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SCOTTISH SECURE TENANCIES AND SHORT SCOTTISH SECURE TENANCIES-ASSIGNATION, SUBLETTING, JOINT TENANCIES AND SUCCESSION

GUIDANCE FOR SOCIAL LANDLORDS

HOUSING (SCOTLAND) ACT 2014



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1. INTRODUCTION

1.1 The Housing (Scotland) Act 2014 ('the 2014 Act') introduces changes that will support social landlords to make best use of their available housing stock, while recognising the right to succeed to a Scottish secure tenancy and the rights of tenants to pass on, sublet or add joint tenant(s) to their Scottish secure tenancy/short Scottish secure tenancy with their landlord's consent.

1.2 This guidance updates, and should be read along with, [SEDD Circular 6/2002, Housing \(Scotland\) Act 2001 - Scottish Secure and Short Scottish Secure Tenancy](#). This guidance and the amendments to the Housing (Scotland) Act 2001 in sections 12 and 13 of the 2014 Act (assignation, sublet, joint tenancy of and succession to a Scottish secure tenancy) will take effect from 1 November 2019. The new provisions do not apply to applications for assignation, subletting, joint tenancies and succession made before 1 November 2019.

2. NOTIFYING TENANTS AND PUBLICISING THE CHANGES

2.1 Landlords were required in the Commencement Order¹ to notify all of their tenants with a Scottish secure tenancy or short Scottish secure tenancy in writing by 1 November 2018 of the changes to their tenancy agreement as a result of Part 2 of the 2014 Act coming into force. These changes include new notification and residency requirements for assignation, subletting, joint tenancies and succession and 2 new reasons a landlord can refuse an application for assignation which all take effect from 1 November 2019. Further information about these changes is provided at sections 4-7 of this guidance.

2.2 There are provisions in the Order² commencing the relevant part of the 2014 Act which will apply where a notification of a household member has been received by the landlord before 1 November 2019 (section 3 below refers). These are known as 'transitional provisions' in the legislation.

2.3 Tenancy agreements will already set out a requirement for tenants to inform their landlord of any change in circumstances, including if someone moves into their home. However, landlords will want to publicise the revised qualifying criteria for assignation, subletting, joint tenancies and succession more widely through their website, tenants' handbook or newsletters so that applicants and tenants can get this information easily. This information should be provided in plain English, as well as in other formats and languages as required. It is important that landlords make it clear to tenants that they have to notify them directly of any changes to their household, which methods of notification they require and who the notification should be made to.

2.4 The revised Model Scottish Secure Tenancy Agreement and Short Scottish Secure Tenancy Agreements published in January 2019 include a specific section on tenant responsibilities for notifying their landlord of changes in household circumstances including when anyone moves into, or out of, their home.

1 the Housing (Scotland) Act 2014 (Commencement No. 8, Savings, Transitional and Supplemental Provisions) Order 2018 (Article 9) <http://www.legislation.gov.uk/ssi/2018/153/article/9/made>

2 the Housing (Scotland) Act 2014 (Commencement No. 8, Savings, Transitional and Supplemental Provisions) Order 2018 (Articles 6,7 and 8) <http://www.legislation.gov.uk/ssi/2018/153/article/6/made>

3. TRANSITIONAL PROVISIONS

3.1 The Commencement Order includes transitional provisions for assignation, subletting, joint tenancies and succession purposes for situations where landlords have been notified of additional household members before 1 November 2019. Further information is provided in sections 4-7 below.

4. ASSIGNATION

4.1 Before a tenant can assign their home to someone else they must apply in writing to their landlord for written permission to do so and get their landlord's written consent.

4.2 Section 12(2) of the 2014 Act makes the following changes to the Housing (Scotland) Act 2001:

- the house must have been the tenant's only or principal home during the 12 months immediately before the tenant applies for written permission to pass their tenancy to someone else (previously there was no qualifying period); and
- the person the tenant wishes to pass their tenancy to must have lived at the property as their only or principal home for the 12 months before they apply (previously the qualifying period was 6 months); and
- the tenant, joint tenant or person they wish to assign their tenancy to must have notified the landlord that the person they wish to assign the tenancy to is living in the house. The 12 month period does not start unless the landlord has been notified that the person is living in the property as their only or principal home.

Assignation - Transitional Provisions

4.3 A notification given before 1 November 2019 by an individual living in the house in question as their only or principal home, or by any other person who was the tenant of the house in question when the notice was given, is to be treated by the landlord as notification of the start of the new 12 month residency requirement introduced in section 32(1)(b) of the 2001 Act. An example of this is below.

4.4 A tenant notified his landlord that his cousin moved into the property as his only or principal home on 1 February 2019. The tenant, who had lived in the property for a number of years, then made a written application to pass the tenancy to his cousin on 1 February 2020. The 12 month residency requirement would be satisfied at the expiry of the 12 month period following notification, i.e. 31 January 2020. The landlord will however also wish to consider whether it is appropriate to allow the assignation (see paragraphs 4.6 to 4.7 below).

Assignment – Notification and Applications

4.5 Landlords should set out clearly in their tenancy information, such as tenants' handbooks, which methods of notification they will accept and who the notification should be made to. For example this could include notification by email or letter or by the tenant updating their household information on web-based tenancy management sites. Where a child in the household reaches the age of 16, landlords will want to take a practical approach to the notification of this information. For example, if they were part of the household when the house was allocated and/or it is their long-term and principal home, the landlord will know who is living in the property and that should be considered as notification.

4.6 A landlord can refuse permission to assign a tenancy if it is reasonable for them to do so. Two new reasons a landlord can refuse an application for assignment have been added to the existing list of reasons at section 32 of the Housing (Scotland) Act 2001³. These new reasons which landlords can use from 1 November 2019 are:

- where the landlord (being a local authority or a registered social landlord) would not give the person the tenant wishes to pass the tenancy to reasonable preference under their allocations policy; and
- where, in the landlord's opinion, the assignment would result in the home being under occupied.

4.7 Where landlords are notified that someone has moved into the property, in line with current practice, they will wish to consider whether it is appropriate for that person to live in the house. For example if this results in overcrowding they may refuse permission for the person to remain in the property. The notification will also give landlords an opportunity to identify any other issues arising from the person's residency in the house, such as support needs.

5. SUBLETTING

5.1 Before a tenant can sublet all or part of their home they must apply in writing to their landlord for written permission and get their landlord's written consent.

5.2 Section 12(2) of the 2014 Act makes the following changes to the 2001 Act:

- the tenant must have been the tenant of the house throughout the 12 months immediately before they apply for written permission to sublet their home (previously there was no qualifying period); or
- if they were not the tenant throughout that period, the house must have been their only or principal home during those 12 months; and the person who was the tenant at that time must have notified the landlord that the person who is now the tenant was living there.

The 12 month period does not start until the landlord has been notified. An example of this could be where the tenant was not the tenant throughout the previous 12 months but has during this period succeeded to the tenancy and immediately wants to sublet it.

5.3 There are no residency conditions for the person that wants to live in the property as a sub-tenant.

³ Inserted by s.12(2) of the 2014 Act

Subletting – Transitional Provisions

5.4 A notification given before 1 November 2019 by an individual living in the house in question as their only or principal home, or by any other person who was the tenant of the house in question when the notice was given, is to be treated by the landlord as notification of the start of the new 12 month residency requirement introduced in section 32(1)(c) of the 2001 Act. An example of this is below.

5.5 A person who succeeded to a tenancy on or before 2 November 2018, applies to the landlord for written permission to sublet that house on or after 1 November 2019. As the house had been the person's only or principal home for 12 months ending on the 1 November 2019, the transitional protection would apply and the 12 month qualifying period for subletting will be satisfied from the date of application. The landlord will however also wish to consider whether it is reasonable to allow the sublet (see paragraph 5.7 below).

Subletting – Notification and Applications

5.6 Landlords should set out clearly in their tenancy information, such as tenants' handbooks, which methods of notification they will accept and who the notification should be made to. For example this could include notification by email or letter or by the tenant updating their household information on web-based tenancy management sites. Where a child in the household reaches the age of 16, landlords will want to take a practical approach to the notification of this information. For example, if they were part of the household when the house was allocated and/or it is their long-term and principal home, the landlord will know who is living in the property and that should be considered as notification.

5.7 Where landlords are notified that someone has moved into the property, in line with current practice, they will wish to consider whether it is appropriate for that person to live in the house. For example if this results in overcrowding, they may refuse permission to remain in the property. The notification will also give landlords an opportunity to identify any other issues arising from the person's residency in the house, such as support needs.

6. JOINT TENANCIES

6.1 Before a tenant can have someone added to their existing tenancy agreement as a joint tenant they must apply to their landlord for written permission to do so and get their landlord's written consent. The person the tenant wants to add as joint tenant, and any existing joint tenants, must apply in writing along with the tenant.

6.2 Section 12(1) of the 2014 Act makes the following changes to the 2001 Act:

- the proposed joint tenant must have lived at the property as their only or principal home for the 12 months before the tenant applies for them to become a joint tenant (previously there was no qualifying period); and
- the tenant, joint tenant or proposed joint tenant must have notified the landlord that the person they wish to become a joint tenant with is living in the house. The 12 month period does not start unless the landlord has been told that the person is living in the property as their only or principal home.

6.3 The 12 month period applies to anyone wanting to be a joint tenant including the tenant's spouse, civil partner or co-habiting partner.

6.4 Joint tenancies ensure that each person has exactly the same rights and responsibilities. While landlords should normally give a joint tenancy for all new and existing tenancies when it is requested and where the notification and residency requirements (if appropriate), have been met, there may be some circumstances where a sole tenancy may be more appropriate to protect the rights of an existing sole tenant. They will wish to consider whether there are any issues in relation to the person's residency in the house that could affect the future sustainability of the tenancy.

6.5 An example of where a joint tenancy may not be appropriate would be where an existing sole tenant comes up for an offer of a new tenancy and requests a joint tenancy with a new partner with a known history of antisocial behaviour or domestic abuse. In that situation landlords will want to ensure that the current sole tenant is not being pressured into requesting a joint tenancy and is given advice on the implications of entering into a joint tenancy. In such cases it may be in the best interests of the tenant to retain a sole tenancy.

Joint Tenancies – Transitional Provisions

6.6 A notification given before 1 November 2019 by an individual living in the house in question as their only or principal home, or by any other person who was the tenant of the house in question when the notice was given is to be treated by the landlord as notification of the start of the new 12 month residency requirement introduced in section 11(6A) of the 2001 Act. An example of this is below.

6.7 A tenant notified their landlord on 5 April 2019 that his partner was living in the house as his only or principal home. They then apply to the landlord in writing for a joint tenancy on 30 November 2019. The 12 month residency requirement for a joint tenancy would be satisfied at the expiry of the 12 month period following notification, i.e. 4 April 2020. When considering any future application for a joint tenancy, the landlord will also wish to consider whether a joint tenancy is appropriate (see paragraphs 6.4 and 6.5 above and also paragraph 6.9 below).

Joint Tenancies – Notification and Applications

6.8 Landlords should set out clearly in their tenancy information, such as tenants' handbooks, which methods of notification they will accept and who the notification should be made to. For example this could include notification by email or letter or by the tenant updating their household information on web-based tenancy management systems. Where a child in the household reaches the age of 16, landlords will want to take a practical approach to the notification of this information. For example, if they were part of the household when the house was allocated and/or it is their long-term and principal home, the landlord will know who is living in the property and that should be considered as notification.

6.9 Where landlords are notified that someone has moved into the property, in line with current practice, they will wish to consider whether it is appropriate for that person to live in the house. For example, if this results in overcrowding they may refuse permission to remain in the property. The notification will also give landlords an opportunity to identify any other issues arising from the person's residency in the house such as support needs.

7. SUCCESSION TO A SCOTTISH SECURE TENANCY

7.1 Section 13 of the Housing (Scotland) Act 2014 amends schedule 3 to the Housing (Scotland) Act 2001. It introduces a new 12 month qualifying period and notification requirement before certain categories of persons become 'qualified persons' and have the right to succeed to a Scottish secure tenancy on the death of the tenant (previously the only qualifying period was a 6 month qualifying period in the case of partners).

7.2 There continues to be no qualifying period under the new provisions for the tenant's spouse, civil partner or joint tenant, provided (in all 3 cases) that the person's only or principal home was the house in question at the time of the tenant's death.

7.3 A person falling within the following categories are qualified persons where the house has been their only or principal home throughout the 12 months ending in the tenant's death:

- partners (cohabitants of either sex and including same sex cohabitants);
- members of the tenant's family aged 16 or over; and
- carers aged 16 or over who have given up a previous only or principal home.

7.4 Under the new provisions, to have a right to succeed to a tenancy after living in the house for 12 months, the 'qualifying person' or the tenant must also have notified their landlord that the person wishing to succeed to the tenancy is living in the house and that the house is that person's only or principal home. The 12 month qualifying period does not start until that notice has been given. The tenant (or any one of joint tenants) or the person who has moved into the house are responsible for notifying the landlord that the person has moved in.

Succession - Transitional Provisions

7.5 A notification given before 1 November 2019 by the tenant, or a person in any one of the categories at paragraph 7.3 above, advising that the specified person is living in the house as their only or principal home is to be treated by the landlord as notification of the start of the new 12 month residency requirement introduced in schedule 3 of the 2001 Act. An example of this is below.

7.6 The sole tenant of the property in question notified the landlord that his carer moved into the property as her only or principal home on 2 August 2019, the tenant then died on 30 November 2019. The carer would not satisfy the 12 month qualifying period at the time of the tenant's death and would not have a right to succeed. Landlords will want to deal sensitively with cases where the person applying to succeed, such as a carer, does not satisfy the full 12 month qualifying period and guidance on this is provided at paragraphs 7.11 to 7.19 below.

Succession - Notification and Applying Succession Rules

7.7 Landlords should set out clearly in their tenancy information such as tenants' handbooks, which methods of notification they will accept and who the notification should be made to. For example, this could include notification by email or letter or by the tenant updating their household information on web-based tenancy management systems. Where a child in the household reaches the age of 16, landlords will want to take a practical approach to the notification of this information. For example if they were part of the household when the house was allocated and/or it is their long-term and principal home, the landlord will know who is living in the property and that should be considered as notification.

7.8 Where landlords are notified that someone has moved into the property, in line with current practice, they will wish to consider whether it is appropriate for that person to live in the house. For example, if this results in overcrowding they may refuse permission to remain in the property. The notification will also give landlords an opportunity to identify any other issues arising from the person's residency in the house such as support needs.

7.9 These new qualifying criteria will assist landlords to minimise disputes over succession rights and to make best use of their available housing stock.

7.10 As is currently the case, where there are several qualifying persons, and/or a qualified person advises that they do not wish to succeed to the tenancy, the landlord will need to apply the rules about the order of succession rights and the rules about succession for properties designed or substantially adapted for the use of people with special needs⁴.

Succession – Exceptional Circumstances

7.11 When considering all applications for succession, at what will be a difficult time for applicants coping with bereavement, landlords should ensure that they do so sensitively and quickly. Landlords will need to consider all the circumstances of the individual case and ensure that appropriate checks are made to determine whether the applicant meets the succession criteria.

7.12 Where an applicant does not have the right to succeed, landlords have no discretion to grant a succession of tenancy. Whilst there is no statutory period of time that a person can remain in the home where there is nobody qualified to succeed, landlords will as is currently the case be expected to show some sensitivity in these situations.

7.13 Depending on the individual circumstance there will sometimes be cases where a landlord considers it appropriate to allocate a tenancy to the applicant, for example the existing tenancy or the tenancy of another property. In these cases a new tenancy will be granted and it will not be a succession. By including an 'exceptional circumstances' clause in their allocations policy, landlords will give themselves the flexibility to allocate a tenancy where an individual does not have the right to succeed to the tenancy but the landlord believes there to be circumstances that justify allocating them a tenancy.

Succession – Carers

7.14 It is essential to recognise the important role of carers, the valuable contribution they make and to ensure that they are not disadvantaged by the new criteria for succession. Some of the most common reasons for moving in are to provide care to a parent or other older relative with dementia or illness or frailty associated with old age or to care for someone who has a terminal or life limiting illness, with many carers giving up their home, career and financial security to provide care.

⁴ Housing (Scotland) Act 2001 – schedule 3 paragraphs 6-9 and SEDD Circular 6/2002
<https://www2.gov.scot/Resource/Doc/1125/0034224.pdf>

7.15 As with all applications for succession, landlords will want to ensure that they consider applications quickly and sensitively. Landlords will also want to bear in mind that uncertainty over their housing situation and the process of applying for succession is likely to cause additional stress for carers during a time of bereavement and upheaval as their caring role ends.

7.16 There will be some cases where an individual has given up their main residence to care for a social housing tenant, or have not informed the landlord they have moved in, and the tenant dies before the 12 month qualifying period has been met. In such cases the carer may then find themselves with no right to the tenancy and potentially homeless at a time when they are also experiencing bereavement.

7.17 These cases will not be common and in some cases there may be understandable and genuine reasons why a carer or tenant has not told the landlord of the changes to the household composition. This could include where the carer moved in following a medical emergency or where they were providing a high level of care which left them with little time for seeking out information and support, or informing the landlord that they have moved in.

7.18 Where an applicant does not meet the criteria for succession, landlords will need to consider carefully all of the circumstances of the individual case and consider whether it is appropriate to allocate a new tenancy for the same or another property, to them.

7.19 It is recommended that landlords should provide all their tenants with a copy of the letter attached at Annex A when notifying their tenants of the new criteria for succession. This letter has been provided by the Coalition of Carers and is a way of specifically highlighting the changes to carers and explaining the new succession arrangements and what tenants should do where other people live with them and help to look after them.

Succession - Applications

7.20 While succession passes by law, landlords normally require the person who wishes to succeed to the tenancy to apply to them for permission to do so and get their landlord's written consent. Tenants also have a responsibility to advise their landlord of any changes to their household as part of their tenancy agreement. Landlords should set out clearly in their tenancy information, such as tenants' handbooks, which methods of application they will accept and who this should be made to. For example this could include application by email or letter.

7.21 Unfortunately there are a few cases where applicants try to take advantage of the succession criteria. In these cases, it can often be difficult to differentiate between genuine qualifying people and those who have just moved into the house in order to take advantage of succession rights. The new qualifying period and notification requirements are intended to reduce these situations.

7.22 Landlords will need to consider all the circumstances of the individual case and ensure that appropriate checks are made to determine whether or not the applicant meets the succession criteria. If they do not, then they cannot succeed to the tenancy. Landlords will then have to decide whether or not to offer a new tenancy to the person. For example, this could be a tenancy for the existing house or the tenancy of another property.

ANNEX A

LETTER SPECIFICALLY HIGHLIGHTING CHANGES TO CARERS

Dear <insert name>

Other people who live with you and help to look after you.

Is there someone who lives with you who helps to look after you? This may be because you have an illness, or disability, or just need help with everyday tasks, such as shopping, cooking, cleaning, help to get washed or dressed, or help to stay safe.

If someone, such as a family member, has moved in with you to help to care for you, then you need to let your landlord know.

Recent changes to legislation mean that for a person to succeed to your tenancy in the event of your death, they must have notified the landlord that they live with you and following that notification they must have been living in your home for at least 12 months. In order to avoid them having to move out in these circumstances it is important that you let your landlord know they are living with you. You can do this by <insert details>

In the future if anyone is planning to move in with you to help to look after you, it is better if they get some advice first about their rights as a carer and how giving up their own home may affect their future rights to a tenancy.

Advice is available from the local carers centre <insert details here> and from <insert contact details for landlord>

Yours sincerely

<insert details>



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