

# Consultation response

## Section 11 of the Homelessness (Scotland) Act 2003

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# Shelter

## Section 11 of the Homelessness (Scotland) Act 2003

### Introduction

Shelter Scotland welcomes the opportunity to comment on proposals for implementing Section 11 of the Homelessness (Scotland) Act 2003. Section 11 of the Act allows for Scottish Ministers to prescribe a system through which local authorities will be notified whenever a mortgage lender, private landlord or registered social landlord (RSL) initiates legal proceedings to repossess a property. Such a system was recommended by the Homelessness Task Force to provide local authorities the opportunity to intervene and prevent homelessness occurring wherever possible<sup>1</sup>. Where it is not possible to prevent homelessness, the early warning that a Section 11 notification provides, should allow for any period of homelessness to be more planned. This can enable a smoother transition into alternative accommodation and minimise the stress and disruption that homelessness causes to individuals and families.

### Answers to consultation questions

#### Section 1

**Q1. Is the form and manner of notifications of proceedings to local authorities clear to you from the information contained in these regulations?**

YES

Comment:

The form and manner of notifications appear to be relatively straightforward. We do, however, feel that when these are posted by mail this should be done by recorded delivery to ensure the safe arrival of the document.

**Q2. Do you believe that the information outlined in the Notice of Proceedings in Form 1 is sufficient to ensure efficient implementation of Section 11?**

NO

Comment:

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<sup>1</sup> Scottish Executive (2002) Homelessness Task Force Final Report: Helping Homeless People: An action plan for prevention and effective response

There appears to be a discrepancy between the Notice of Proceedings in Form 1 and the accompanying guidance which requires to be clarified. The first Enactment under which proceedings are being notified is listed as Section 11(1) of the Homelessness etc (Scotland) Act 2003. This section of the primary legislation states that the only exemption to notification is when the landlord is a local authority.

However, the accompanying Guidance to local authorities states at paragraph 13 that Short Assured Tenancies (SAT) in the private sector are only to be covered “*when provision is sought to end this tenancy early through eviction*”. We appreciate that the nature, volume and high turnover of SATs may mean that there are good reasons for exempting most from the notification system.

For example, when many SATs come to an end and the landlord is seeking to regain the property this does not present a significant risk of homelessness to the tenant(s). In the majority of such instances the tenant(s) is able to find alternative accommodation without a period of homelessness occurring. To insist on local authorities having to intervene in such cases is likely to create significant unnecessary work for little, if any, gain. Furthermore, were a Section 11 notification to be completed whenever a private landlord sought possession of a property let on a SAT this would be likely to create a volume of notices which local authorities would simply not have the capacity to respond to.

However we believe that there should be additional coverage of SATs under the Section 11 system to that proposed. If at the end of the tenancy period neither the landlord or tenant wish to terminate the tenancy, by tacit relocation, it continues on the same terms and conditions. As at any time during the running of the tenancy, to regain the property the landlord must serve two months notice to the tenant and serve a valid notice to quit. If however, the tenant remains in the property the landlord is required to obtain a court order to remove them. If the tenant is occupying the property through tacit relocation such situations are not covered in the draft guidance as the tenancy would not be considered to be brought to an end *early* through the eviction.

It does not seem unreasonable to assume that if someone does not move out in these circumstances that they have not found alternative accommodation and are at risk of homelessness. This would indicate a risk of homelessness and the intervention of the local authority may be appropriate.

If, however, the eviction is taking place outwith the initial tenancy period there may be little that a local authority can do to prevent it from taking place. In this situation the landlord does not require any specific grounds to evict, the tenant cannot defend the action and a sheriff has no option but to grant the eviction decree. However, it does provide the local authority with an opportunity to provide advice and information, assist with sourcing or arranging alternative accommodation or planning for a period of homelessness.

Therefore we recommend that a private landlord letting property on a SAT should be required to provide a Section 11 notification at the point at which application is made to the court to evict. We recognise that this will be unlikely to capture all of the cases that there is a risk of homelessness as some private tenants who have not secured alternative accommodation will leave the property on the basis of the Notice to Quit, without waiting for the eviction to occur. However there are likely to be some instances where the local authority will be able to intervene and provide valuable support and assistance to people. These tenants would already be entitled to advice and assistance as being threatened with homeless under current legislation. However, Section 11 may provide local authorities with a means of identifying people at risk and offering support to them. This could result in more people getting access to a service and help prevent homelessness.

**Q.3 Do you believe that the information outlined in the Calling-up Notice etc, in Form 2 is sufficient to ensure the effective implementation of Section 11?**

YES

Comment:

**Q4. Do you have any suggestions to make Form 1 and 2 in the regulations more user friendly?**

NO

Comment:

**Q5. Do you have any general comments on or suggestions on the form and manner of notification to local authorities from landlords and creditors as outlined in the regulations set out in section 11?**

NO

Comment:

## Section 2

### A) Statutory guidance to local authorities

**Q6. Are you clear from the guidance at which stage local authorities should expect to receive the notification of proceedings?**

NO

Comment:

As mentioned in the answer to question 2 earlier in this response we believe that private landlords letting on a SAT should complete a Section 11 notification when the legal action is lodged in court, in cases where the tenancy is being ended following the expiration of the initial tenancy period.

In relation to rented accommodation in the social rented sector and for private sector landlords seeking to evict before the expiration of the initial SAT period, or for landlords renting on an assured tenancy, the guidance is not clear. Paragraph 7 states that notification by landlords should be provided to the local authority at the stage of the Notice of Proceedings being raised. However at paragraph 13 the guidance states that “the notification should happen when the court form or initial writ etc is lodged or the notice is served at the outset of any action”. These sections are also repeated in the guidance to landlords and creditors. This makes it unclear as to whether the Section 11 notice is to be served when the Notice of Proceedings to repossess the property is served on the tenant or at the later stage (of at least four weeks) of the case actually being lodged in court. This requires to be clarified in order that landlords are clear of the stage at which they should provide notification.

There are potential advantages and disadvantages to a Section 11 notice being served at either of these stages. If a Section 11 notification was to be provided when the Notice of Proceedings was served there are likely to be a significant amount of notices generated by landlords. This could potentially overwhelm local authorities, undermining their ability to actually respond to them. However the advantage of providing a Section 11 notification at this stage may improve a council’s ability to prevent homelessness by having a much longer period within which to intervene. Perhaps the way to prevent councils being inundated with Section 11 notifications is to challenge the practice of Notice for Possession being served as a matter of course for tenants who are in a certain amount of arrears, or have not made rent payments for a defined period of time even if this is due to a housing benefit claim being processed<sup>2</sup>. This causes far more notices to be served than

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<sup>2</sup> Communities Scotland (2005) Thematic Studies: Evictions in Practice

is necessary and reflects practice in the use of legal proceedings as an attempt to scare tenants into paying their rent regularly and also in automatic system generated rent management systems. Both of these procedures can result in notices being served inappropriately, creating stress among tenants and in relation to Section 11 could be particularly unhelpful to local authorities in attempting to intervene to prevent homelessness.

Were notification not to occur until the case is actually lodged in court there is a minimum of three weeks before the case is actually heard. While in many cases time pressures may mean that this period can be longer there is no guarantee that this additional time would be available. To only provide three weeks within which to intervene may undermine efforts to prevent an eviction decree from being granted. Although it is possible for further attempts to prevent the actual eviction taking place after the decree has been granted this may be harder to achieve and the granting of the decree will be likely to place further pressure and stress on the household.

**Q7: Do you have any comments/ suggestions in relation to local authorities ensuring landlords or creditors know where to sent proceedings?**

YES

Comments:

The guidance states that some landlords and creditors may not be aware of which local authority area a property is in and will therefore be unable to provide notice. RSLs generally have many links with the local authorities within which they operate through service level agreements, nominations arrangements and Section 5 homelessness protocols. These entail that the RSL is aware of the local authority areas it operates in. Similarly private landlords have been required to register their properties with local authorities since April 2006 and again, should therefore be aware of where their properties are in relation to council boundaries. While such formal arrangements may not currently exist between local authorities and mortgage lenders we have confidence that these organisations will have the resources and expertise to be able to gather such information as to which council area an address is in.

**Q8: Is it clear from the guidance which information local authorities should expect to receive from landlords and creditors?**

YES

Comment:

**Q9: Is the guidance clear on what action should be taken by local authorities when notification is received from landlords and creditors?**

NO

Comment:

As stated earlier in this response the intention behind Section 11 is to allow for local authority intervention and to prevent homelessness wherever possible. This is stated within the guidance to local authorities as being the purpose and that local authorities may also use the information gathered through Section 11 for strategic purposes. However, within the introductory information and at paragraph 5 of the guidance to landlords and creditors it states that information collected through Section 11 can be used *either* to intervene *or* for strategic purposes. It should be made clear throughout the regulations and guidance that the that local authorities will be required to intervene with the purpose of preventing homelessness when a Section 11 notification is received. There are potential benefits in being able to use the information collected through the Section 11 process strategically but these are secondary to the purpose of Section 11 in preventing individual instances of homelessness. Further guidance may be useful for local authorities in how the information can be used strategically, for example, covering what information can be collected and how this should be analysed and used.

More detailed and clear guidance would be useful on the types of intervention that local authorities should make on receiving a Section 11 notice. The following information reflects this:

At paragraph 20 there is a suggestion that local authorities should prioritise households that are already known to be at risk of homelessness in responding to Section 11 notifications. We would argue that a Section 11 notification, as a reflection of the fact that legal proceedings have been initiated to repossess their home, indicates that there is a significant risk of homelessness. So while we agree that households who have previous experience of homelessness are legitimately the focus of particular attention, it does not follow that 'new' households should be ignored.

To ascertain any information that the local authority already holds on the household, as described in the guidance at paragraph 21, is however useful. If there is information available of any factors that may further contribute to the household being vulnerable to homelessness, then these should be used in determining the nature of the planned intervention to prevent homelessness.

The guidance recognises that the effectiveness of writing to the household may be limited as some households are not likely to respond. It is known that some people experiencing financial difficulties stop reading their mail for example. Other factors such as literacy or

language issues may reduce the effectiveness of writing to households. The guidance should make clear that writing to households in response to receiving a Section 11 notification may just be a first step measure. More proactive attempts to contact the household, such as visiting, should also be made, although we accept that this may not be necessary in all cases. It is welcome that the guidance mentions that efforts must be made to minimise any alarm that could be caused by a visit.

It may also be useful to link the guidance into the duties that local authorities have under Section 32 of the Housing (Scotland) Act 1987 and amended by the Homelessness Act (2003) which prescribe the advice and information that is to be made available to households threatened with homelessness.

The guidance should make more of the options that will be available to local authority staff in relation to signposting households to other specialised services. Although the potential sources of services are useful they are limited. It is suggested that people in need of housing advice and information are referred to a Shelter Housing Advice Centre. Shelter does operate a free national housing advice phone line and Advice On-Line at the Shelter web site also contains advice and information for people threatened with homelessness. However, were people to require more detailed or involved support such as casework support or advocacy services, there are capacity constraints to this help.

As part of their duties under the Housing (Scotland) Act 2001, councils must make housing advice and information available. Council staff involved in homelessness prevention should have detailed knowledge of the range of relevant services that are available within their area. This knowledge should be used to ensure that households are signposted to the most appropriate sources of support and information depending on their circumstances. Referrals should be made by local authority staff and, where additional risk of homelessness is perceived, followed up to ensure that households keep appointments and receive support. The implementation of Section 11 may provide further opportunity for better integration between local authorities and other organisations providing advice, information, support and other services to people for a range of issues that may contribute to people becoming homeless. The creation of networks of organisations providing these services may help to ensure that service provision is comprehensive or that where there are gaps, these can be identified and filled.

The local authority involvement in the case and efforts to prevent homelessness should continue beyond the initial response to receiving the Section 11 notification to the point at which the potential homelessness is prevented or becomes inevitable. If the latter point is reached then the local authority's priority should become focused on ensuring that the subsequent period of homelessness can be planned for. This should ensure that the household does not become roofless, that good quality, suitable temporary



accommodation is available at the point that homelessness occurs and that the period of time spent homeless is minimised.

**Q10: Do you have any comments about the data protection issues raised in the guidance?**

YES

Comments:

At paragraph 28 there is a point made about how long local authorities should store Section 11 notifications providing the general principle of data protection that information should only be kept for as long as it is necessary for the purpose that it was collected for. While the principles of data protection should be upheld by local authorities, for the purposes of building up a picture of evictions and repossession activity within their area to inform strategic planning it could be necessary for local authorities to hold suitably extracted information over a longer period of time. For these purposes local authorities may develop information systems that store the relevant information on the action but do not store personal information on the individuals involved.

**Q11: Do you have any general comments on or suggestions you believe would strengthen the statutory guidance to local authorities set out in section 2?**

NO

Comment:

Nothing to add to those points made at earlier questions.

**B) Guidance to landlords and creditors**

**Q12: Is it clear from this guidance what the duty of landlords and creditors under Section 11 is and how it should be discharged.**

NO

Comment:

The reasons that the guidance is unclear relate to the timing at which notification should be provided and the issue of whether private sector Short Assured Tenancies should be covered by the notification system. Our points in relation to these were covered in earlier questions.

A further point related to the timing of the notification is that a limit should be imposed. For example that notification should be provided within three working days of legal action

being raised. This will assist landlords, creditors and local authorities in clarifying exactly when the notice should be provided.

**Q13: Is it clear from the guidance what the purpose of Section 11 is and how landlords and creditors can contribute to and benefit from this?**

NO

Comment:

It is unclear from the guidance whether the primary duty of landlords and creditors is to notify local authorities of legal action to repossess properties or to carry out a range of actions to prevent homelessness. It should be made clear that while landlords should seek to avoid eviction or repossession wherever possible, that the purpose of Section 11 is to ensure that they notify the local authority when legal action does arise.

However, it is also important that legal action and Section 11 does not become a tool that landlords and creditors use to pass the buck or bring about other outcomes. For example, it is already well known that some landlords use the threat of eviction as a means of trying to improve poor delivery of housing benefit. It is quite possible that they would complete a Section 11 notification with the intention of getting the local authority homelessness service to intervene and get the housing benefit issue resolved. Landlords and creditors should not see the Section 11 notifications system as a means to pass the responsibility for homelessness prevention more generally to the local authority. This point is covered in more detail during the answer to the following question.

At paragraph 5 in the guidance to landlords and creditors it states that the local authority will either respond to the notification on an individual basis or by reassessing their strategic approach. This should be amended to reflect that local authorities will be expected to respond on an individual basis. The landlord or creditor should be made aware that the nature of this intervention will be to provide support to try to prevent the eviction or repossession from occurring. However, we also believe that local authorities should also warn landlords and creditors that theirs is the primary responsibility to manage the tenancy well and that persistent use of Section 11 simply to pass responsibility will mean the possible application of sanctions (although see further below).

**Q14: Is it clear from the guidance what actions landlords and creditors can take to help prevent homelessness.**

NO

Comment:

It is good to encourage landlords and creditors not to raise legal action unnecessarily. Furthermore, there may also be some value in encouraging landlords and creditors to provide some limited signposting to services that may be able to assist tenants or mortgage holders who are experiencing difficulty in sustaining their accommodation.

RSLs have a social purpose and are involved in providing accommodation for people with a range of support needs as well as providing housing for general needs. Therefore RSLs should be able to provide or facilitate access to support services. They should also be in a position to take a more comprehensive role in relation to homelessness prevention.

However, it may be unrealistic to expect private landlords and creditors to make the detailed and involved interventions that are listed in the guidance, for example, making formal referrals to support organisations and following up the outcome of these, making referrals to social work services and reviewing the effectiveness of support services etc. These are well above and beyond the scope of the services that many private landlords and creditors normally provide. These appear to be much closer to the types of actions that local authorities should be undertaking on receipt of a Section 11 notification and not part of the duties of a private landlord or creditor.

It is crucial though that landlords and creditors do not come to view Section 11 as a means of passing the responsibility to prevent homelessness to local authorities. Landlords and creditors have a responsibility not to repossess property unless as a last resort and this should be retained following Section 11. It should not be the case that landlords and creditors, come to see the responsibility for any homelessness prevention work as solely that of the local authority and that Section 11 notifications become a means of referral of tenants to access such services. While the draft regulations and guidance do make clear that landlords and creditors have – and will retain – these responsibilities, there may be some confusion about the extent of these. It may be useful to make clear in the guidance that RSLs, private landlords and mortgage lenders may also have quite different approaches to homelessness prevention activities and that it may be unrealistic to expect that each would become involved to the same extent or in the same areas of prevention activity.

**Q15: Do you have any general comments or suggestions you believe would strengthen the guidance to landlords and creditors set out in section 2?**

YES

Comment:

There is no statutory sanction on landlords or creditors who fail to comply with the Section 11 process and this may be a weakness in how successful Section 11 is in helping local authorities to prevent homelessness. Should any organisations or individuals fail to

comply with the Section 11 process it is unclear how local authorities could become routinely aware of this and hold landlords and creditors to account. While the guidance outlines some proposals to attempt to ensure that landlords comply, there is a concerning disparity between the sanctions and monitoring that are being considered.

### **Private landlords**

It is proposed that private landlords compliance with Section 11 is a matter for consideration in relation to landlord registration. The registration system was initially set-up to ensure that local authorities could contact the landlords of private sector tenants engaging in anti-social behaviour. There are now a number of additional demands being considered to be placed on the registration system and it is unclear how they are supposed to be achieved through the registration system. Examples in addition to Section 11 notifications include the regulation of tenancy deposits and landlords' activities in relation to harassment and illegal eviction.

Furthermore, there is evidence that the registration system is not functioning properly almost a year after its implementation. At the time of writing, there are backlogs of data entry in local authorities with only eight per cent of over 83,000 applications for registration having been approved.<sup>3</sup>

### **Creditors**

As mentioned above there is no information provided within the draft regulations and guidance of potential action against creditors who fail to comply with the Section 11 notification system.

### **Registered social landlords**

While Communities Scotland Inspections may be the most appropriate means of ensuring that RSLs comply with Section 11 implementation the fact that inspections of individual RSLs are performed on a five year cycle (and that the move towards a risk and proportionality approach to programming inspections may mean that some organisations are inspected less frequently) there could be a risk that any RSL not complying with Section 11 may not be picked up on for significant amounts of time. To compensate for this Communities Scotland may be able to implement a system whereby the information provided on legal action against tenants is provided through RSLs Annual Performance and Statistical Returns and checking this against the information held by local authorities on Section 11.

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<sup>3</sup> Parliamentary question S2W-31857 Anti-Social Behaviour etc (Scotland) 2003. Answered on 22<sup>nd</sup> February 2007

In general the different proposals for ensuring compliance may be a significant weakness in the Section 11 process. It seems inherently unfair that a private landlord who does not comply may be barred from letting property while no such sanction is being considered for other landlords. As there is no available statutory sanction for landlords or creditors not complying with Section 11 the successful implementation may depend on the goodwill of landlords and creditors and their being able to recognise the benefits that homelessness prevention can bring to the running of their business.

The social responsibility that RSLs have is integral to their housing functions and may make it easier to facilitate compliance. However, the engagement of representative and trade bodies may be necessary to encourage compliance with Section 11 in the private sector. The Council of Mortgage Lenders may have a crucial role in providing advice and support to their members in complying with the Section 11 system. Furthermore, the Financial Services Authority as the regulatory body in the UK for mortgage lenders could be engaged in encouraging Section 11 compliance and its Mortgages: Conduct of Business Sourcebook should be updated to reflect the duties that mortgage lenders will have. There may also need to be further clarity on how Section 11 affects creditors who lend money in Scotland but are based in other parts of the UK or elsewhere.

The Scottish Association of Landlords and individual landlord accreditation schemes may also have a crucial role in encouraging compliance in the private rented sector.

**Q16: Do you feel that the proposals promote equality? If not please give details of your concerns?**

YES/ NO

Comment:

No comment

**Q17 Do you agree with local authorities being asked to monitor implementation in the first year and being asked to provide this information to the Scottish Executive?**

YES

Comment:

It is right that monitoring of the implementation of Section 11 is performed by local authorities, however, this should not be confined to the first year of its operation and information on the operation of Section 11 should be ongoing. There should also be a requirement for the Scottish Executive to publish information gathered from local authorities on activity undertaken through Section 11 as part of increased information being available on a range of homelessness prevention work that will be undertaken by

local authorities. This will provide useful information on the impact of Section 11 in preventing homelessness. Guidance should cover the frequency and nature of how this information will be published.

**Q18: Do you have any other comments or suggestions about the monitoring and evaluation of the implementation of section 11?**

Yes

Comment:

Further guidance would be useful covering the information that local authorities should collect. This could include the number of notifications received, the number and nature of interventions made, referrals made to other agencies and the outcomes of these and the numbers of repossessions/ evictions that are prevented as a result of acting upon a Section 11 notice.

**Conclusion**

Shelter continues to welcome the increased attention being placed on the prevention of homelessness in policy and practice in Scottish housing and homelessness services over the past few years. Furthermore, we are pleased that this important aspect of the Homelessness Task Force's recommendations is being taken forward. However there are still some questions that need to be clarified to ensure that Section 11 is effective in allowing local authorities the opportunity to provide services that can prevent homelessness for people at risk of losing their home. These focus on the timing at which landlords and creditors will be required to provide notification, the response that local authorities will be expected to provide and the lack of consistency to ensure compliance among landlords and creditors.