

# HOME OWNER AND DEBTOR PROTECTION (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### THE ACT

#### Part 2 – Sequestration and Trust Deeds

##### *Section 11 – power in relation to debtor’s family home*

67. **Section 11** amends section 40 of the 1985 Act. Under section 33(1) of that Act the debtor’s estate as at the date of sequestration vests in their trustee, and this will include interest in a family home which is registered in the debtor’s name. It is part of the trustee’s function under section 3(1)(a) of that Act to “recover, manage and realise the debtor’s estate”. The Accountant in Bankruptcy’s Notes for Guidance of Trustees (see <http://www.aib.gov.uk/guidance/DAS>) states that if a trustee has identified that it would be in the financial interests of creditors to realise any equity in the family home, the trustee must take appropriate action to secure or realise that asset (Note 6.10.3). Section 39A of the 1985 Act, inserted by section 19 of the 2007 Act, provides that any right or interest in the debtor’s family home is reinvested in the debtor three years after the date of sequestration if no action is taken by the trustee. “Family home” is defined in section 40(4)(a) of the 1985 Act.
68. Section 40 of the 1985 Act currently provides that before a trustee in sequestration sells or disposes of any right or interest in the debtor’s family home, the trustee must obtain the consent of an occupant spouse, civil partner, former spouse, or former civil partner. If there is no such person and the debtor occupies the house with a child of the family, the trustee has to seek the debtor’s consent. “Child of the family” is defined in section 40(4)(b) of the 1985 Act. If consent cannot be obtained, the trustee must apply to the sheriff for permission to sell a family home. The sheriff, having considered the circumstances of the case, may refuse the trustee’s application, grant the application, or postpone granting it for up to one year.
69. **Section 11(a)** amends section 40 of the 1985 Act so that it applies to trust deeds as it applies to bankruptcies. Under section 4(1)(a) of the Trusts (Scotland) Act 1921, a trustee has a general power to sell the trust estate. The amendment to section 40 will require trustees under trust deeds which fall within the new definition to seek the relevant consent or the permission of the sheriff in the same way as a trustee in bankruptcy.
70. **Section 11(b)** amends section 40(2) of the 1985 Act to increase from one year to three years the maximum period that a sheriff can postpone the granting of an application by a trustee (in sequestration or under a trust deed) to sell a debtor’s family home without the relevant consent.
71. **Section 11(c)** inserts new subsections (3A) and (3B) into section 40 of the 1985 Act. Section 11 of the Homelessness (Scotland) Act 2003 provides that when a landlord raises repossession proceedings, the landlord must give notice to the local authority.

*These notes relate to the Home Owner and Debtor Protection (Scotland)  
Act 2010 (asp 6) which received Royal Assent on 18 March 2010*

The schedule to the 2003 Act imposes a similar duty on creditors taking steps to enforce standard securities. The form of notice for section 11 of the 2003 Act is prescribed in the [Notice to Local Authorities \(Scotland\) Regulations 2008 \(S.S.I. 2008/324\)](#).

72. The new subsection (3A) imposes a similar duty on the trustees of bankrupt estates or under trust deeds. The new subsection (3B) provides that Scottish Ministers may prescribe the form used by trustees to notify local authorities. Regulations made under section 40(3B) will be subject to the negative resolution procedure of the Scottish Parliament under section 72(1) of the 1985 Act.
73. [Section 11\(d\)](#) inserts a definition of “local authority” and modifies the definition of “relevant date” in the list of definitions in section 40(4) of the 1985 Act.