



# SCOTTISH EXECUTIVE

---

Deputy Minister for Enterprise & Lifelong Learning  
**Allan Wilson** MSP

Meridian Court  
5 Cadogan Street  
Glasgow G2 6AT

Alex Neil MSP  
Convenor  
Enterprise and Culture Committee  
The Scottish Parliament  
Edinburgh  
EH99 1SP

Telephone: 0845 774 1741  
scottish.ministers@scotland.gsi.gov.uk  
<http://www.scotland.gov.uk>

16<sup>th</sup> June 2006

[Enterprise.committee@scottish.parliament.uk](mailto:Enterprise.committee@scottish.parliament.uk)

---

## **BANKRUPTCY AND DILIGENCE (SCOTLAND) ETC BILL NEW PART ON EJECTIONS**

The Bill is, as you know, a large and at times complex measure. It did not prove possible to have provision on all our intended reforms in the Bill at introduction, despite our best efforts to do so.

The Executive has therefore lodged amendments for the Committee meeting on 20 June 2006 which, if agreed, will have the effect of introducing a new part on Ejections into the Bill.

I thought it would help the Committee in its consideration of those amendments if I wrote to you with an explanation of the policy background.

### **Overview**

The objective of reform of ejection is to ensure that the ejection process is so far as possible fair and clear for all involved, and to abolish old and outdated procedures (*modernisation theme, striking the right balance theme*).

### **Statistical information**

We cannot say with certainty how many people are physically ejected (that is, evicted) from land or buildings, including homes.

We do of course have an idea about the number of court actions raised that relate to land or buildings, but that number only tells us about the number of cases in which ejection may be an issue.

There are a number of reasons for the uncertainty about the number of actual ejections, for example:

- Some court actions concerning land relate to (say) disputed rights of way, and no one is seeking ejection,
- In cases where a warrant (or order) for ejection is granted we cannot be sure how many people are actually ejected.

- In some cases people can be ejected without the need for a court warrant, for example in a compulsory purchase or they may leave voluntarily.

With those caveats, the following table sets out the number of relevant actions disposed of in the courts in the period 2003 to 2005:

<b>Nature of action</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>
Land/heritable (ordinary action)	1,517	1,508	2,055
Land heritable (summary cause)	9,848	10,001	9,382
Mortgage lender (ordinary action)	3,082	3,186	4,230
<b>Total</b>	<b>14,447</b>	<b>14,695</b>	<b>15,6670</b>

## **General background**

This area of law covers a myriad of types of removings and other actions related, amongst other things public sector tenancies, private tenancies, commercial tenancies, agricultural tenancies, debt enforcement and squatters.

The law has been developed bit by bit over many years in various statutes and court cases, leading to (for example) different procedures for ‘removing’ an occupier who has or had a right to be in heritable property (eg. a leased office or a dwelling house on mortgage default) and ‘ejecting’ an occupier who has never had a right to be there (such as a squatter).

“Removing” has a general meaning which covers any surrender of heritable property, for example the surrender of a lease (domestic or commercial) by a tenant. It also has a more specific meaning of an action by which a heritable proprietor, such as a landlord, seeks to recover possession of his/her property from a tenant. The conclusion of such an action is the granting of a “warrant for ejection” by the court by virtue of which occupants of the property can be evicted by officers of court.

“Ejection” is the term used for an action where an owner or possessor of heritable property seeks to recover possession from an occupant of the property who has no legal right or title to occupy the property – for example a squatter. Such an action will also conclude with a “warrant for ejection”.

It should however be noted that occupiers can be removed from land in circumstances not covered by the new part, such as where there is a compulsory purchase. It is not thought that the intended common procedure should cover special cases like that, at least for the time being.

## **Policy Objectives**

It is not intended that the reforms will cover all types of ejection. As mentioned above, there are special cases such as compulsory purchase

The new procedure will mainly cover ejections connected with debt enforcement, tenancy disputes, and recovery of possession where persons have no valid title to occupy. It is intended that this list will be capable of amendment.

The new part deals only with reforming the process of ejection. It does not make any changes to the existing substantive law such as the grounds on which people can be ejected, or change the liability of people to pay damages for losses that have been caused by either lawful or unlawful occupation.

For example, the new part will reform the way in which claims for damages are secured. It does so by abolishing caution for ‘violent profits’. In some circumstances a tenant may only be allowed by the court to defend an application for ejection if they can give security for payment (‘caution’) for any claim for violent profits.

Violent profits are penal damages for losses caused in a period of unlawful (i.e. ‘violent’) possession, for example where a tenant stays on in premises after a lease has been terminated. The law on violent profits will in some circumstances allow (say) a landlord to recover double the rent that would otherwise have been due.

It may be that penal damages of that kind are no longer appropriate in a modern Scotland, but that is a debate for another day. The Bill will not therefore change the substantive law on damages.

### ***Modernising the law***

An objective of the new part is to modernise the procedure for removing a person from heritable property. This will bring clarity to this area of the law, and ensure that where ejections are necessary a fair and open procedure is followed.

The new part will, for example, take away the power of the court to order the defender to find caution for any claim for damages for violent profits. This will make it a bit easier for people to defend actions of removing, where there is a defence.

### ***Striking the balance***

An objective of the new part is to strike a better balance between creditor (pursuer) and debtor (defender) interests.

Debtor/defender interests will be better protected by, for example, giving the court a new power to arrange for the preservation of the contents of premises, and making it harder to eject during unsocial hours.

Creditor/pursuer interests will be better protected by making it clear that where caution for actual/normal losses is appropriate, that the security can cover damage caused by people the defender has let into premises.

## **Main proposals contained in the Amendments on Ejection**

The amendments that make up the new Part:

- List the types of removings and ejection covered by these reforms,
- Abolish the outdated need in Court of Session actions to obtain separate letters of ejection, even after the court has agreed that ejection is appropriate,
- Clarify that in most cases a warrant for ejection cannot be enforced until a 14 day charge to remove has run out,
- Clarify the dates and times when persons in which in most cases persons cannot be ejected (public holidays, Sundays, before 8am or after 8pm),

- Enable the court to make an order for preservation of goods left behind at the premises, and determine who should pay any storage costs,
- Take away the power of the court to order the defender to find caution for violent profits, and
- Modernise the law of caution in respect of normal claims by the pursuer, and clarify what kind of claims can be secured.

## Consultation

In 2002 the Scottish Executive issued the consultation document *Enforcement of Civil Obligations in Scotland*. This consultation included a section on proposed reform of the law of ejection.

It asked whether:

- There should always be service of a charge prior to execution of a warrant for ejection, and whether the standard period of charge should be 14 days,
- The procedure to be followed for executing a warrant for ejection should be reformed, and
- Any new provision was necessary for protection of possessions in the premises at the time of ejection.

The consultees who considered these questions responded as follows:

- There was almost total support for the service of charge prior to execution of a warrant of ejection, with the exception of instances where those being ejected have no right, title or interest in the property e.g. squatters. There was also strong support for the period being 14 days, allowing for a shortended period on cause shown.
- The vast majority were in favour of clarifying the dates and times during which an ejection may take place. Some respondents requested that the court be able to use its discretion to extend those hours if needed.
- The majority of respondents considered that provision should be made for disposal of any possessions left in the premises. Advice and enforcement agencies wished to see a situation where proprietors or creditors were required to store possessions for a specified time at a set rate. Those in favour of our proposal for the court thought that clarity was needed on whether a creditor who either leaves property in the premises, or stores it elsewhere, has a duty of care to the debtor/defender for any damage. All respondents agreed that any storage costs should be borne by the debtors, although a small number thought that the landlord should never have to pay such costs in advance.

In 2004 the Executive followed up that consultation by publishing *Modernising bankruptcy and diligence in Scotland: draft bill and consultation*. Chapter 10(A)(vi) of that consultation set out intention to reforming the procedural law of ejections, and no further comment was received.

## Impact Assessment

The Executive has considered whether the changes will have an adverse effect on particular interests.

### *Human Rights*

The Executive is satisfied that the provisions in the amendments are compatible with ECHR rights.

### *Island Communities*

These amendments have no specific impact on island communities.

### ***Local Government***

The amendments do not have a specific impact on local government. As with the other Diligence proposals in the Bill, they will affect local government in the same kind of way as they do with any other creditor, debtor or lender.

### ***Sustainable Development***

These amendments have no specific impact on sustainable development.

### ***Impact on business, charities and voluntary bodies***

These amendments have no specific impact on business, charities and voluntary bodies.

### **Financial consequences**

There will be some administrative costs associated with implementing the reforms. For example, officials will need to prepare the necessary secondary legislation. These costs will be modest.

**ALLAN WILSON**