the crofting community relating to the croft to be put to another purposeful use on the application. The Commission must also be satisfied that, where planning consent, or any other formal approval, is required to deliver the purposeful use, that such approval has been granted.
74. Subsection (7) places a time limit of 28 days for the Commission to decide the application and allows them to place conditions if consenting. Subsection (8) defines "cultivate" and "purposeful use" for the purposes of the whole of the 1993 Act.

Duties of owner-occupier crofters

Section 34: Duties of certain owner-occupiers of crofts

75. **Section 34** inserts new sections 19B to 19D into the 1993 Act covering owner-occupier crofters. Section 19B(1) provides that a person is an "owner-occupier crofter" if the conditions in subsections (2)-(4) are satisfied. Those conditions are: the person is the owner of a croft; the person was the tenant crofter who exercised the right to buy the croft, a crofter's nominee or an individual who purchased the croft from the landlord who created the croft (or a successor in title to these persons); and the croft has not been let to any person as a crofter since it was acquired from the landlord or constituted as a croft. Section 19B(5) defines "owner-occupied croft" and "owner-occupier's croft", and subsection (6) defines "constituting landlord".
76. New section 19C sets out the same duties for owner-occupier crofters as those placed on tenant crofters. Subsection (2) of new section 19C requires owner-occupiers to be ordinarily resident on, or within 32 kilometres of, the croft; not to misuse or neglect the croft; to cultivate every part of the croft which is capable of being cultivated or otherwise put it to purposeful use; and to keep the croft in a fit state for cultivation.
77. Subsection (3) and subsection (4) of new section 19C respectively set out the statutory definitions of "misuse" and "neglect" for owner-occupied crofts, in the same terms as apply to tenanted crofts. Subsection (5) requires the Commission to take into account, in determining if these duties have been complied with, whether appropriate measures have been taken to control or eradicate a range of items. Subsection (6) provides that owner-occupier crofters may act in a way that would otherwise constitute misuse or neglect, if such actions are planned and managed and are taken to conserve the natural beauty, or the flora and fauna, of the locality.
78. Subsection (7) of new section 19C provides that owner-occupier crofters may continue using the croft for a subsidiary or auxiliary occupation, if permitted immediately prior to the date on which section 21 of this Act comes into force, without that being treated as

misuse or neglect. Subsection (8) provides the Scottish Ministers with power to amend, by order, the meaning of neglect.

78. [Section 21](#) also inserts new section 19D which prevents an owner-occupier from transferring any part of an owner-occupied croft, whether or not for value, without first dividing the croft with the consent of the Commission. This matches the position for tenant crofters who must obtain the consent of the Commission before they may divide their crofts.
79. Subsection (3) provides that the Commission must not determine an application for consent to divide an unregistered owner-occupier croft, unless an application for first registration of the owner-occupier croft is made within 6 months. The Commission does not need to consider the application for consent until an application for first registration is submitted.
80. Subsection (4) ensures that the division of a registered owner-occupied croft is registered by requiring registration to take place within 3 months of the granting of the consent to the division by the Commission or the consent will expire, and providing that the division takes effect on the date of registration. Subsection (5) requires the Keeper to make up and maintain a new registration schedule in respect of the new croft created by the division.
81. Subsection (6) provides that any transfer of ownership of part of an owner-occupied croft which is not a new croft created through division approved by the Commission is null and void; and subsection (7) allows the Commission to declare the original croft vacant. Subsection (8) provides definitions of “division”, “original croft” and “new crofts” for the purposes of this section.

Commission consent for absence from croft

Section 35: Consent for absence from croft

82. This section inserts new sections 21B, 21C and 21D into the 1993 Act. These introduce a new concession for both owner-occupier and tenant crofters to be absent from their crofts with the permission of the Commission. This is done on the understanding that there may be valid reasons for absence. Under the 1993 Act, absent owner-occupiers could be required to submit letting proposals and absent tenants could have their tenancies terminated for failing to reside on, or near, their croft.
83. Section 21B permits the Commission to consent to tenant crofters and owner-occupier crofters being ordinarily resident further than 32 kilometres from the croft. This consent can be granted where the Commission has received an application under subsection (1) (which, in the case of an application by a tenant crofter, has also been copied to the landlord of the croft under subsection (2)). Subsection (3) of new section 21B states that the Commission may grant consent only if they consider there is a good reason for a tenant or owner-occupier crofter to be ordinarily resident further than 32 kilometres from the croft. Subsection (4) empowers the Commission to attach conditions, including a time limit, to any consent that it grants in this context.
84. Subsection (5) of new section 21B requires the Commission to make a decision on any application to be absent within 28 days of the date of application. The appeal provisions in section 52A of the 1993 Act apply to the Commission’s decision under subsection (5). Subsection (6) requires the Commission to inform the applicant and, where the applicant is a tenant crofter, the landlord of their decision and the reasons for making it.
85. New section 21C permits an applicant to whom the Commission has granted time-limited consent to be absent from the croft to apply to extend the duration of such an absence.

86. New section 21D permits an applicant to whom the Commission has granted conditional consent, other than a condition time-limiting the consent, to make an application to have the condition varied.

Enforcement of duties of crofters and owner-occupier crofters

Section 36: Information as to compliance with duties: annual notices

87. This section inserts new section 40A into the 1993 Act, requiring tenant and owner-occupier crofters to make an annual declaration that they are complying with the duties inserted into the 1993 Act by Part 3 of this Act. Subsection (1) requires the Commission to give notice to each tenant and owner-occupier crofter requiring them to provide the Commission with the information detailed in subsection (2) (for tenant crofters) or subsection (3) (for owner-occupier crofters). The information required is that they are complying with the duties in relation to residency, misuse and neglect or, if not, whether they have received consent to be absent from the croft or a tenant is complying with these duties.
88. Subsection (4) requires the Commission to issue notices to all tenant and owner-occupier crofters within 1 year of the commencement of section 36 of this Act and subsection (5) requires similar notices to be issued as soon as reasonably practicable annually thereafter.
89. Subsection (6) applies section 40(2) of the 1993 Act to a notice given under this section. The effect of this is that failure to furnish the Commission with the information within 3 months of the notice without reasonable cause, or knowingly or recklessly providing false information, will result in the tenant or owner-occupier crofter being guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale.
90. Subsection (7) disapplies subsection 55(1A) of the 1993 Act to a notice given under this section and removes the requirement to send notices under this section by registered post. Notices may therefore be sent by any other postal services.

Enforcement of duties of crofters and owner-occupier crofters

Section 37: Enforcement of duties of crofters and certain owner-occupiers

91. This section inserts 10 new sections into the 1993 Act (sections 26A to 26H, 26J and 26K) setting out the arrangements for the enforcement of duties placed on tenant and owner-occupier crofters.
92. New section 26A places a duty on the Commission to investigate certain reports of alleged breaches of duty by tenant and owner-occupier crofters. This section applies to a report from a grazings committee including information that a tenant or owner-occupier crofter is not complying with their duties or any such information in writing from a grazings committee or grazings constable, an appointed Commission assessor or a member of the crofting community within which the croft is situated.
93. Subsection (4) requires the Commission to investigate a suspected breach of duty reported in this way, although they need not investigate where they consider that the information provided is frivolous or vexatious (subsection (5)).
94. New section 26B provides that it and new section 26C (which requires the Commission to serve notice of a suspected breach of duty) apply where the Commission consider that tenant crofters or owner-occupier crofters are not fulfilling their duties to reside on, or within 32 km of, the croft, not to misuse or neglect the croft, and to cultivate and maintain the croft. Subsections 26B(2) and (3) provide that a crofter or owner-occupier crofter is deemed to be complying with those duties (other than the duty not to misuse the croft) where a crofter's subtenant, or an owner-occupier's tenant under

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a “short lease”, is complying with those duties or where consent to be absent from the croft has been granted. Subsection (4) defines “relevant person” for the purposes of sections 26C, 26D and 26K. The expression “short lease” is defined in section 29A(4) of the 1993 Act (as inserted by section 39 of the Act).

95. New section 26C requires the Commission to give written notice to those they consider are not fulfilling their duties, unless they consider there is good reason not to. Subsection (2) requires the written notice to explain why the Commission considers duties are not being complied with and to give notification that a person subject to the notice may make representations to the Commission within a “representation period” of 28 days of issue of the written notice. Where notice is given to a tenant crofter, a copy must be sent to the landlord. Section 26B(3) requires the Commission to consider all representations made within the representation period, although they may also consider representations made later (subsection (4)). Subsection (5) requires the Commission to decide whether or not the duties are being complied with no later than 14 days after the representation period ends.
96. New section 26D sets out the steps that the Commission must take if they decide, under section 26B(5), that a duty is not being complied with, prior to proceeding with the tenancy termination and letting procedures introduced by new sections 26H and 26J. The Commission must give written notice to the person in breach providing an opportunity for them to give an undertaking to remedy the breach and comply with the duty that has been breached within a period considered by the Commission to be reasonable. New section 26C(2) details the information a written notice must contain and requires that, where notice is given to a tenant crofter, a copy must be sent to the landlord. Subsection (3) permits the Commission to place conditions upon an undertaking given and subsection (4) requires the Commission to decide whether or not to accept an undertaking within 28 days of it being offered.
97. New section 26E sets out the circumstances in which the Commission may not proceed with the tenancy termination and letting procedures introduced by new sections 26H and 26J. The Commission may not proceed or take further enforcement action if the period for giving or complying with an undertaking has not expired or if an undertaking has been complied with. The Commission may also not take further enforcement action where it has consented to, or a tenant crofter has applied for consent (where that has not been decided upon) to, the subletting of the croft or, in the case of an owner-occupier crofter, the Commission has consented to the letting of the croft on a “short lease” (within the meaning of new section 29A), or an application has been made by the owner-occupier crofter to let the croft (whether on a short lease or to a tenant crofter) and that application has not yet been determined. Nor may the Commission take further enforcement action in respect of a failure to comply with the residency duty where they have either consented to the absence or are still in the process of considering an application for consent for absence, extending a period of absence or varying an absence condition.
98. New section 26F places a duty on the Commission to proceed with the tenancy termination and letting procedures introduced by new sections 26H and 26J. The Commission must take action, unless they consider there is a good reason not to, if they decide under section 26C(5) that a tenant crofter or owner-occupier crofter is not complying with any duty under this part of the Act and none of the circumstances mentioned in new section 26E apply. Subsection (2) requires the Commission to proceed with tenancy termination in respect of tenant crofters, and letting procedures in respect of owner-occupier crofters.
99. New section 26G enables the Commission to divide a croft before they proceed with the tenancy termination and letting procedures introduced by new sections 26H and 26J. The Commission may take such action where it considers it fair to divide the croft, but only after having given due consideration to the factors stipulated by subsection (2) of section 26G. Subsection (2) states that the Commission must consider the use and

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occupation of the croft, the interests of the estate on which the (tenanted) croft is located, the sustainable development of the crofting community, and such other matters as the Commission deems appropriate. Subsection (3) provides for a division of a croft, or an owner-occupied croft, under this section to take effect on the date of registration of the division in the Crofting Register. Subsection (4) requires the Keeper to make up and maintain a new title sheet in respect of the new croft created by the division. Subsection (5) provides that, where a croft has been divided for failure to comply with the duties placed on the tenant crofter or owner-occupier crofter, the Commission may proceed with the tenancy termination and letting procedures introduced by new sections 26H and 26J in respect of either the whole of the original croft or any part of the croft. Subsection (6) requires the Commission, where they decide to divide a tenanted croft under this section, to give written notice to the landlord of the division and the effective date of that division. Subsection (7) defines “division” and “new crofts” for the purposes of this section.

100. New section 26H sets out the procedures that the Commission must follow when terminating a croft tenancy. The Commission must, unless they consider there is a good reason not to, make an order terminating the tenancy of a tenant crofter if they are satisfied that it is in the general interest of the local crofting community. Subsections (2) to (4) require the order to be notified to both tenant crofter and landlord and to specify the date on which it takes effect (which must not be earlier than 28 days after the later notification of the action (whether that is to the tenant crofter or the landlord)). Subsections (5) and (6) provide for the ejection of the crofter if he or she fails to give up occupation of the croft. The sheriff may refuse to issue a warrant for eviction only where the crofter can show cause. Subsection (7) permits the Commission to recover the expenses of applying for a warrant for eviction, and executing that warrant, from the crofter. Subsection (8) gives a crofter whose tenancy has been terminated for failure to comply with duties under the Act the same rights (e.g. compensation for permanent improvements made to the croft) and liabilities (e.g. rent due) as if the crofter had voluntarily renounced their tenancy on the date on which the order terminating the tenancy takes effect. This provides all crofters with the same rights and liabilities irrespective of how tenancies are ended.
101. New section 26J sets out the procedures that the Commission must follow when requiring an owner-occupier crofter to submit letting proposals. Subsection (1) requires the Commission, unless they consider there is a good reason not to, to direct the owner-occupier crofter who has failed to comply with a duty under section 19C(2) to submit a proposal, within 28 days of the Commission’s direction, for letting the croft. Subsection (2) limits these letting proposals to a maximum of 3 potential tenants. Subsection (3) requires the Commission to approve or reject a proposal submitted in response to such a direction within 8 weeks of the date of the direction. Subsection (4) requires the Commission to take action under subsections (7) and (8) where the owner-occupier crofter has not submitted a letting proposal within 28 days or has not had a letting proposal approved within 8 weeks of the direction having been given. Subsections (5) provides that when the Commission direct an owner-occupier crofter to submit proposals to let an unregistered owner-occupied croft, the let of that croft is void unless an application for first registration of the croft is submitted within 3 months beginning with the date of the letting. Subsection (6) provides that when the Commission direct an owner-occupier crofter to let a registered owner-occupied croft, any approval to a letting expires at the end of 3 months beginning with the date of letting approval unless an application to amend the registration details of the croft is submitted within that period; and the let takes effect on the date of registration.
102. Subsections (7) and (8) require the Commission to invite applications, by public notification, for letting and to set a time period within which applications may be received. When the time period set in the public notification has ended, the Commission must decide to whom (if anyone) the croft should be let and, in consultation with the owner-occupier crofter, the conditions under which the croft is to be let. Where no applications are received, the Commission may choose not to let the croft, thereby

rendering it a vacant croft. Subsection (9) provides that the letting of an unregistered owner-occupied croft to an applicant is void unless an application for first registration of the croft is submitted before the expiry of the period of 3 months beginning with the date of the letting. Subsection (10) requires an application for registration of the letting of a registered owner-occupied croft to be submitted within 3 months of the decision to let the croft being made and provides that the letting takes effect on the date of registration.

103. Subsection (11) allows the owner-occupier crofter to apply to the Scottish Land Court within 28 days of the letting date to vary the conditions set by the Commission. Any variation determined by the Scottish Land Court will take effect from the letting date (subsection (12)). This is similar to the existing procedures for requiring letting proposals under the vacant croft provisions in section 23 of the 1993 Act.
104. New section 26K sets out the rights of appeal to the Scottish Land Court in relation to the new enforcement provisions. Subsections (1) to (4) set out the issues which may be appealed. These are: a decision of the Commission that a duty is not being complied with (section 26C(5)); not to accept an undertaking or to impose conditions on an undertaking (section 26D); an appeal against the division of a croft (section 26G); the making of an order by the Commission terminating a croft tenancy (section 26H); and a direction from the Commission for an owner-occupier to present letting proposals (section 26J). Subsection (5) provides that any appeal under subsection (2) or (3) must be made within 42 days of the decision, order or direction appealed against and subsection (6) defines the grounds on which an appeal may be made. Subsection (7) sets out the actions the Land Court may take in respect of an appeal and subsection (8) requires the Commission to give effect to the decision of the Land Court on an appeal under this section. Subsection (9) provides a power for the Land Court, following a decision on an appeal under this section, to order the Keeper to rectify the Crofting Register.

Grazings committees: duty to report misuse etc.

Section 38: Grazings committees: duty to report breaches of crofters' and owner-occupier crofters' duties etc.

105. This section inserts new section 49A into the 1993 Act, which requires grazings committees to report breaches of duties to the Commission and sets out a process and requirements for doing so. Subsection (1) sets out the issues on which a grazings committee must report to the Commission. These are the conditions of the common grazing, crofts of tenant and owner-occupier crofters with a share in the grazing and any other matter the Commission may require. Subsection (2) requires a grazings committee's report to also include any breach of duty by a tenant or owner-occupier crofter and subsection (3) allows the report to cover any other information affecting the common grazing or crofting in any township associated with the common grazing the committee consider appropriate.
106. Subsection (4) requires the first grazings committee report to be submitted to the Commission as soon as reasonably practicable after 1 year of this section coming into force and subsection (5) provides for 5-yearly reports to be submitted thereafter.

Letting of owner-occupied crofts

Section 39: Letting of owner-occupied crofts

107. This section inserts 2 new sections into the 1993 Act (sections 29A and 29B) setting out the arrangements for the letting of owner-occupied crofts.
108. Section 29A requires the owner-occupier crofter to obtain the written consent of the Commission prior to any letting of an owner-occupied croft. That might be a letting to a tenant as a crofter or it might be a letting to a tenant under a short lease

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who, because of section 29B, does not have that status. Subsection (2) requires that, with the exception of short leases, the Commission must not grant the consent if the owner-occupied croft is unregistered unless an application for first registration of the croft is submitted by the applicant within 6 months of the application for consent being made. The Commission need not consider the application until the registration application is submitted. Subsection (3) requires, with the exception of short leases, registration to take place within 3 months of the consent to the letting being granted, and provides that the letting takes effect on the date of registration. Subsection (4) permits the Commission to impose conditions, other than in respect of rent, in giving their consent to a letting proposal where the letting is for a period of 10 years or less (a “short lease”). Subsection (5) makes void any lease granted without the Commission’s consent, and, where the lease is a short lease, any lease not granted in accordance with any conditions imposed by the Commission under subsection (4). Subsection (6) empowers the Commission to terminate a short lease if a condition they have attached to their consent has been breached or if the tenant fails to comply with a condition of let, other than in respect of rent. Subsections (7) and (8) disapply subsections (2) and (3) to short leases, as short leases do not require to be registered under sections 4 or 5 of the Act. Subsection (9) provides that, where a lease under this section includes a lease of the common grazing shares, the owner-occupier crofter’s rights to, and any regulations relating to, the grazings apply to the tenant for the duration of the lease. Subsection (10) clarifies that the conditions imposed under this section will not apply to the letting of the croft house, or other buildings on the croft, to holiday visitors.

109. Section 29B clarifies the status of a tenant under a short lease. Such tenants will be treated as neither a crofter nor a tenant under a tenancy under the Agricultural Holdings (Scotland) Act 2003. Consequently, they will not have the same legal rights as those types of tenants. A tenant of an owner-occupier’s croft on a lease other than a short lease or a holiday let will be a tenant crofter. As a result, the owner-occupier crofter becomes a landlord of a croft and the provisions relating to owner-occupier crofters will cease to apply.