

# HOME OWNER AND DEBTOR PROTECTION (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### THE ACT

#### **Part 1 – Residential Standard Securities Etc.: Creditor’s Rights on Default**

4. [Part 1](#) of the Act amends the Heritable Securities (Scotland) Act 1894 (“the 1894 Act”), the Conveyancing and Feudal Reform (Scotland) Act 1970 (“the 1970 Act”) and the Mortgage Rights (Scotland) Act 2001 (“the 2001 Act”).
5. Under section 5 of the 1894 Act a creditor may take proceedings to eject a proprietor in personal occupation of property given in security where the debtor has failed to pay the principal sum or interest due under the security.
6. The 1970 Act is the principal statutory provision dealing with standard securities in Scotland. The 1970 Act provides three ways in which a creditor may seek to repossess the property against which a debtor’s borrowing is secured: calling up a standard security under section 19; serving a notice of default under section 21; and applying to the court for a warrant to exercise remedies on default under section 24.
7. The 2001 Act modifies the 1970 Act and the 1894 Act to allow certain residents to apply to court to suspend enforcement rights of a creditor in a standard security over property used for residential purposes. They can also apply for the continuation of proceedings raised by the creditor relating to those rights. The 2001 Act also makes provision for notifying tenants and other occupiers of enforcement action by a creditor in a standard security.
8. The main effects of Part 1 of the Act are to:
  - Require all repossession cases relating to residential property to call in court, except in cases of voluntary surrender (which require written confirmation that the surrender was voluntary). This ensures shrieval scrutiny on the extent to which creditors have complied with the pre-action requirements. In cases where the debtor appears or is represented it also allows sheriffs to consider wider circumstances about the debtor and those living in the property before any decree for repossession is granted (sections 1, 2 and 3).
  - Set out pre-action requirements for creditors. These require creditors, before applying to repossess a residential property, to provide the debtor with information and to take reasonable steps to avoid repossessions occurring. They also require creditors to refrain from taking repossession proceedings in certain circumstances (section 4).
  - Preserve and extend the right of certain residents other than the debtor (entitled residents) to make representations to a court considering a repossession application (section 5).

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- Provide a right to seek recall of a decree for repossession already granted for the debtor and each entitled resident provided the person seeking recall has made no previous representations to the court (section 6). The creditor is also able to seek recall.
  - Give those facing repossession and entitled residents who make applications to the court the right to be represented in court by an approved lay representative (section 7).
9. A considerable number of technical amendments to the 1894 and 1970 Acts are made to give effect to the above. Much of the 2001 Act is repealed as the relevant provisions will be incorporated in the 1894 and 1970 Acts. In addition to subordinate legislation under the Act, the Sheriff Court Rules Council will be considering making provision in court rules to facilitate the operation of the procedures that the Act introduces.

***Section 1 - residential standard securities: restriction of creditor's remedies***

10. **Section 1** limits those situations in which a creditor can exercise the rights specified in standard conditions 10(2) and (3) of the standard security (set out in Schedule 3 to the 1970 Act), being the rights to sell or to enter into possession of the security subjects where the borrower is in default. The limitation applies only to property wholly or partially used for residential purposes; rights in relation to other property are unaffected.
11. The limitation provides that the rights can be exercised only where the residential property has been voluntarily surrendered or where a court has granted a warrant under section 24 of the 1970 Act, thereby ensuring that all cases for possession or sale of residential property require a court application. There is an exception for voluntarily surrendered unoccupied property, to allow a debtor to avoid the expense of court proceedings.
12. **Section 1(1)** amends section 20 of the 1970 Act by inserting a new subsection (2A), to apply this limitation of a creditor's remedies to the service of a notice calling up a standard security.
13. **Section 1(2)** amends section 23 of the 1970 Act by inserting a new subsection (4), to apply this limitation of a creditor's remedies to the service of a notice of default.
14. **Section 1(3)** of the Act amends the 1970 Act by inserting section 23A. Section 23A(1) specifies the requirements for a residential property to be voluntarily surrendered and section 23A(2) sets out those who must confirm their consent to surrender in writing. Subsections (1) and (2) require that:
- the property be unoccupied;
  - the debtor and other interested persons (proprietor where not debtor, non entitled spouse or civil partner and cohabitants in terms of section 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981) confirm their consent in writing; and
  - the written confirmation certifies that the person: does not occupy the security subjects and is not aware of any occupation; consents to the exercise by the creditor of the creditor's rights on default; and consents freely and without coercion of any kind.

***Section 2 - court applications by creditor for remedies on default***

15. **Section 2** makes provision about court applications by a creditor under section 24 of the 1970 Act for warrant to exercise the creditor's remedies where the borrower defaults in a standard security over residential property. It sets out a new procedure applying to such applications, including applications required as a result of section 1 of the Act (i.e. following a calling-up notice or notice of default).

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16. Section 2(2) inserts subsections (1A) to (1D) into section 24 of the 1970 Act. Subsection (1C) requires a creditor to fulfil the pre-action requirements specified at section 24A of the 1970 Act (see section 4(1) of the Act) before making a section 24 application in respect of a residential property.
17. Subsection (1D) provides that a section 24 application in relation to a residential property is to be by summary application procedure. This applies regardless of whether the application includes a crave for some other remedy. That ensures that in all cases the court will set a date on which it will hear the case and on which the debtor will have an opportunity to defend the case or make submissions to the court.
18. Sections 2(3) and 2(4) make minor consequential changes to the 1970 Act.
19. Section 2(5) inserts new subsections (5) to (9) into section 24 of the 1970 Act. Subsection (5) confirms that a court may grant any order that it thinks fit on the application but may only grant it if it is satisfied that the pre-action requirements have been complied with and it is satisfied that it is reasonable in the circumstances of the case to grant the application.
20. Subsections (6) and (7) specify the matters to which the court must have regard when considering a creditor's application in a case where the debtor appears or is represented (see section 5 of the Act for a case where an entitled resident makes an application). The matters in subsection (7) mirror the matters to which a court currently has regard in an application made under the 2001 Act. The matters are currently set out in section 2(2) of the 2001 Act (as amended by [S.S.I 2004/468](#) to include reference to the Debt Arrangement Scheme established under the Debt Arrangement and Attachment (Scotland) Act 2002).
21. Subsection (9) clarifies the effect of a debtor remedying a default (within the meaning of standard condition 9(1)(a) or (b)) before a creditor has been granted decree in respect of a section 24 application in relation to a residential property. In those circumstances the standard security has effect as if the default had not occurred.

***Section 3 - court powers in action for possession of residential property***

22. Section 3(1)(b) inserts subsections (2) and (3) into section 5 of the 1894 Act. Subsection (2) provides for summary application procedure for proceedings under section 5 in relation to a residential property. This applies regardless of whether the application includes a crave for any other remedy.
23. Subsection (3) requires a creditor to comply with pre-action requirements before making an application. The requirements themselves are inserted as section 5B of the 1894 Act by section 4(2) of the Act.
24. Section 3(2) inserts section 5A into the 1894 Act, which relates to proceedings relating to residential property brought under the 1894 Act. In section 5A—
  - Subsections (2), (3) and (4) provide for the notification that a creditor must give, and the form that it must take, when bringing such proceedings. This sets out in the 1894 Act the requirements which were previously in section 4(4), (5) and (5A) of the 2001 Act.
  - Subsection (5) confirms that a court may grant any order that it thinks fit on the application but may only grant it if it is satisfied that the pre-action requirements have been complied with and it is satisfied that it is reasonable in the circumstances of the case to grant the application.
  - Subsections (6) and (7) specify the matters to which the court must have regard when considering an application in a case where the debtor appears or is represented (see section 5 of the Act for a case where an entitled resident makes an application). They mirror the matters to which the court would currently have regard in an

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application made under the 2001 Act, and are identical to the matters introduced into the 1970 Act by section 2(5) of the Act.

**Section 4 – pre-action requirements**

25. **Section 4** outlines the pre-action requirements which creditors must satisfy before making an application under section 24(1B) of the 1970 Act or an application under section 5 of the 1894 Act in relation to residential property.
26. Section 4(1) inserts section 24A into the 1970 Act. This relates to proceedings described at section 24(1B) of the 1970 Act (i.e. in relation to residential property). The pre-action requirements at subsections (2) to (6) are that the creditor:
  - provides the debtor with clear information about the terms of the standard security, the amount due (including any arrears and charges in respect of late payment and redemption) and any other obligation under the security in respect of which the debtor is in default;
  - makes reasonable efforts to agree with the debtor proposals for future payments and the fulfilment of any other obligation under the security in respect of which the debtor is in default;
  - refrains from making a section 24 application for repossession or sale where the debtor is taking steps likely to result, within a reasonable period, in the payment of arrears or the principal sum and to fulfil any other obligation for which the debtor is in default;
  - provides the debtor with information about sources of advice and assistance in relation to management of debt;
  - encourages the debtor to contact the local authority in whose area the property is situated.
27. Subsection (7) requires creditors to have regard to guidance issued by Scottish Ministers. Subsection (8) allows Scottish Ministers by subordinate legislation to make further provision about and modify the pre-action requirements, but not to add new categories of pre-action requirements.
28. Section 4(2) inserts section 5B into the 1894 Act. This relates to proceedings described at section 5(2) of the 1894 Act (i.e. residential property). It repeats the pre-action requirements, guidance and powers set out for applications under section 24(1B) of the 1970 Act.

**Section 5 – application to court by entitled residents**

29. **Section 5** makes provision for certain individuals to intervene in an application by a creditor under the 1894 Act or the 1970 Act in relation to residential property. The 2001 Act currently provides that the debtor and certain other residents of the property being possessed or sold can apply to the court for a suspension of the creditor's rights or a continuation of court proceedings. The Act's requirement for all possessions or sales to be by court application means that the debtor no longer needs the right to make such an application. Section 5 preserves and extends the 2001 Act rights of the other residents (entitled residents) to make an application to the court.
30. **Section 5(1)** inserts sections 24B and 24C into the 1970 Act. Section 24B allows entitled residents to apply to the court to continue the proceedings or to make any other order the court thinks fit. It provides that in such an application the court is to have regard to the same matters as it is required to consider if a debtor appears or is represented. These are the matters in new section 24(7) of the 1970 Act, which mirror the matters in section 2(2) of the 2001 Act (to which a court would currently to have regard in an application made under the 2001 Act).

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31. Section 24C defines entitled residents. Other than the debtor, these individuals are the same as those who can make an application under section 2 of the 2001 Act.
32. **Section 5(2)** inserts sections 5C and 5D into the 1894 Act. These sections make provision in respect of applications under the 1894 Act corresponding to that in the new sections 24B and 24C of the 1970 Act.

***Section 6 – recall of decree***

33. **Section 6** makes provision for the recall of a decree following the creditor's application under section 24(1B) of the 1970 Act or section 5 of the 1894 Act (where section 5A applies). These are actions in respect of residential properties. Recall of a decree has the effect of reviving the original proceedings, thereby again giving the creditor, debtor and entitled residents the opportunity to make representations to the court.
34. **Section 6(1)** inserts section 24D into the 1970 Act. The debtor or an entitled resident may make an application for the recall of a decree only where they did not appear in the earlier proceedings. The creditor may also apply for recall. The application can be made at any time before the decree has been fully implemented. An application for recall of decree can only be made by an entitled resident if they have not already been involved in the proceedings. Further provision will be made by court rules as regards notification of a recall application, which must be given to the creditor and debtor (unless they are the applicant) and to each entitled resident.
35. **Section 6(2)** inserts section 5E into the 1894 Act. This makes provision in respect of applications under the 1894 Act corresponding to that in new section 24D of the 1970 Act.

***Section 7 – representation in repossession proceedings***

36. **Section 7** allows for the representation of the debtor or entitled resident by an approved lay representative in court proceedings in relation to the possession or sale of a residential property.
37. **Section 7(1)** inserts section 24E into the 1970 Act. Section 24E(1) allows approved lay representation of debtors and entitled residents in proceedings under section 24(1B) of the 1970 Act (i.e. creditor applications) and section 24D(1) (i.e. applications for recall of decree). Lay representation in these proceedings is not available in any circumstances which are prescribed by the Scottish Ministers.
38. Section 24E(2) requires a lay representative to satisfy the sheriff throughout the proceedings that they are competent to represent the debtor or entitled resident and are authorised to do so.
39. Section 24E(3) defines approved lay representative: an individual approved by a person, named body or description of body prescribed by Scottish Ministers by subordinate legislation. Section 24E(4) enables the Scottish Ministers to require organisations with approved lay representatives to provide information about approvals and withdrawals of approval. Under section 24E(4) the subordinate legislation may also, among other things, make provision about the approval and removal of approval process.
40. **Section 7(2)** inserts section 5F into the 1894 Act. This makes provision for lay representation in respect of applications to which section 5A applies or applications for recall of decree granted in respect of such an application under the 1894 Act, corresponding to the provision made in new section 24E of the 1970 Act. Lay representation in these proceedings is not available in any circumstances which are prescribed by the Scottish Ministers.
41. **Section 7(3)** amends section 32 of the Solicitors (Scotland) Act 1980 to ensure that approved lay representatives will not be in breach of the restrictions on unqualified persons preparing certain documents.

**Section 8 – minor and consequential amendments**

42. **Section 8(1)** inserts subsections (10A) and (10B) into section 19 the 1970 Act, replacing provisions currently found in section 1(8) of the 2001 Act. These make provision for the shortening of the notice period mentioned in a calling-up notice, stating that this requires the consent in writing of those specified at the inserted subsections (10B)(a) and (b). Section 8(1) also consequentially inserts subsection (12) into section 19, providing that a calling-up notice in relation to residential property expires after 5 years from the date of the notice, to clarify the effect of other changes.
43. **Section 8(2)** amends section 21 of the 1970 Act to apply section 19(10) and (10B) to notices of default. Section 8(4) repeals provisions in the 2001 Act that are superseded as a consequence of the provision in Part 1 of the Act.
44. **Section 8(5)** preserves the requirements under section 11 of the Homelessness etc. (Scotland) Act 2003 for lenders to have to notify local authorities when initiating court action to repossess, allowing repeal of related parts of the Mortgage Rights (Scotland) Act 2001