



Law Society
of Scotland

Consultation Response

Discussion Paper on Heritable Securities: Non-monetary securities and sub-securities.

September 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Banking, Company & Insolvency, and Property & Land Law sub-committees and Property Law committee welcome the opportunity to consider and respond to the Scottish Law Commission Discussion Paper (Report 175) on Heritable Securities: Non-monetary securities and sub-securities¹.

We have the following comments to put forward for consideration.

Consultation questions

Question 1. What information or data do consultees have on:

(a) the economic impact of the current legislation on heritable securities in relation to transactions involving non-monetary securities or secondary standard securities?

We have no comments.

(b) the potential economic impact of any option for reform proposed in this Discussion Paper? (Paragraph 1.21)

We have no comments.

¹ [Report on Heritable Securities \(Report No 175\) \(scotlawcom.gov.uk\)](https://www.scotlawcom.gov.uk/reports/175)

Question 2. Which of the following approaches do consultees prefer and why?

(a) A standard security may not secure a non-monetary obligation, but it may secure an obligation to pay damages for non-performance of that obligation.

**(b) A standard security may secure a non-monetary obligation, but the security will entitle the holder only to damages for non-performance of that obligation.
(Paragraph 3.12)**

Our preference is option (b), as this aligns with current practice. We agree with the reasons for adopting this approach stated in the SLC's first discussion paper.

Question 3. If a standard security under any new legislation entitles its holder only to monetary remedies:

(a) Is specific provision required to deal with the ranking of such a security?

We do not think that specific provision is required to deal with the ranking of such security. General default rules of ranking will ordinarily apply to such a security in competition with other rights. In addition, ranking arrangements can be used to determine the respective priorities of different secured parties, as is currently the case.

(b) If so, what provision is required? (Paragraph 3.17)

Question 4. Should the law provide a means by which contractual obligations to transfer or grant subordinate real rights in land can be protected beyond the usual contractual remedies? (Paragraph 4.14)

Yes, we think that such obligations should be protected beyond the usual contractual remedies.

Question 5. Which of the following approaches do consultees prefer?

(a) A party wishing to protect the priority of an obligation to transfer or grant a subordinate real right in land should continue to take a standard security in respect of that obligation and rely on the rule against offside goals to protect that obligation.

(b) The law should be reformed to provide a bespoke mechanism for protecting the priority of an obligation to transfer or grant a subordinate real right in land. (Paragraph 4.20)

Of these two choices, we prefer option (b). We do not think that the standard security (at least in its current form) is the best mechanism to protect the priority of an obligation to transfer or grant a subordinate real right in land.

Question 6. If a new form of notice is introduced to protect the priority of obligations to transfer land or grant a subordinate real right, should this be known as a conditional advance notice? If not, what name should be used?

We are concerned that “conditional advance notice” is too similar to “advance notice” and may cause confusion. We would suggest that another term is used, such as “conditional notice”.

We note more generally that the proposals look to build upon the advance notice system introduced under the Land Registration etc. (Scotland) Act 2012. We consider that there would be merit in exploring a new or distinct framework to achieve something different, rather than this being based on modifying the current advance notice system.

We note the reference at paragraph 4.52 of the Discussion Paper to the use of restrictions in the land registration system of England and Wales. If a distinct framework is developed in this area, we consider that there could be benefits in sharing similarities with this system.

Question 7. If a conditional advance notice scheme is introduced:

(a) Should the conditional advance notice include the same content as the advance notice?

We agree that the content of the conditional advance notice should be substantially the same as the advance notice.

(b) Should the conditional advance notice also include identification of the contract or undertaking in which the obligation to grant the intended deed is set out?

Yes, we believe that the conditional notice should clearly identify the contract or undertaking in which the obligation to grant the intended deed is set out.

(c) Should any further information be included in the conditional advance notice? (Paragraph 4.39)

We consider that the conditional advance notice should also set out the nature of the obligation that is the subject of the notice.

Question 8. If a conditional advance notice scheme is introduced:

(a) Should it be possible for an application for a conditional advance notice to be made by the person with the power to validly grant the intended deed?

Yes, we agree.

(b) Should it be possible for an application for a conditional advance notice to be made by any other person? If so, which person and why?

We consider that the potential grantee should also have the ability to apply for a conditional advance notice with the consent of the potential grantor.

Question 9. If a conditional advance notice scheme is introduced:

(a) Where the intended deed relates to a property in the Land Register, should a conditional advance notice be entered on the title sheet of that property?

Yes, we agree.

We also note generally that it is essential that any new notice shows up in property searches for so long as the notice exists.

(b) If so, in which section of the title sheet should it be noted?

On balance, we think it would be sensible for a conditional advance notice to be included in the securities section.

c) If not, where in the Land Register should the conditional advance notice be located?

(d) Where the intended deed relates to a property in the Register of Sasines, should a conditional advance notice be recorded in that Register?

Yes.

Question 10. If a conditional advance notice scheme is introduced:

(a) What should be the duration of the protected period and why?

While we can see some merit in having a protected period of five years, as it aligns with the period for inhibitions, we have concerns about the risk of conditional advance notices being inadvertently extinguished due to the need to extend them.

We consider that a longer period than the suggested 5 years would be required, noting in particular that having a fixed protected period of e.g. 5 years would place the grantee in a worse position than under the current law. Any proposed new system should improve the current framework and improve parties' rights.

An alternative approach might be to allow for bespoke durations which would avoid having to renew every five years but with a maximum period of e.g. 50 years.

The use of options in housebuilding projects is an example of why the duration of the protected period would merit being longer than 5 years. As a local plan cycle is 10 years, parties would want the relevant option to cover sufficient timescales for the local plan allocation, plus a planning application. This means that 10 – 15 years could be needed from signing an option to triggering it, having achieved planning consent for a greenfield site.

(b) At the end of the protected period, should it be possible to extend the period by the same fixed duration? If not, why not?

Yes, if there is to be a fixed duration, it should be possible to extend the period by the same fixed duration.

(c) Should it be possible for the person intending to grant the deed to extend the period of the notice? Should it also be possible for the intended grantee of the deed to extend the period of the notice? If not, why not? (Paragraph 4.61)

We think it should be possible for either the intended grantor or the intended grantee to extend the period of the notice.

Question 11. If a conditional advance notice scheme is introduced:

(a) Should the priority of the deed specified in the notice be protected against any voluntary competing deed registered during the protected period? If not, why not?

Yes, we agree.

We would welcome further information on the scope or definition of the term “competing deed” and consider that there may be merit in this being defined. For example, clarity would be welcomed on whether this would include deeds of conditions or servitudes registered during the lifetime of the notice (or if not, on the interaction/effect of the notice in relation to such deeds).

(b) Should performance of the obligation to deliver the deed specified in the notice be protected against any voluntary competing deed registered during the protected period? If not, why not?

Yes, we agree with the Scottish Law Commission and believe that both the priority of the deed and performance of the obligation to deliver the deed should be protected against any voluntary competing deed.

Question 12. If a conditional advance notice scheme is introduced, should the priority of the deed specified in the notice be protected against:

(a) Any involuntary competing deed registered during the protected period?

While we can see merit in the arguments advanced in the Discussion Paper regarding giving involuntary competing deeds priority over a conditional advance notice, this is weaker than the protection available under a standard security. Consequently, it would incentivise the obtaining of a standard security in addition to, or in place of, a conditional advance notice. It also raises the question of whether a more effective reform would be to amend the law regarding standard securities to give effect to the secured obligation rather than introduce a conditional advance notice.

(b) An inhibition, or another entry in the Register of Inhibitions which takes effect as if an inhibition, during the protected period? Please provide reasons in support of your answers if you wish.

Our answer to (a) above also applies (modified accordingly) to this question.

Question 13. If a conditional advance notice scheme is introduced, should it be provided that:

(a) Where the claim protected by the notice is assigned, the assignee acquires the right to the notice;

Yes, we agree.

(b) The intended grantee of the protected deed has the power to apply for transfer of the notice, and must do so where necessary to transfer the notice following assignation of the protected claim?

Yes, we agree. This would align the position with that under section 16 of the Moveable Transactions (Scotland) Act 2023².

Question 14. If a conditional advance notice scheme is introduced:

(a) Should provision be made for discharge of the notice as under the advance notice scheme, subject to the reform of the requirement of consent from the intended recipient?

Yes, we agree.

(b) Should the intended recipient be required to consent to the discharge application in writing?

Yes, we agree.

(c) Should a court process be available for discharge where the intended recipient cannot be found, fails to respond or refuses to consent?

Yes, we agree.

Question 15. Do you have any comments on the use of conditional advance notices in relation to purchase options held by tenants in respect of the property they lease?

We have no strong views on this.

We would highlight more generally that if the new notice is not to apply to such purchase options in leases – and they are not declared to be inter naturalia or protected under the legislation resulting from the Aspects of Leases consultation – we would welcome consideration of how to address any gap in protection. We note that such purchase options can be very valuable to tenants, for example in ground

² [Moveable Transactions \(Scotland\) Act 2023 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

lease situations where the purchase option can be exercised when the tenant has complied with development obligations.

Question 16. Is further exploration required of the potential to protect obligations to transfer land by way of a standard security, a personal real burden or an inhibition? If so, why? (Paragraph 5.24)

Given some of the issues identified above, the standard security regime could be reformed as a means of fulfilling such obligations, instead of or in addition to introducing conditional advance notices.

Question 17. In what circumstances is a standard security taken over a standard security in practice?

This is quite rare in practice but, as indicated in the Discussion Paper, sometimes takes place in securitisation transactions.

Question 18. Should the grant of a standard security over a standard security cease to be competent? If not, why not?

We broadly support the logic of the position outlined in the Discussion Paper and think there is merit in replacing the granting of a standard security over a standard security with the possibility of assigning a standard security for security purposes.

Question 19.

(a) Should it be possible to assign in security a standard security?

Yes, we agree.

(b) If so, what consequences should follow from such an assignation in security?

We agree that a standard security should be viewed as accessory to a secured claim and the security will ordinarily follow the assignation of the secured claim, subject to completion of formalities. However, this

should be considered subject to alternative provisions in practice, e.g. if the parties wish to separate the secured claim and the security (e.g. for enforcement purposes).

We believe it would be helpful to have legislative provision directly relating to heritable property to confirm the position and this is preferable to relying upon the provisions of the Moveable Transactions (Scotland) Act 2023 or expressly seeking to extend the scope of that Act.

For further information, please contact:

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