

Briefing for the Citizen Participation and Public Petitions Committee on petition [PE1981](#): Ensure perpetrators of domestic abuse, who have been excluded from the matrimonial home, cannot force the sale of a property, lodged by Caroline Gourlay

Brief overview of issues raised by the petition

The petition relates to the [Matrimonial Homes \(Family Protection\) \(Scotland\) Act 1981](#) ('the 1981 Act'). The 1981 Act gives certain rights to same sex and mixed sex spouses, and some more limited rights to same sex and mixed sex cohabitants. The [Civil Partnership Act 2004](#) ('the 2004 Act') creates broadly equivalent rights for same sex and mixed sex civil partners as the 1981 Act does for spouses. The main rights under the 1981 and 2004 Acts are summarised below.

Statutory occupancy rights – where there is a sole owner or tenant

A key part of the legislation relates to the situation where one person is entitled, as owner or tenant, to occupy the matrimonial home ('the entitled spouse' or 'the entitled civil partner') and the other person is not ('the non-entitled spouse' or 'the non-entitled civil partner'). The legislation says the non-entitled spouse or civil partner has statutory 'occupancy rights' in respect of the property, which can be enforced in court if necessary (1981 Act, sections 1-3; 2004 Act, sections 101-103).

Furthermore, the statutory occupancy rights of a non-entitled spouse or civil partner cannot be prejudiced by reason of a 'dealing' by the entitled spouse or civil partner in the matrimonial or family home, such as a sale (except in limited circumstances). Usually this means that the non-entitled spouse's written consent will be required for a sale to proceed (1981 Act, section 6; 2004 Act, section 106). Typically, the process of obtaining the necessary consent will be managed through solicitors.

Crucially, enforceable occupancy rights in favour of a spouse or civil partner (with some specific exceptions) end when the marriage or civil partnership ends (1981 Act, section 5(2)(a); 2004 Act, section 105(2)(a)). They also end in a variety of other circumstances.

Statutory occupancy rights for cohabitants under the 1981 Act are weaker than those for spouses or civil partners. For example, they are not automatic, the court must grant them. They can only be granted for up to six months initially, although they may be renewed by the court for further period(s) of up to six months (1981 Act, section 18).

Jointly owned property

It is common nowadays for a former couple to co-own the matrimonial or family home. This situation is covered by a mixture of the 1981 Act, the 2004 Act and the 'common law', i.e., judge-made law.

Where property is co-owned, and the aim is sale of the entire property (as opposed to one person's share of that property) both owners must agree to a sale. Again, any sale process is typically managed through solicitors.

Without the agreement of the other person, the person who wants the whole property to be sold must start a court action, with the aim of obtaining a court order for 'division and sale.' Once granted, this order usually enables the sale of the property on the open market (and a subsequent split of the proceeds of that sale between the owners).

Where a spouse or civil partner has raised an action of division and sale involving their matrimonial or family home, the court may a) refuse to grant the order; b) postpone doing so for a period it considers reasonable; or c) may grant the order subject to conditions (1981 Act, section 19; 2004 Act, section 110). This statutory protection only applies to spouses and civil partners. If such a court order is applied for by an ex-spouse, ex-civil partner or cohabitant, the court **must** grant the order for division and sale.

Legal negotiations between a former couple about a possible sale typically happen with an awareness of what might happen should a case get to a court.

Exclusion orders

The 1981 Act provides protection to a spouse (and, in certain circumstances, a cohabitant) at risk of physical or mental injury because of another spouse's (or cohabitant's) conduct. The 2004 Act makes equivalent provision for civil partners. For example, a spouse or civil partner (whether entitled or not) can apply to the court for an 'exclusion order', to suspend the rights of the other to occupy the matrimonial or family home. A non-entitled cohabitant, where granted occupancy rights by the court, can also ask the court to grant an exclusion order (1981 Act, sections 4 and 18; 2004 Act, sections 104).

An exclusion order is temporary. For example, it ends when a married couple divorce or, for civil partners, when a civil partnership is dissolved (1981 Act, section 5; 2004 Act, section 105).

Exclusion orders are one of a range of civil court orders which can be granted with the aim of offering protection from a perpetrator of domestic abuse.

Relevant policy initiatives

In 2018, the Scottish Government [consulted on a package of measures aimed at improving legal protections against domestic abuse](#). Part 2 of the consultation paper (which has never been implemented) proposed a range of measures designed to improve the effectiveness of exclusion orders.

The [Scottish Law Commission is currently reviewing aspects of family law](#). Phase 2 of this project is likely to involve a review of civil law remedies relating to domestic abuse. It is not known whether Phase 2 will extend to a review of the 1981 Act (including its provisions on exclusion orders).

Sarah Harvie-Clark
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03/11/2022

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot

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