These notes relate to the Mortgage Rights (Scotland) Act 2001 (asp 11) which received Royal Assent on 25 July 2001

MORTGAGE RIGHTS (SCOTLAND) ACT 2001

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive (with the approval of Cathie Craigie MSP, who was the member in charge of the Bill for this Act), in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

3. To assist the reader, a glossary of the terms used throughout the Explanatory Notes is provided at the end of the Notes.

THE ACT

Background

4. Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970 created the standard security (commonly known as a mortgage) as the only means of securing a debt over land and buildings. The 1970 Act sets out twelve standard conditions that the parties to a standard security are required to adhere to (either as set out in the Act or as varied by agreement between the parties). The first seven of these conditions concern the maintenance of the value of the secured property and place certain obligations upon the debtor which the creditor can carry out if the debtor fails to do so. The remaining conditions deal with the creditor's rights to enforce the security (e.g. to pursue payment of arrears from the debtor) and allow the creditor to recover from the debtor any expenses incurred in exercising those rights.

5. Where the debtor defaults on mortgage repayments or otherwise fails to carry out obligations under the standard security, the bank or building society or other creditor can take action to (among other things) sell or enter into possession of the property. The 1970 Act provides for three distinct processes which can be used by creditors when they seek to enforce their rights - a calling-up notice, a notice of default and a warrant under section 24 of the 1970 Act. Where a debtor is in arrears, the creditor may also apply under section 5 of the Heritable Securities (Scotland) Act 1894 to eject the debtor from the property. These processes are outlined briefly in the glossary at the end of these Notes.

Outline of the Act

6. Where a creditor has taken enforcement action (as described above) over property used for residential purposes, the Act makes provision for the sheriff court, on the application of the debtor or certain other persons, to suspend the enforcement process in appropriate cases. In deciding whether to do so, the court is required to consider whether—

- the applicant might be able to repay the debt or arrears, or fulfil the obligations under the standard security, within a reasonable time so as to keep their home, or
- the enforcement process should be delayed to give the applicant and others staying at the property time to find alternative accommodation.

7. The Act also provides for the debtor, the proprietor (if different) and the occupier of the property to receive notice of any enforcement action and encourages them to obtain legal advice on their rights. Any order made by the sheriff has to be sent for recording in the Register of Inhibitions and Adjudications.

Section 1 Application to suspend enforcement of standard security

8. Where a creditor has issued a calling-up notice or a notice of default, made an application under section 24 of the 1970 Act or commenced proceedings under section 5 of the 1894 Act, this section allows the debtor or the proprietor (where the proprietor is not the debtor) to apply to the court for an order under *section 2*suspending the creditor's rights of enforcement. A debtor or proprietor can apply only where the property subject to the security is that person's sole or main residence.

9. The section also allows the debtor's or proprietor's non-entitled spouse to apply to the court where the security subjects are the sole or main residence of the non-entitled spouse, whether or not it is the sole or main residence of the debtor or proprietor.

10. This section also allows an application to be made by a person living together with the debtor or proprietor as husband or wife or in a same sex relationship with the characteristics of husband and wife (who is referred to in these Notes as a "partner"). The partner of the debtor or proprietor may apply where the security subjects are the sole or main residence of both the debtor or proprietor and the partner (and, in such a case, no further tests require to be met before the partner can apply). Where the security subjects are no longer the sole or main residence of the debtor or proprietor, the (former) partner can only make an application if (a) the security subjects are still his or her sole or main residence, (b) he or she lived with the debtor or proprietor throughout the six month period up to the date when the security subjects ceased to be the sole or main residence of the debtor or proprietor, and (c) the security subjects are the sole or main residence of a child under sixteen years of age of the debtor/proprietor and partner (and child here includes a step-child and someone brought up by or treated by the debtor/ proprietor and (former) partner as their child).

11. Applications to the court must be made within the time limits specified in *subsection (4)*. *Subsections (5) and (8)* make provision, in cases where a calling-up notice or notice of default have been served, for shortening the time limits with consent.

12. The effect of s*ubsection (7)* is that a creditor is not entitled to exercise rights to enforce a standard security at any time when an application under this Act is competent (or when an application has been made but not yet determined by the court).

Section 2 Disposal of application

13. Where the court considers it reasonable in all the circumstances, the court may under this section, suspend the creditor's rights to such extent, for such period and subject to such conditions as it thinks fit and/or, in the case where the application is made during proceedings under section 24 of the 1970 Act or section 5 of the 1894 Act, continue the proceedings to such date as it thinks fit. In effect, this allows the court—

- to give the applicant reasonable time to remedy the default, where (in the view of the court) the applicant is likely to be able to achieve this, or
- to give the applicant and others staying at the property sufficient time to arrange alternative accommodation and avoid risking homelessness.

14. In reaching its decision, the court will take into consideration particular factors in the overall circumstances of the case. These particular factors are the nature and the reason for the default by the debtor; the ability of the applicant to fulfill within a reasonable period the obligations under the standard security which the debtor has defaulted on; any action by the creditor to help the debtor fulfil these obligations; and the ability of the applicant and any other person living in the property to arrange alternative accommodation, thus avoiding the risk of homelessness.

15. Where the applicant clears the default while an order is in force, the standard security has effect as if the default had not occurred.

16. A calling-up notice requires the debtor to repay the whole loan rather than simply make good any arrears or rectify any other forms of default. In this case the "default" is the failure to comply with the notice. As such, if the court decided to give the applicant time to remedy the 'default', the applicant would be required to repay the whole sum borrowed and any interest, which for most debtors would be extremely difficult. So by opting to serve a calling-up notice rather than a notice of default, a creditor would effectively deprive the debtor of the opportunity of obtaining an order allowing time to clear the arrears or otherwise rectify any default. The effect of *subsection (4)(a)* is that the court may suspend enforcement of the calling-up notice until the notice expires under the 1970 Act. By attaching conditions to the order the court can thus allow the applicant to repay the arrears only, rather than the whole debt as required under the calling-up notice.

17. The section also allows the creditor or the applicant to apply to the court to change the terms of the order or revoke it, or further to continue proceedings to a future date.

Section 3 Registration of order under section 2

18. Section 3 seeks to avoid the risk of a fraudulent or accidental sale by a creditor in the face of a section 2 order suspending that creditor's rights of enforcement by requiring the clerk of the court to send a notice about the order, with a certified copy of the order attached, to the Keeper of the Register of Inhibitions and Adjudications (Registers of Scotland) for recording. Section 3 gives the Scottish Ministers power to prescribe the form and content of the notice that must be sent to the Keeper.

Section 4 and the schedule Notices to debtors, proprietors and occupiers

19. *Section 4*amends the forms used in connection with a calling-up notice or notice of default and provides for notices to be given to the debtor and proprietor where a creditor applies to the court for a warrant under section 24 of the 1970 Act or commences proceedings under section 5 of the 1894 Act. The section also provides for a notice to be sent in each case to the occupier of the property. The latter notices contain wording designed to bring matters to the attention of spouses and partners. The notices, which will be sent by recorded delivery, inform each party of their rights and advise them to consult a solicitor. They also inform them that advice, including advice about managing debt, is also available from Citizens Advice Bureau or other advice agencies. The wording of the notices is given in the *schedule* to the Act.

Sections 5 to 7

20. These sections contain formal provisions about Crown application, inter -pretation, short title and commencement. Under *section 7*, the Act is to come into force on a day specified by the Scottish Ministers by way of statutory instrument. The commencement order may include transitional, transitory and savings provisions.

GLOSSARY OF TERMS

21. A **standard security** is the legal agreement that secures the money borrowed (the debt) from a bank, building society or other creditor on an interest in land (usually a property

such as a house). A standard security is the legal term in Scotland for what is commonly called a mortgage and can be secured to borrow money for the purchase of a property or for some other reason such as to pay for a wedding or a new car.

22. A debtor **defaults** when they fail to comply with an obligation under the standard security, most commonly by failing to keep up mortgage repayments. Other defaults include failure to maintain the property and renting out the property without obtaining the consent of the creditor.

23. There may be cases where the debtor does not own the property which is used as security for the money borrowed. In such cases the owner is the **proprietor** and the debtor takes on the obligations of repaying the loan.

24. Where one spouse has the right to occupy the matrimonial home either as owner or as tenant of the property and the other spouse does not have that right, that other spouse is the **non-entitled spouse**.

25. A **calling-up notice** is issued by the creditor and requires the debtor to repay the whole sum borrowed and any interest within two months. The creditor may be entitled to serve a calling-up notice even where the debtor is not in default, but failure to comply with the notice is itself a default. A calling-up notice expires five years from the date of the notice or from the date of the last offer for sale, if the creditor exercised the right to sell.

26. A **notice of default** is issued by the creditor and requires the debtor to remedy the default within one month. A notice of default expires five years from the date of the notice.

27. The creditor can apply to the court for a **warrant under section 24** of the 1970 Act to obtain the right to exercise any of the remedies available to the creditor when the debtor is in default. Remedies include undertaking necessary maintenance to the property and selling the property to pay off the outstanding debt.

28. The creditor can apply to the court under **section 5** of the 1894 Act to eject the debtor where the debtor is in arrears and still occupies the property.