

Citizen Participation and Public Petitions Committee

2nd Meeting, 2023 (Session 6), Wednesday 8
February

PE1981: Ensure perpetrators of domestic
abuse, who have been excluded from the
matrimonial home, cannot force the sale of
the property

Lodged on	9 November 2022
Petitioner	Caroline Gourlay
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to strengthen legislation to stop perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, being able to cause further trauma and distress to their victims by trying to force the sale of the property.
Webpage	https://petitions.parliament.scot/petitions/PE1981

Introduction

1. This is a new petition that was lodged on 9 November 2022.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. While not a formal requirement, petitioners have the option to collect signatures on their petition. On this occasion, the petitioner elected to collect this information. 228 signatures have been received.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe C** of this paper.

6. A submission has been provided by the petitioner. This is included at **Annexe D**.

Action

The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee

Annexe A

PE1981: Ensure perpetrators of domestic abuse, who have been excluded from the matrimonial home, cannot force the sale of the property

Petitioner

Caroline Gourlay

Date lodged

9 November 2022

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to strengthen legislation to stop perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, being able to cause further trauma and distress to their victims by trying to force the sale of the property.

Previous action

I have written to my MSP, and the Cabinet Secretary for Justice, Keith Brown MSP.

I have also contacted the Justice Committee, as well as organisations including the Law Society of Scotland, Sheriff Court, Shelter Scotland, Scottish Women's Rights, Rape Crisis, and Women's Aid.

Background information

There appears to be a loophole in existing legislation which allows perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, to contact their victim via a solicitor. This can add to the distress experienced by the victim. A perpetrator of domestic abuse, who is removed from the property, should be unable to force sale of that property until the interdict put in place to keep the victim safe has expired.

In my case, the perpetrator was found guilty by a high court jury of rape and sexual assault but was acquitted due to the Moorov doctrine. The court granted an interdict and exclusion order preventing the perpetrator

from contacting me or causing me mental injury or distress. Within weeks of the exclusion order being issued I received solicitors letters about the sale of the property. I have contacted dozens of people but no one can tell me if the interdict and exclusion order prevents him from doing that. It should not be this difficult for a victim to find the information about this or to get someone to help stop it.

Annexe B

The logo for SPICe, consisting of the letters 'SPICe' in a white, sans-serif font on a dark purple background.The logo for The Information Centre, consisting of the text 'The Information Centre' and 'An t-Ionad Fiosrachaidh' in a white, sans-serif font on a dark blue background.

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

Senior Researcher

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

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

Annexe C

Scottish Government submission of 1 November 2022

PE1981/A: Ensure perpetrators of domestic abuse, who have been excluded from the matrimonial home, cannot force the sale of the property

The Committee has asked for a response by the Scottish Government to Public Petition PE1981. The Petition is “Calling on the Scottish Parliament to urge the Scottish Government to strengthen legislation to stop perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, being able to cause further trauma and distress to their victims by trying to force the sale of the property”.

Under [section 1](#) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (the 1981 Act), where one spouse is entitled as an owner or tenant to occupy a matrimonial home (the entitled spouse) and the other is not (the non-entitled spouse), the non-entitled spouse has occupancy rights. (The Civil Partnership Act 2004 sets out equivalent arrangements to the 1981 Act for civil partners). A non-entitled cohabitant will only have occupancy rights if granted by the court.

The 1981 Act also provides protection to a spouse or to children who are at risk of physical or mental injury because of the other spouse’s conduct. Under [section 4](#), either spouse (whether entitled or not) may apply to the court for an exclusion order to suspend the rights of the other to occupy the matrimonial home. A non-entitled cohabitant granted occupancy rights by a court can also seek an exclusion order.

An exclusion order is temporary and will end, for example, when a married couple divorce: [section 5](#). The order does not affect who owns or tenants the home, or prohibit future transactions with the property.

Under [section 4\(4\)](#), the applicant for an exclusion order can also ask the court to make certain ancillary orders, including interdicts. An interdict is an order prohibiting or restraining specified behaviour or conduct. An example of an interdict ancillary to an exclusion order is an order

prohibiting the non-applicant from entering the matrimonial home without the express permission of the applicant ([section 4\(4\)\(b\)](#)).

Ms Gourlay should seek legal advice if she has questions regarding the conduct that her interdict is capable of restraining.

If a couple, married or cohabiting, own a home together, both must agree to a sale. Otherwise, the party who wants to sell the property will need to raise a court action, seeking an order for division and sale. Under [section 19 of the 1981 Act](#), where a spouse has raised an action of division and sale involving their matrimonial home, the court may refuse to grant the decree, or postpone doing so for a period it considers reasonable, or may grant the decree subject to conditions.

Provision is made in the 1981 Act for the occupancy rights of a non-entitled spouse not to be prejudiced by reason only of any dealing of the entitled spouse with the matrimonial home, such as a sale, except in certain circumstances: [section 6\(1\) and \(3\)](#). This does not apply where the couple are cohabiting and not married.

Typically, this means that if a non-entitled spouse has not renounced their occupancy rights, the non-entitled spouse's written consent will be required for the sale to proceed: [section 6\(3\)\(a\)](#). The entitled spouse can also ask a court to dispense with the non-entitled spouse's consent: [section 6\(3\)\(b\)](#).

Ms Gourlay should seek legal advice to identify if there is any further action she should take to protect her interests.

The Scottish Government remains committed to the prevention and eradication of violence against women and girls. We also want to ensure that the right supports are in place for those affected by violence and abuse.

We have no plans at present to reform the 1981 Act or the equivalent provisions for civil partners.

The Scottish Law Commission are considering carrying out a review of civil remedies in relation to domestic abuse. Information on the Commission's work on aspects of family law is at [Scottish Law Commission: Aspects of family law \(scotlawcom.gov.uk\): please see in particular Phase Two](#).

Annexe D

Petitioner submission of 3 November 2022

PE1981/B: Ensure perpetrators of domestic abuse, who have been excluded from the matrimonial home, cannot force the sale of the property

I have sought legal advice on both matters suggested by the Scottish Government reply.

My interdict states that the abuser cannot cause me mental injury or distress, but having spoken with my solicitor, who has read over the paperwork for both the interdict and the exclusion order, there is nothing I can use to stop the contact via a 3rd party.

I have 2 options: buy him out, which I can't borrow enough to do; or sell. After the trauma this man has caused me, I cannot cope so soon taking on the sale. If I don't engage, I have been advised that I could be liable for the full cost of court action. Regardless of how the contact comes it is extremely distressing and retraumatising. I would have liked to have some form of legislation in place to stop him being able to do that.

Domestic abusers who have been found guilty of such serious offences by a High Court jury, including sexual assault and rape, should be held accountable. For the term of the interdict and exclusion order, they should be unable to contact the victim either directly or indirectly, as doing so is a continuation of their abuse, to control and manipulate. Victims need time and space to recover and cannot do that whilst the perpetrator is allowed to make contact. This is not fair, and it is not justice.