

Prevention duty overview, March 2022

SUMMARY

Shelter Scotland exists to defend the right to a safe home and fight the devastating impact the housing emergency has on people and society. We work in communities to understand the problem and change the system. We run national campaigns to fight for home.

We were pleased to participate in the Prevention Review Group (PRG) and we share the sector wide aspiration to ensure and enable public bodies, beyond the housing and homelessness sector, to provide the required support to prevent homelessness wherever possible.

Many of the proposals within the government consultation would introduce important and positive changes for people at risk of homelessness. We wholeheartedly support:

- Extending the definition of threatened with homelessness from two to six months
- Introducing duties on public bodies to ask and act if they believe someone is at risk of homelessness
- Defining in legislation reasonable steps that local authorities should take to support someone who is threatened with homelessness

If enacted, and, importantly, if adequately resourced, we believe these policies would help reduce the number of people who have to experience the crisis of homelessness.

However, for us the litmus test for any changes to Scotland's homelessness rights must be that they will reduce housing inequality and enhance existing homelessness rights and protections. The proposals contained in the prevention duty consultation go far beyond preventing homelessness, with a large proportion focusing on the local authority's duty to individuals who have been assessed as statutorily homeless. It is some of these proposals which present a substantial risk to the rights-based framework in Scotland.

We have significant concerns about the proposal to remove people's right to permanent accommodation and replace it with 'stable' accommodation. We strongly oppose this proposal and see it as an unnecessary dilution of Scotland statutory rights. In line with human rights-based obligations, there should be no regression of rights, and to realise the human right to adequate housing there must be security of tenure. **We outline an alternative legislative change around discharging duty into supported accommodation which would meet the policy aspirations of choice and control whilst protecting the intention of the Scottish rights-based system and negating the need to regress rights.**



As stated in the 2018 Ending Homelessness Together Action Plan:

“This is a significant change and will require careful planning. In particular, we need to ensure that a new duty does not undermine the strengths of the existing homelessness rights. We will learn from evaluation of prevention duties elsewhere.”¹

To solve the housing and homelessness emergency in Scotland and realise the human right to adequate housing, we must strengthen the housing rights framework, not weaken it. We must then ensure that individuals are aware of their rights, and able to enforce them – plus provide adequate resources for public bodies to deliver on their statutory obligations and to enable them to continue and roll out the many good practice examples that exist in prevention homelessness.

Further, to enable these efforts to be a success, there needs to be sufficient homes available for people to move into. The proposal to extend the existing forms of accommodation to include non-secure housing outcomes are said to provide more choice and control to applicants, but the main barrier to applicant’s choice and control on their housing outcomes is the long waiting times for social housing. The solution to this bottleneck isn’t to dilute rights, but to increase the supply of socially rented homes. The Scottish Government must therefore make good on its promise to secure delivery of 110,000 new affordable homes, including 70% for social rent, by 2032 in order to ensure anyone faced with homelessness is able to access a social home that meets their needs.

¹ Scottish Government (2018), [Ending Homelessness Together Action Plan](#)

PART 1: PREVENTION OF HOMELESSNESS

The proposals can be summarised as two parts: prevention of homelessness, and changes to the statutory homelessness duty.

With regard to prevention of homelessness, these proposals can be split further:

a) The role of public bodies (to ask and act if they have reason to believe a household is at risk of homelessness)

We agree with the majority of these proposals. Within our full consultation response we will share good practice and practical examples of what does and doesn't currently work, building on the experience of our advice services. The key to success for much of these proposals is dependent on adequate resourcing.

b) The role of the local authority housing/homelessness department to take reasonable steps to prevent homelessness.

The reasonable steps duty is outlined in the consultation document as follows:

Duty to take reasonable steps to secure that suitable accommodation is available, or does not cease to be available. The minimum statutory framework should include:

- *Housing options information, advice and advocacy*
- *Support for landlords and tenants in the private rented sector, including landlord negotiation and assistance, rent deposit guarantee schemes and other access schemes*
- *Welfare and debt advice and assistance*
- *Advocacy support*
- *Support for people experiencing domestic abuse to choose the best housing outcome, including assistance to remain safely in their own home where this is their preference*
- *Family mediation services*
- *Supply of furniture or similar goods*
- *Referral to other relevant agencies.*

Currently, under Section 32(2) of the 1987 Act where an applicant is still in accommodation but is assessed as being unintentionally threatened with homelessness, a local authority has a duty to ensure that accommodation does not cease to be available for occupation. If it is not possible to prevent the loss of the accommodation, the authority must ensure that other housing becomes available. Unless there is a change of circumstances the household will still be unintentionally homeless and therefore this accommodation should be provided on a permanent basis. The local authority has a duty to give advice and assistance to others threatened with homelessness.

It is important to state that there is much good prevention activity going on throughout Scotland, but much of this is outwith the statutory homeless framework under informal housing options approaches. At present, Shelter Scotland see few cases where an individual

has been assessed as threatened with homelessness by their local authority. Similarly, the last annual homelessness statistics showed in 2020-21 there were 1,103 'threatened with homelessness' decision made, just 3% of all decisions. This included a huge variance between local authorities – from 22% of decisions in Argyll and Bute (95 decisions), to eight local authorities reporting having made five or under 'threatened with homelessness' decisions. At Shelter Scotland, we find people may have approached their local authority for support, but a homeless application is not always taken nor support provided under Section 32 duties.

Case study 1: A client and their family were private tenants in a property in a poor state of disrepair. Repairs were requested numerous times and were not been undertaken. The landlord suggested that the tenants just leave if they are not happy, and indicated he might be terminating their tenancy. This resulted in the client approaching their local authority for homeless assistance. Although the local authority said they will provide support to the client from their private rented team, there is a backlog and they cannot provide further support at this time. Despite this partial offer of support, the local authority did not accept a homeless application. Had the local authority taken a homeless application and treated this household as threatened with homelessness, they could have given advice on remedies in the First-tier Tribunal and signposted the household for legal advice in relation to access these remedies.

Case study 2: A client was released from prison in August 2020. Under the SHORE standards, eight weeks prior to his release he should have been supported to make a homeless application, and accommodation should have been put in place 24 – 48 hours prior to liberation. In this case, this did not happen. The day he was released, the client borrowed a friend's phone and called a number he had been given but the council told him they didn't have his name in the system. At 7pm that night they called him back and told him the address of a hostel to go to. He was not provided information to make a homeless application. He stayed in the hostel for around five months before he met someone who referred him to Shelter Scotland.

In many cases we believe individuals would have met the definition of threatened with homelessness. In others it can be less clear, for example private tenants who have received valid notices to quit or leave: more clarity would be welcomed on when a private tenant meets the legal definition of threatened with homelessness, particularly given the recent and proposed changes to the private residential tenancy regime including making eviction grounds discretionary.

Case study 3: A client and their family live in a short assured tenancy. The landlord has issued the client with a section 33 notice trying to end the tenancy, under the 'no fault' ground for eviction. The local authority are not willing to provide temporary accommodation until an order for eviction is granted through the First-tier Tribunal. As this is a short assured tenancy, it is certain that the landlord will repossess the property, and the delay is prolonging the insecurity for the family.

In the cases above, supporting local authorities to shift from crisis intervention to prevention activity may have been helpful to prevent homelessness.

Whilst the Code of Guidance outlines some regulatory requirements on how local authorities should provide advice and assistance in their various duties, this is limited² and the specific actions making up the duty to ensure accommodation does not cease to be available is not

² For example, Section 9.24 in Scottish Government (2019) [Homelessness: Code of Guidance](#)

prescribed in detail. In addition, local authorities run 'housing options' services, which again are subject to few legislative requirements although there is Housing Options guidance as well as entries within the Code of Guidance relating to this provision. Offers of support and assistance can vary between local authorities.

The proposals to introduce a reasonable steps duty for people who are threatened with homelessness are therefore welcome.³ It should enable local authorities to build on their current service offering – and entitle applicants by law to receive such assistance. As outlined above, this support could be to either assist people to stay in their own accommodation e.g. through use of mediation service, financial or other help with managing rent arrears, or making physical adaptations to the property; or to find alternative accommodation in a planned move by providing access to a rent deposit guarantee scheme, identifying supported accommodation (under a SSST or PRT) or helping someone apply to a housing association or a common housing register. In line with HARSAG's intent, it should mean outcome-orientated preventative practice can be better regulated, and by mandating specific options that each local authority needs to offer (such as mediation services) it should make the prevention offer between local authorities more comparable. It should (and indeed must) also come alongside new resources for local authorities to undertake this preventative work – a factor which is crucial given the pressures on local authority services and without which will likely result in ineffectual legislation.

Further, the proposals contained in part 2 of the consultation suggest extending the definition of someone 'threatened with homelessness' to someone who might become homeless in six months, rather than two, giving more time for the preventative activity to take effect. We support this extended timeline – it will be particularly effective for cases of discharge from institutional settings. We believe rather than limiting it to 56 days as proposed that prevention activity should be continued where it is appropriate to support someone into permanent accommodation. In some cases, the most effective preventative action will be before the six-month period, including for many prisoners whereby action should be taken at the start of the sentence.

³ NB: as discussed later, we do not think it is helpful for reasonable steps to be included within the statutory response to people who are assessed as homeless, when the existing duties should apply.

PART 2: CHANGES TO THE STATUTORY HOMELESSNESS FRAMEWORK

‘Stable and suitable’ accommodation

In line with the Cabinet Secretary’s comments to the Scottish Parliament regarding the prevention duty proposals⁴, Shelter Scotland strongly believes that someone who is assessed to be unintentionally statutorily homeless should continue to be entitled to a permanent tenancy as they are at present. Anything less than this represents a regression of rights and is not acceptable under Scotland’s commitment to progressive realisation of the human right to adequate housing.

Currently, those who are defined as unintentionally statutorily homeless are entitled to one offer of permanent accommodation. Permanent accommodation is defined as: an SST, an SSST under para 1,2 or 2A of 2001 Act; or a PRT. It does not include accommodation which (a) is overcrowded within the meaning of s135; (b) does not meet the special needs of the applicant or any other person referred to in their household or (c) that is not reasonable for the applicant to occupy.

The consultation asks for opinions on the proposal to replace the current full housing duty with a duty to provide accommodation which is ‘stable and suitable’. Shelter Scotland disagrees strongly with the proposal to extend the existing forms of accommodation to include non-secure housing outcomes. We believe the current existing permanent housing duty (and associated temporary accommodation duties) should remain, with the alternative legislative change outlined below for those who might require supported accommodation.

Security of tenure is crucial in preventing future homelessness. Enabling local authorities to discharge duty to those who have already experienced the trauma of homelessness into accommodation without security of tenure is non-sensical, particularly when the underlying principle is to prevent homelessness. Further, taking a human-rights based approach, we should be progressively realising the human right to adequate housing within Scotland. This right includes a strong emphasis on security of tenure: housing is not adequate if its occupants do not have a degree of tenure security which guarantees legal protection against forced evictions, harassment and other threats.⁵ The proposed changes are in direct conflict with realising the UN right to adequate housing.

There are several scenarios which merit further discussion:

1. The need for supported accommodation as a potential stable accommodation offer for those at risk of or experiencing homelessness

The current statutory framework does not presently envisage SSST being granted where there has been no previous Anti-Social Behaviour.

⁴ Scottish Parliament (2022) [Scottish Government debate: Prevention of homelessness duties, 2 Feb 2022](#)

⁵ Office of the United Nations High Commissioner for Human Rights [Fact Sheet No 21: The Right to Adequate Housing](#)

Shelter Scotland suggest a change is made to legislation to enable local authorities to discharge their duty into a SSST for support reasons⁶ – currently the law only allows a local authority to offer a SSST if there is antisocial behaviour. This would mean that local authorities would be able to discharge their duty into supported accommodation which is provided via a SSST or PRT.

Where the landlord is a social landlord, a SSST can be created under para 6 of Schedule 6 of the Housing (Scotland) Act 2001. Where the landlord is a private landlord a PRT can be granted. So long as the tenancy has been granted following an assessment under section 12A of the Social Work (Scotland) Act 1968 (where the need for community care services have been identified) the landlord can terminate the PRT if supported accommodation is no longer needed. In other words the insertion of 'or 6' in section 31(5) Housing (S) Act 2001 would enable local authorities to discharge their duty by offering supported accommodation through a SSST, as well as by a PRT. In both cases a homeless applicant will have greater security of tenure than someone under an occupancy agreement. A Sheriff Court or Tribunal would have oversight of the proposed eviction of the applicant. There are a number of safeguards in place in respect of both which could give rise to a defence by the homeless applicant. This would require effective working relationships with the Social Work department to ensure that everyone who requires an assessment under section 12A would get one.

Shelter Scotland would further suggest incorporating the principles of The Homeless Persons (Provision of Non-Permanent Accommodation)(Scotland) Regulations 2010⁷ into primary legislation to provide clarity on expectations of the local authority when supported accommodation is provided and to ensure that duty is discharged only when the applicant's needs are met.

The regulations outline that non-permanent accommodation can be offered when:

(a) a housing support services assessment has concluded that the applicant or any other person residing with that applicant currently requires a level of housing support services which makes permanent accommodation inappropriate; and

(b) as a result of that housing support services assessment, the local authority is providing the applicant and any person residing with that applicant with transitional accommodation together with–

(i) all services required in terms of the housing support services assessment and a record of the services to be provided;

(ii) access to independent advice and information services in connection with the services mentioned in sub-paragraph (i);

(iii) a timetable, agreed with the applicant, for the provision of the transitional accommodation and housing support services and a record of the timetable;

(iv) a review date for the provision of services and transitional accommodation, not later than six months from the date on which the transitional accommodation was first provided;

(v) an undertaking to provide permanent accommodation when a housing support services assessment identifies that this would be appropriate; and

⁶ Alongside incorporation of The Homeless Persons (Provision of Non-Permanent Accommodation) (Scotland) Regulations 2010 to strengthen rights further – as detailed further in the paper.

⁷ [The Homeless Persons \(Provision of Non-permanent Accommodation\)\(Scotland\) Regulations 2010](#)

(vi) a mechanism to monitor the use of transitional accommodation and the long term outcomes for the applicant.

We believe these regulations offer important protections for those experiencing homelessness who require supported accommodation including an ongoing duty to provide permanent accommodation when this is identified as appropriate.

In contrast, the consultation proposes enabling local authorities to discharge their duty to people experiencing homelessness to an occupancy agreement. Supported accommodation through the vehicle of an occupancy agreement, whilst possible⁸, is not desirable in particular given the vulnerability of this client group and the policy intention to prevent (recurring) homelessness. There is far less scope for preventing eviction from accommodation occupied under an occupancy agreement than there is for someone who has a SST, SSST or PRT. The following case studies are provided as examples of homeless persons with support needs who are already in the homeless system and being asked to leave their (temporary) accommodation. In these instances, these individuals had no security of tenure, and on being asked to leave had to contact Shelter Scotland to access their right to further temporary accommodation to which they were entitled:

Case study 4: A teenage boy with autism, ADHD and epilepsy was provided with temporary accommodation at a hostel. He was asked to leave because of his behaviour.

Case study 5: A young teenage girl with ADHD and depression was asked to leave a supported accommodation unit due to behavioural issues, having previously been removed from other temporary accommodation units for similar reasons. The council noted that the staff in the supported accommodation felt ill equipped to support her given her support needs.

We do not believe the safeguards proposed would prevent scenarios like the above from happening. It is the lack of security of tenure and due process rights which fail to protect these individuals. The safeguards proposed within the consultation are in three parts:

(1) that the applicant consents to that type of accommodation;

We have significant concerns about how to ensure consent is freely given, and the potential coercion of individuals into accepting these options, particularly those who may have support needs.

(2) that the owner/ landlord has provided written confirmation of their intention that the accommodation will be available for at least 12 months;

This would not prevent a parent or landlord (for example) from changing their mind – and given the situations would often relate to instances whereby an individual has previously been asked to leave, this would be high risk. Furthermore, it is difficult to envisage what a local authority could or would do where a parent or landlord subsequently does change their mind, other than take steps to take a fresh homeless application and secure temporary accommodation.

(3) that the local authority is satisfied with this reassurance.

This proposed safeguard effectively leaves it to the local authority to decide whether or not the non-secure accommodation is adequate for the purposes of discharging their duty. It provides very little reassurance to the applicant who would need to be able to challenge the local authority's exercise of its discretion.

⁸ See *Watts v Stewarts and others (Trustees of the Ashted United Charity)*[2018] Ch 423

Finally, the proposals have been drafted under the understanding that intentionality would be abolished. This is not yet the case and we have concerns about how this would affect people's rights in practice.

Further, current legislation envisages the provision of supported accommodation by way of a short assured tenancy for a minimum of 12 months. This is now redundant given the Private Housing (Tenancies)(Scotland) Act 2016 and homelessness legislation should be updated to reflect this. It seems appropriate to highlight that this Act replaced short assured tenancies with private residential tenancies and the greater security of tenure they afford. The proposals of the PRG to introduce a mechanism to discharge duty to people experiencing homelessness to accommodation with an occupancy agreement or a non-legally binding 'assurance' of its term, i.e. accommodation even more insecure than a short assured tenancy, is a backwards step and marks a regression in rights.

2. Someone who has been asked to leave the family home, i.e. is statutorily homeless

The consultation asks how a local authority might be able to provide support to a person to 'prevent their homelessness' and enable them to move back home. It is important to make clear that prevention of homelessness is no longer possible – efforts at this stage are about preventing rooflessness, or alleviating homelessness by enabling someone to move back/stay in their own home. In the majority of these situations, an individual is likely to still require temporary accommodation and therefore it is important that we ensure that there are no barriers to them receiving the full housing duty and no confusion over their rights as someone who is statutorily homeless. Good practice, and arguably lawful decision making, would require a local authority to take the homeless application, advise the applicant of their right to interim accommodation pending their inquiries and decision, and offer interim accommodation.

In some cases, mediation or other prevention activity may be effective and someone may be able to move back or remain permanently in their accommodation. However, equally there are many situations whereby this would not be the best route for the individual or may simply delay their homelessness with them reapplying shortly in the future. Or, it may simply be a temporary fix and remove their need for temporary accommodation, enabling them to remain in that accommodation for a short period to provide time to find alternative accommodation – again the statutory homelessness status may be important here for people's priority level in gaining access to social housing. Extreme care must be taken to ensure that any support is person-centred: most people make a homeless presentation as a last resort having already tried to make things work before making an application for assistance.

3. A victim/survivor of domestic abuse, i.e. is statutorily homeless

Again, the consultation asks how a local authority might be able to provide support to a victim/survivor to 'prevent their homelessness' and enable them to move back home. Ensuring that the statutory homelessness status and associated rights to temporary and permanent accommodation of someone in this situation is crucial.

People experiencing domestic abuse will normally require alternative accommodation whilst the perpetrator is removed – should the applicant have expressed a wish to return to that property. Where they have perpetrator has been arrested, they may be released on bail. Whilst the Domestic Abuse (Protection)(Scotland) Act 2021 introduces helpful measures to protect

victims of domestic abuse, these require the involvement of Police Scotland and enable perpetrators to challenge the granting of orders which might ban them from their home. The victim may not feel safe in their home, pending criminal proceedings. There is also the question of what rights to the tenancy or property the victim has – and how easy it is for the rights to be transferred over.

“Do women have the option of staying in the family home? Women were asked if they felt they had a choice about remaining in their home or moving out. The majority of women (84%) said they had no choice. Several women commented that they had to leave as their ex-partner refused to. This sense of his entitlement to the family home was also understood by some women as a legal entitlement; that they had to leave because the house was in her partner’s name or because it was a joint tenancy. One woman commented that she had no choice but to leave as her name had been removed from the tenancy by her ex-partner without her knowledge. Women also said that they had to leave because they did not feel safe in their home. Some women left because they were afraid of increasing violence, harassment, stalking and other abusive behaviour. That they had no control over their lives; that staying was too stressful and they were concerned about the possible repercussions for themselves and their children.”⁹

Once more, a person-centred approach is extremely important here – even if the threat of further abuse is removed or reduced, there may be a risk of further trauma to an individual to return to their previous accommodation where abuse occurred.

‘Choice and control’

The consultation implies changes are required to ensure that homeless households are able to access the same set of housing options available to the non-homeless population, including the above examples of supported accommodation and returning to previous accommodation, and other options such as living with a resident landlord or shared accommodation.

We have outlined the necessarily changes to legislation to enable supported accommodation to be provided in such a way that provides security of tenure. With regard to the other options, Shelter Scotland believe that no further legislative change is required. Currently, if a household is assessed as homeless and wishes to return to their previous/present accommodation, or move in with friends or relatives, they can do so and a local authority fills out the HL1 proforma saying as much under question 23 (e.g. option 10 – returned to previous/present accommodation, or option 11 – moved in with friends/relatives). Shelter Scotland is not aware of any concerns raised by clients over barriers to accessing their previous or alternative accommodation under the present statutory framework, and therefore see no need to amend legislation in this regard.

However, there may be a case to amend guidance to make clear that local authority advice and assistance to return home is an option that individuals may take up if they wish – and indeed the resources should be available to ensure that such services are not limited or restricted to prevent this from happening. Essentially, just because someone has received an assessment of statutorily homeless and is waiting for accommodation, this doesn’t mean that the same set

⁹ Scottish Women’s Aid (2017) [Change, justice and fairness: Why should we have to move everywhere and everything because of him?](#)

of services or prevention support available to them at an earlier stage isn't or shouldn't be available to them to access if they so wish.

Illustrative case: A young person has had an argument with their parents, and leaves the family home. They have nowhere to stay and approach their local authority to make a homeless application. The local authority provides the individual with temporary accommodation. The individual is assessed as homeless. Three months later, the parents and young person have made contact and at this point are keen to attempt mediation. The young person asks the local authority if they could assist in arranging independent mediation, and following this the parents invite the young person back to stay. The young person chooses to do so, and explains to the local authority they no longer wish to exercise their rights under the homeless legislation. The local authority records the client as having moved back home and closes the case.

In the above case example, guidance for local authorities should ensure that the individual is aware of their rights and that they have been supported to make the right decision for them, to ensure they have choice and control. The law as it stands still enables flexibility and there should be no bar to households' access to 'housing options' services. Guidance can and should ensure this is clear to local authority housing practitioners, for example not limiting mediation services to only those at risk of homelessness. In short, there is no need to change the statutory framework for people experiencing homelessness to access 'mainstream' accommodation. However, equally there should be an acknowledgement that making a homeless application is also a choice and a method by which households can access additional, specific support and rights appropriate for their housing situation.

The proposals to allow local authorities to discharge their homelessness duty to accommodation that is 'stable and suitable' are said to provide more choice and control to applicants. Shelter Scotland strongly disagrees with this as choice and control is already provided for in the system. Many clients we support do not choose to make a homeless application and access their statutory rights. However those that do, do so because they are in need of the assistance provided by the statutory framework, and want the security offered by the permanent housing duty. The main barrier to applicant's choice and control on their housing outcomes is the long waiting times for social housing. The solution to this bottleneck isn't to dilute rights, but to increase the supply of socially rented homes.

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