

REPORT TO: Cabinet

MEETING DATE: 9 April 2013

BY: Executive Director (Services for Communities)

SUBJECT: Scottish Government Consultation: Better Dispute Resolution in Housing

1 PURPOSE

- 1.1 To advise Cabinet of the proposals being consulted on by the Scottish Government to introduce a new Housing Panel model for Scotland.
- 1.2 To seek approval for a response to be submitted on behalf of East Lothian Council.

2 RECOMMENDATIONS

- 2.1 It is recommended that Cabinet approve the Council's response to the consultation (Appendix 1).

3 BACKGROUND

- 3.1 The Scottish Government is working to deliver a well functioning housing system for the people of Scotland and states that an important element of that is to ensure that where housing problems and disputes arise, they can be resolved effectively and efficiently.
- 3.2 The majority of housing disputes are resolved between parties involved without recourse to a court or decision-making body. In circumstances where an agreement cannot be reached, someone else needs to make a binding decision. In most housing cases this decision-maker will be a court. The sheriff courts currently consider most but not all types of housing disputes in Scotland.
- 3.3 The main exceptions are issues related to the statutory repairing standard for private rented dwellings, rent determination cases in the private rented sector, and property disputes between property factors and homeowners. These cases are considered by the Private Rented Housing Panel / Homeowner Housing Panel, Scotland's only specialist housing panel.

- 3.4 The Consultation Paper sets out views gathered from a range of stakeholders that the current dispute resolution system is not working well enough for parties involved in housing disputes. The problems relate to housing cases reaching court which could have been resolved at an earlier stage, delays in cases reaching court, the adversarial nature of court action, a lack of legal representation for people involved in cases and court decisions being unpredictable – partly attributed to concerns about the inexperience of some sheriffs in housing law.
- 3.5 The Consultation Paper proposes three options for changing the way housing disputes are handled, to be applied across all tenures. These options are not considered to be mutually exclusive.
- Option 1 – Actively promote the use of early preventative action and mediation in resolving housing disputes.
- Option 2 – Creating a Pre-Court Housing Panel to which disputes could be referred soon after it became apparent that attempts by the parties to resolve the problems had failed. This would take a problem solving approach and would make and monitor compliance with enforceable interim decisions. If those orders were not complied with, the case could follow an accelerated path to court. Under this option, it would still be for the court, not the panel to end tenancies and evict tenants.
- Option 3 – Creating a Housing Panel replacing the court as the main forum for resolving some housing disputes. This kind of panel would be able to end tenancies and evict tenants.
- 3.6 The response prepared on behalf of East Lothian Council broadly supports the principal of a system which can better resolve disputes in a less formal setting however makes clear that there are strengths within the current system which should not be lost. Whatever system is in place there must mechanisms for dealing with the most serious cases. A number of issues are raised in terms of how the Panel would interact with other legislation and how it will be resourced and delivered.
- 3.7 The response acknowledges the important role preventative action and mediation should play within a new Housing Panel system (Option 1). The response does not support the creation of a Pre-Court Housing Panel (Option 2) as it is considered this would introduce additional complexity and bureaucracy.
- 3.8 The proposals included in the consultation should be considered in the context of wider reforms planned for civil courts and tribunals. A separate consultation, Making Justice Work – Courts Reform (Scotland) Bill considers proposals to restructure the way civil cases and summary criminal cases are dealt with by the courts in Scotland.

4 POLICY IMPLICATIONS

- 4.1 There are no policy implications arising from this report.

5 EQUALITIES IMPACT ASSESSMENT

- 5.1 This Report is not applicable to the wellbeing of equalities groups and an Equalities Impact Assessment is not required.

6 RESOURCE IMPLICATIONS

- 6.1 Financial – None.
6.2 Personnel – None.
6.3 Other – None.

7 BACKGROUND PAPERS

- 7.1 Better Dispute Resolution in Housing: Consultation on Introduction of a New Housing Panel for Scotland is available at <http://www.scotland.gov.uk/Publications/2013/01/6589>
- 7.2 Making Justice Work – Courts Reform (Scotland) Bill – a consultation paper is available at <http://www.scotland.gov.uk/Publications/2013/02/5302>
- 7.3 East Lothian Council response – Appendix 1

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DATE	26 March 2013

Annex A CONSULTATION ON DISPUTE RESOLUTION IN HOUSING



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

East Lothian Council

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Johnson

Forename

Catherine

2. Postal Address

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3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate Yes No

ANNEX B

CONSULTATION QUESTIONS

Option 1: Preventative Action

1. Do we need to consider legislation to assist the early resolution of disputes, for example by imposing additional legal duties on landlords or other public bodies?

Yes No Don't Know

If "yes" please provide reasons for your answer.

Comments

1a. If yes, in what areas should these duties be imposed and for what purpose? e.g. should we impose wider pre-action requirements before landlords could raise eviction proceedings in any case?

Please explain your own views.

Comments

2. Would this sort of upstream action be preferable and achieve better outcomes than a new Housing Panel or reformed courts?

Yes No Don't Know

3. Are there non-legislative measures we could take to encourage the prevention and early resolution of housing disputes between parties?

Yes No Don't Know

3a. If yes, what measures would these be?

Comments

Option 1: Mediation

4. Do you think mediation should be made more widely available for housing disputes?

Yes No Don't Know

4a. If no, please explain your views.

Comments

4b. If yes, what sort of housing issues would mediation be most effective at resolving?

East Lothian Council considers that mediation can be successful at resolving housing disputes in some circumstances however it forms only part of the picture. The nature of mediation means that parties have to engage and there may be reasons that why a particular case or set of circumstances make mediation inappropriate.

Mediation is successfully used by East Lothian Council in relation to anti-social behaviour cases. A contract is currently in place and this is operating well. The Council is also investigating the possibility of making mediation available for owners involved in common repairs where agreement cannot be reached.

The Council also funds a mediation service to assist with 'asked to leave' homelessness cases where appropriate. The service aims to resolve disputes which have led to a young person being asked to leave the family home, avoiding the need for crisis response and enabling planned moves.

Mediation is currently available in relation to cases referred to the Private Rented Housing Panel (PRHP) however it is understood that this facility is currently under used. The type of landlord and tenant dispute the PRHP currently deal with may be particularly suited to mediation.

Mediation may also be successful in relation to some cases relating to tenancy breaches, particularly where the relationship between the tenant and landlord has broken down.

The Council considers that mediation is less likely to be successful in relation to rent arrears cases (both social and private rented) unless there is an element of dispute involved i.e. the tenant is withholding rent.

4c. If yes, would it be better to do this by expanding existing provision or by creating a new housing mediation service?

Expanding existing provision New mediation service

4d. If yes, how can parties be encouraged to use mediation to resolve housing problems?

East Lothian Council considers that encouraging use of mediation services requires parties to be convinced of its merits and willing to engage. Not all

cases will be suitable for mediation and the Council does not consider that imposing legislative requirements in relation to mediation is appropriate.

4e. If yes, how might mediation be funded?

East Lothian Council considers that expanding existing mediation services is more appropriate than establishing a new service where mediation is used as part of a package of measures to improve dispute resolution. This will enable local authorities the flexibility to design mediation services in a way which best meets local needs.

As mentioned previously East Lothian Council currently funds a mediation service in relation to anti-social behaviour cases. The Council is committed to continuing to fund this service however ongoing budgetary constraints mean that if the use of mediation is to be expanded to other tenancy disputes it is unlikely the Council could meet the increased cost associated with providing this service within existing resources and top-up funding would be required.

The Council is concerned that increasing the role of mediation could overwhelm existing services, many of which rely on volunteers. It is recognised that housing professionals often provide informal mediation in a range of capacities. While the independence of a mediator can often be crucial in parties engaging with mediation services there may be a role for housing officers and other housing professionals to receive greater training in mediation skills. This could enable the principles of mediation to be applied more broadly in relation to housing disputes, particularly those requiring a lower level response.

As stated the Council considers that mediation is most appropriate to be included as part of a package of measures rather than as a requirement for particular disputes. The support for expanding existing mediation services are given on this basis. Notwithstanding this view, the Council considers that should engaging mediation services become a statutory requirement for landlords in relation to any aspect of housing disputes (particularly where there may be recourse to end a tenancy) a national mediation service should be established in order to ensure consistency and availability of services across the country.

4f. If yes, do you feel there are enough mediators across Scotland to deal with housing cases?

East Lothian Council do not believe there to be an adequate number of mediators in Scotland to deal with any expansion in housing dispute mediation. Many mediation services currently rely on volunteers and the availability of service varies from local authority to local authority.

Increasing pressure on mediation services which are not capable of dealing with increased demand will have a detrimental effect on mediation as a solution to housing disputes. The introduction of waiting lists for example, is likely to turn people off from considering mediation.

5. What can we do to improve public awareness of mediation as a way of solving housing disputes?

No comment

Option 2: Pre-court Housing Panel

6. Do you think there should be a Housing Panel as a pre-court dispute resolution forum for some housing disputes?

Yes No Don't Know

6a. If yes, which cases should the panel handle?

Comments

6b. If yes, are there cases which would not be appropriate?

Comments

6c. If yes, who should be able to refer cases to the panel?

Comments

6d. If yes, who should be panel members and would they require particular qualifications?

Comments

6e. If yes, how long should panel orders remain in place for?

Comments

6f. If yes, if panel orders (e.g. to pay rent arrears) were not complied with, how and when should the case be escalated to court for a final decision (e.g. on whether to evict the tenant)?

Comments

6g. If yes, in addition to the management activities of landlords and regulatory bodies, what added value would a Housing Panel provide?

Comments

6h. If no, what alternative form of formal dispute resolution might better apply to the cases described here?

The Council considers that a Pre-court Panel is likely to add an additional layer of complexity and bureaucracy.

The Council does agree that the principles of the Pre-Court Panel as described in the consultation paper could be incorporated into a new Housing Panel system. The ability of a Panel to provide quick and easy access to arbitration and make binding orders could be particularly useful in cases which could otherwise be unlikely to end up in the tribunal system. For example, private rented sector arrears cases or common repair cases.

6i. If no, do you think improvements to the dispute resolution system would be better delivered through proposals for civil court reform as outlined in paragraphs 4.5 to 4.9?

Yes No Don't Know

Option 3: Housing Panel Replacing the Courts as Decision Maker

7. Should there be a new housing tribunal, to be called the Housing Panel?

Yes No Don't Know

7a. If yes, who should be members of this type of Housing Panel?

Should a Housing Panel be established East Lothian Council considers that the membership is extremely important to the ability of the Panel to deal with the wide range and complex nature of issues which will be referred to it.

The Panel should include members capable of dealing with the broad range of topics it is anticipated the Panel will hear. Panel make up should vary depending on the cases to be heard and therefore the knowledge and skills required. The Council considers that it may be appropriate to require the Chair to be a legal professional as with the current PRHP and the members must be suitably qualified to ensure sound judgements and decisions can be made.

Consideration must be given to the extent to which the Panel will require knowledge in other areas of law (such as social work legislation, mental

health legislation and anti-social behaviour legislation) and the skills and knowledge Panel members will require to enable this.

The volume of cases likely to be referred to the Panel may dictate that it must employ full time panel members.

7b. If yes, should the Housing Panel be created by expanding the caseload of the Private Rented Housing Panel?

Yes No Don't Know

7c. If yes to question 7, which housing cases should a new Housing Panel consider?

East Lothian Council considers that the Housing Panel should consider all cases which relate to tenancy rights and responsibilities as well as all cases relating to repairs and factoring. This should include cases currently heard by the PRHP and the Homeowners Housing Panel as well as cases relating to common repairs.

The broad range of cases to be considered may require a Panel structure to be created which reflects the different skills and knowledge required to hear cases. For example, it may not be appropriate for members with expertise in social housing management to hear cases relating to factoring. The structure may also reflect the type of decision the Panel is making.

The Council considers that while many of the principles of the PRHP may be used to establish a Housing Panel it is not clear, just by the sheer volume of cases likely to be added to the caseload, that expanding the role of the PRHP is appropriate.

7d. If yes to question 7, should parties be charged a fee for raising actions before a new Housing Panel?

Yes No Don't Know

7e. If no to question 7, what do you see as the main difficulties and challenges in establishing a Housing Panel?

(It is presumed that this question should be 'if yes')

East Lothian Council agrees with the principal of a system which can better resolve disputes in a less formal setting and which may have the potential to better engage tenants and landlords, particularly where vulnerable tenants with complex needs are involved.

The Council is clear that there are strengths within the current system which should not be lost, these include rigorous decision making and

comprehensive assessment of facts and reasonableness. Whatever system is in place there must be mechanisms for dealing with the most serious cases.

The Council would like to highlight a number of issues which are not addressed within the consultation paper:

1. It is not clear how the Panel would interact with existing legislation and what primary legislative change would be required. As noted in the answer to question 7a there are a range of issues which may relate to a 'housing dispute' case which are governed by non-housing legislation. The consultation paper does not make any reference to how the Panel would interact with other legislation. There can be significant crossover between housing legislation and other issues, particularly in relation to anti-social behaviour legislation.
2. It is not clear how the Panel will be funded. Landlords are currently charged a fee for raising Court action against a tenant and East Lothian Council would support a fee structure for landlords referring cases to the Housing Panel. However, fees could be prohibitive to tenants seeking to raise action against a landlord.
3. The potentially large caseload poses significant questions in relation to the personnel resource required to operate the Panel. The Panel must be able to hear cases across the country and be able to take account of local circumstances. The Panel must also be well resourced and able to hear cases quickly. A Panel which relies on professional members must ensure that it is sufficiently resourced so as not to place too great a burden on members. It may be necessary for the Panel to employ at least some full time Panel members.
4. The number of cases which the Panel may deal with also requires consideration in terms of its set up. Although the Council does not consider extending the remit of the PRHP to be appropriate (primarily for reasons of the vast increase in caseload) it is likely that lessons could be learned from its experience in delivering a tribunal system in a housing context. The Council believes that if a Panel is to be established a regional pilot may be the best approach to establishing the Panel. The Council considers that establishing a Panel to deal with only some case types in the first instance is inappropriate due to the importance of all aspects of a dispute / tenancy being taken into account in making a determination.

7f. If no to question 7, do you think improvements to the dispute resolution system would be better delivered through proposals for civil court reform as outlined in paragraphs 4.5 to 4.9?

Yes No Don't Know - The Council will respond separately to the consultation Making Justice Work – Courts Reform (Scotland) Bill – a consultation

Equality issues

8. Which equality groups, if any, do you think will be differently affected by each of the options in this consultation paper?

None

9. How do you think they will be affected by each option (positively or negatively)?

Comments

10. What changes could we make to each of the options to mitigate or remove any adverse effect on the equality groups you have identified?

Comments

11. What opportunities do the changes/options present for equality of opportunity to be advanced, and/or the fostering of good relations between and among different people?

No comment

Business and Regulatory Impact Assessment

12. Are there businesses, public bodies or 3rd sector organisations not already listed in the BRIA that we should engage with in developing one or more of these policy options?

Yes No Don't Know

If yes, please provide details of these organisations.

13. Which options will impact on these organisations and what would the impact be?

Comments

14. Could the enforcement, sanctions or monitoring of any of the options have a disproportionate impact on any organisation or group of organisations within the public, private or third sectors?

Yes No Don't Know

If yes, please explain what the impact will be

Comments

