

ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION
NOT FOR PUBLICATION OR BROADCAST
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DISCUSSION PAPER ON HERITABLE SECURITIES: DEFAULT AND POST DEFAULT

The Scottish Law Commission today publishes a second Discussion Paper consulting on reform of the law of securities granted over land and buildings in Scotland.

Heritable securities, often referred to as mortgages, are essential to the economy. Without them, many people could not afford to buy their homes or grow their businesses. A heritable security allows a creditor to take particular types of legal action against a debtor if they default on their debt. In practice, what this usually looks like is a lender eventually selling a borrower's home or business property if the borrower becomes unable to repay their mortgage loan. When and how a creditor can take action, and the protections in place for the debtor when it does, are the focus of this Discussion Paper.

Scottish Government statistics show that at least 2,204 "repossession" cases were initiated in the Scottish courts in 2019/2020. The law governing this form of debt enforcement should provide an effective, efficient procedure which incorporates appropriate protection for the most vulnerable debtors. Much of the current legislation dates back over 50 years, however, and has been made more complex by piecemeal amendments over the years. It is questionable whether the current regime remains fit for purpose.

In this paper we propose a new, streamlined scheme for enforcement of heritable securities in Scotland. We consider in detail:

- the circumstances which should trigger a security holder's right to take action against a debtor;
- the steps a security holder must take prior to exercising the security, including enhanced protections available to debtors who are at risk of losing their homes;
- the remedies available as a result of the security, including the power to collect rent from tenants where the mortgaged property is leased, the power to eject occupants and sell the property, and the power to foreclose (where the security holder takes ownership of the property itself);
- the expenses of enforcement action and how these should be met.

We also consider issues of ranking between securities (where more than one security has been granted over the same property).

We seek views from consultees on 69 questions, including:

- whether security holders should be subject to a duty to conform with reasonable standards of commercial practice when exercising remedies?
- which debtors and properties should qualify for enhanced protection under the scheme?
- how should a new “default notice” system operate to ensure a debtor has fair warning that a security holder may take action?
- should a security holder be allowed to exercise any remedies as a result of the security other than sale of the property, collection of rental income from the property, or foreclosure?

While the general ethos of the project is to aim for “evolution, not revolution” in the law, our provisional proposals are designed to achieve substantial improvements across the enforcement process as a whole.

The Commission is very keen to hear from everyone with an interest in the issues raised in the Discussion Paper, including individuals with home mortgage loans, small and medium sized enterprises, third sector organisations who work with debtors, and legal practitioners and academics. Comments can be made until 1 April 2022, and will help shape the recommendations to be made in our final Report.

Professor Frankie McCarthy, the lead Commissioner, said:

“It is a fact of life that lenders will sometimes have to exercise their mortgage rights to recoup money owed. It is vital for both borrowers and lenders that the law is as clear as possible on how this can happen, and that appropriate protection is given to debtors, particularly where they may be at risk of losing their home. This Discussion Paper asks important questions about how to improve the current law and strike the right balance between the interests of borrowers and lenders. We hope to hear from a wide range of people to ensure our eventual recommendations for reform take into account the needs of everyone with an interest in mortgage law in Scotland.”

FURTHER INFORMATION

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. We recommend changes that will improve, simplify and update the law of Scotland. The Chair of the Scottish Law Commission is the Rt Hon Lady Paton, a Senator of the College of Justice. The other Commissioners are David Bartos, Advocate; Professor Gillian Black; Kate Dowdalls QC and Professor Frankie McCarthy. The Interim Chief Executive is Charles Garland.
2. This is the second of three consultation exercises in the Scottish Law Commission’s Heritable Securities project. The first Discussion Paper considered pre-default issues. It was published in June 2019 and is available on our website at: https://www.scotlawcom.gov.uk/files/2115/6078/4827/Discussion_Paper_on_Heritable_Securities_-_Pre-default_DP_No_168.pdf.
3. We expect to publish a third Discussion Paper in early 2023 which will deal with two complex, technical issues in the law of heritable securities, namely sub-security arrangements and security over non-monetary obligations.
4. Further information can be obtained by contacting the project manager Stephen Crilly, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131; email info@scotlawcom.gov.uk).

5. The paper will be available on our website at <https://www.scotlawcom.gov.uk> as early as possible on 17 December 2021.