



Law Society
of Scotland

Consultation Response

Scottish Law Commission call for comments on the
draft Moveable Transactions (Scotland) Bill

August 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Banking, Company & Insolvency Sub-committee, Intellectual Property Law Sub-committee, Obligations Law Sub-committee and Rural Affairs Sub-committee welcome the opportunity to consider and respond to the Scottish Law Commission's *call for comments on the draft Moveable Transactions (Scotland) Bill*.¹ The Sub-committees have the following comments to put forward for consideration.

General remarks

The Law Society welcomes the consultation on the draft Bill and the ongoing opportunity for engagement on this important issue. We responded fully to the Scottish Law Commission's initial consultation in 2011. Since then a number of our Committee members who are experts in their field have provided detailed input to the Commission's work on an ongoing basis. Our comments on this consultation are accordingly high level but we are pleased to support the modernisation of Scots law in relation to security and assignation of moveable property which this Bill would bring about.

We are aware that there is strong support for these changes across the profession and would encourage the Scottish Government to bring forward legislation in this area in line with the Commission's recommendations. The time dedicated by many legal professionals to the Commission's reform project further evidences the importance of the reforms to ensure that the Scottish legal system is fit for purpose and reflects modern commercial realities, in particular in relation to the increasingly electronic nature of communications and commercial transactions.

We consider that the Bill as a whole presents a modern, balanced and practical set of reforms that should provide benefits to Scottish businesses - including, and perhaps especially, SMEs - while protecting

¹ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/security-over-corporeal-and-incorporeal-moveable-property/>

consumers. We also welcome the making of specific provision for entities actually or potentially subject to insolvency proceedings.

Assignment of claims

We welcome the modernisation of Scots law relating to the assignment of claims.

The alteration to the requirement of intimation to allow assignment to be given legal effect through registration provides a more practical mode of assignment which we consider is better suited to modern commerce. In addition to facilitating assignment, the electronic nature of the register should also allow records to be searched more easily. The issue of transparency is key and we would encourage the Scottish Government to take steps to publicise the changes which the new Register of Assignations would bring about.

Assignment of receivables is a commonly used funding tool for businesses, with property rights in the receivables being controlled by contract between assignor and assignee (with detailed arrangements covering the scenario where A is paid instead of B). The new regime would facilitate this and consumer protection legislation would continue to apply to protect consumers who are borrowing.

At present the debtor is protected when paying to the assignor until notified and is then protected by the notification and this sensible rule would appear to continue. Registration in and of itself would be most useful between assignees and on assignor insolvency but in practice we expect that notification would be likely to take place in addition to registration if there were concerns about the management of debtor payments. Often this would not be the case as the assignor would commonly continue to manage collections from debtors on behalf of registered assignees anyway.

We also note that issues could arise with double assignment of claims. However, this would require fraud on the part of the double assignor; it is a known risk of the existing system. The risk of multiple assignment fraud could in fact be reduced in comparison to the current position by the practicalities of registration if this succeeds in facilitating searches which would identify prior registrations of rights.

Security over moveable property

We welcome the legislation relating to pledges and the creation of a statutory pledge.

We support the Commission's decision to limit the statutory pledge (so far as relating to incorporeal property) to financial instruments and intellectual property, at least for the time being, for the reasons set out in the covering note.

We note that the proposed Scottish legislation will interact with the UK legislation on registered intellectual property rights, especially the Patents Act 1992 and the Trade Marks Act 1994. However, it is not clear what would happen if a Scottish statutory pledge of a registered intellectual property right were to be registered in the Register of Statutory Pledges but did not appear in the UK Register of Patents or, as the case might be, Trade Marks. It might be helpful if the legislation clarifies that registration in the Register of Statutory Pledges is not sufficient to transfer the patent or trademark in itself.

We agree that a statutory pledge effectively registered before the attachment of a floating charge should normally rank above that floating charge for the purposes of insolvency. We also support the creation of the statutory pledge as conferring a real right in security which should be included as a fixed security right for the purposes of insolvency law.

Furthermore, we welcome the introduction of a Register of Statutory Pledges. However, some practitioners have also voiced concerns that statutory pledges granted by entities registered with Companies House would need to be registered in the Companies House register – both in the interests of transparency and to ensure that the Companies House register contained all relevant information – and further as to the eligibility of this new type of “pledge” for registration with Companies House.

Consumers

The ban on assigning salaries and restriction on granting a statutory pledge over goods worth less than £1000 seem to offer sensible consumer protections, in addition to the continued application of consumer protection legislation mentioned above.

Agricultural charges

Practitioners report that agricultural charges under the Agricultural Credits (Scotland) Act 1929 are not frequently used in practice. Accordingly we have no objections to the repeal of this legislation as proposed.

For further information, please contact:

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² Sections 31, 68 and 69

³ Section 25