

Scottish Government submission of 28 November 2023

PE2060/A: Review existing legislation and legal remedies against trespassers

The petitioner urges the Scottish Government to review and revise existing legislation to offer better protection against trespassers. The following information may be helpful to inform the Committee's consideration of PE2060.

Trespass can be considered as either entering or remaining in property owned by someone else without having received permission to do so. Depending on the specific circumstances, trespass can be dealt with through the civil law as well as through the criminal law. Underpinned by common law principles, the Trespass (Scotland) Act 1865 (the 1865 Act) criminalises certain conduct that amounts to what can be described as trespass. The offence in the 1865 Act is disapplied in respect of the exercise of rights under the Land Reform (Scotland) Act 2003.

A number of specific suggestions are proposed. The petitioner suggests homeowners should be absolved of responsibility for injuries or inconvenience caused to trespassers.

In general terms, there is no general criminal law exemption that permits, for example, homeowners to use violence or force against trespassers. The use of reasonable force against a person who is house-breaking can be justified on occasion; however it will always be for the police and prosecutors to assess the specific circumstances of any situation arising and this is in respect of a person house-breaking rather than trespassing a property.

To succeed in a personal injury claim in Scotland the claim must meet the following criteria: a third party must have owed you a relevant legal duty; the duty must have been breached; and you must have suffered injury as a result of that breach.

Under the Occupiers Liability (Scotland) Act 1960, an 'occupier' of land has a duty to show care towards people on that land in relation to dangers connected with the state of the land or anything being done there. The care required is such care as is reasonable in the

circumstances to see that the person will not suffer injury as a result of such dangers. This duty of care is the same regardless of whether or not an individual has permission to be on the occupier's land, but factors such as the foreseeability of unauthorised entry and any steps taken to prevent unauthorised entry and to warn of dangers may be of relevance in determining whether or not reasonable care has been taken in the particular circumstances. Any personal injury claim will turn on the particular facts and circumstances including whether the person who suffered the injury contributed through their own negligence. You may find the information in the following guide of interest.

[Brief guide to occupiers legal liabilities in Scotland in relation to public outdoor access.pdf \(outdooraccess-scotland.scot\)](#)

The petitioner also suggests there should be easier access to interdicts. A person can apply to the civil courts in Scotland at the moment for an interdict. Legal aid may be available when making any such application. An interdict can protect the applicant by prohibiting the other person from doing certain things, including being on or using the applicant's land or property. The decision on whether or not to grant an interdict is for the court. Before granting an interdict or an interim (temporary) interdict, the court would need to be satisfied that doing so would protect the applicant's rights for example because there is a reasonable likelihood that a wrong previously committed will be repeated, and it is clear what the interdicted person is being told not to do.

There is a proposal from the petitioner that criminal charges should be able to be sought where 'demonstrable distress' arises, with a particular mention made of vulnerable people. Without further detail it is difficult to understand the specifics of what may be sought here. [Section 3 of the 1865 Act](#) provides for certain circumstances in which criminal liability in respect of trespass in Scotland currently arises.

Finally, there is a request by the petitioner for lower evidential burdens to prove trespass. It is worth noting exactly what evidential burden operates in respect of the law relating to trespass will depend on the nature of the legal process e.g. a criminal offence carries a differential evidential burden than a civil law matter.

I hope this reply is helpful to the Committee's consideration of PE2060.

Criminal Justice Division