**Moveable Transactions (Scotland) Bill**

Stage 1 Briefing

December 2022

**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.

The Moveable Transactions (Scotland) Bill[[1]](#footnote-1) (the Bill) was introduced by the Cabinet Secretary for Justice and Veterans, Keith Brown MSP, on 25 May 2022. In August 2022 we responded to the Financial Memorandum on the Bill from the Finance and Public Administration Committee Calls for Views[[2]](#footnote-2) and in September 2022, we responded to the call for evidence on the Bill from the Delegated Powers and Law Reform Committee[[3]](#footnote-3). We also gave oral evidence on the Bill to the Delegated Powers and Law Reform Committee on 4 October 2022[[4]](#footnote-4).

We note that the Delegated Powers and Law Reform Committee published the Stage 1 report on the Bill on 2 December 2022[[5]](#footnote-5).

We now welcome the opportunity to provide comment on the Bill ahead of the Stage 1 debate which is due to take place on 13 December 2022.

**General comments**

The Bill seeks to modernise Scots Law on moveable transactions and implements the Scottish Law Commission Report on Moveable Transactions (Scot Law Com No. 249)[[6]](#footnote-6) which was published in December 2017. The Bill aims to change the law concerning moveable property on assignation of claims (i.e. the transfer of a claim from one person to another), and pledges (i.e. a type of security).

We are pleased to support the modernisation of Scots law in relation to security over and assignation of moveable property. We consider reform in this area to be a priority.

We consider that the Bill removes a competitive disadvantage for Scottish businesses in comparison to their English counterparts. We have seen that parties have incurred difficulties in raising finance on moveable property in Scotland, and this creates difficulties for parties accessing finance in Scotland, which impacts negatively on the business sector.

We are aware that there are several categories of assets over which lenders are unwilling to provide access to finance to Scottish companies or in respect of Scottish assets. We have set out in detail elsewhere the benefits that we believe the Bill will provide to various asset classes and would be happy to reiterate the benefits to particular asset classes if at all helpful. In particular, though, we note that difficulties have also arisen where lenders would not let corporate groups incorporate Scottish companies because of difficulties taking securities over their shares, however similar concerns did not apply to English and Channel Islands companies.

We acknowledge that transactions still occur in respect of Scottish assets and to Scottish businesses, however we believe that the existing legal rules provide an extra level of cost and administration which makes it more expensive to operate within Scotland than it is within England, and we consider that the Bill is an important step to redressing this balance. It is, of course, possible that industries utilising such existing workarounds will continue to do so, rather than utilise the new registers created by the Bill. However, it is our view that corporate transactions will heavily utilise both new registers that will be created by the Bill.

We also consider that there is a difficulty with the unclear rule arising from case law which provides that you need actual rather than constructive delivery to constitute a pledge. This is a particular problem for small distillers where the spirit is held by a third-party custodian, as it means that such goods cannot be pledged without being physically delivered to the creditor. We are of the view that this rule would be effectively repealed by the Bill.

We have already provided a number of detailed comments on the Bill, some of which are set out below. We have, though, two key items of concern in respect of the Bill:

1. We consider it to be vital that shares and other financial instruments can be made subject to a statutory pledge, either by direct incorporation or via interaction with the UK Government. It is obviously not for us to opine on the competence of the Scottish Parliament, and so we take no position on which of these routes should be followed; and

2. We consider that protections to consumers in respect of statutory pledges need to be revisited. We have expressed a preference for this to be resolved by increasing the minimum value threshold for an item to be subject to a statutory pledge.

We are of the opinion that the search functionalities and provisions of the registers should be amended to also include the registered number of a business entity (company, limited partnership, or limited liability partnership (LLP)), as names can change but these numbers remain constant, and the search functionality should be added to the search function in respect of an individual (name, month, and year of birth).

We believe that searching by security granter is the most important part. The registers have some inherent limitations – they are registers of transactions rather than registers of assets (like the Land Register) or registers of persons (like Companies House). The registers will not – and cannot – be definitive statements that the assets underpinning them (a) originally existed, (b) are owned by the party purporting to grant the right, or (c) that the right/asset still exists. This is further compounded by the fact that the Bill allows for future assets to be subject to the relevant rights (which may not be specified in the document), and for the relevant rights to be created over classes of assets rather than requiring specific assets to be listed.

We note this is not a problem, however we believe that it does mean that searching by assets can never be definitive. We also consider that parties will not insert any additional information when registering the asset, as parties will provide the information required by statute and parties will wish to avoid the risk of inaccurate information.

We believe that that it would be helpful to have a tick-box for the category of the assets covered by the pledge, particularly for large lenders, rather than requiring the listing of each asset secured. The registers also can capture future assets and those part of an identifiable class, meaning that the list of assets on the register will not and cannot ever be exhaustive and conclusive. We would also suggest a text box for comments for the end date of the pledge would be useful. Some transactions involve groups of corporate lenders acting as a syndicate, and so it would be helpful to include a tick box to be ticked if the lender is holding the pledge (or, if applicable, assignation) as a trustee for others.

We support the proposed dual system for assignation, and we believe that flexibility is key, and that this overrides the divergence of the register.

We consider it important that the provisions which enable consumers to identify the identity of the party to whom the debt has been assigned should be clear and cost free to consumers. This is particularly important during a cost-of-living crisis, where more people might be seeking support from creditors, such as payment holidays.

The Bill comprises of 118 sections and is divided into three parts.

We have the following comments to put forward for consideration.

**Specific comments on the Bill**

**Part 1**

Part 1 of the Bill sets outs the Assignation provisions. Chapter 1 concerns Assignation of claims (sections 1 to 9), Protection of Debtors (sections 10 to 14), Accessory security rights (section 15), Abolition of certain rules of law (section 16) and Saving (section 17). Chapter 2 concerns the Register of Assignations and Chapter 3 concerns the Miscellaneous and Interpretation of Part 1.

We note the provisions on Assignation, as set out in sections 1 to 9 and the creation of the Register of Assignations in section 18.

We suggest that the provisions of sections 1, 43, 46 and 56 require an equivalent provision to section 2(4), to clarify that cross reference to another document for the assigned claim/pledged property is competent. We wish to re-iterate that the ability to assign/pledge categories of items, and future items, means that neither register (the Register of Assignations and the Register of Statutory Pledges) can ever itself be a complete source of information in respect of claims assigned or items pledged.

We note the content of section 4 regarding the Assignation of claims for insolvency, and we consider that section 4(6)(a) should refer to a “protected trust deed” being registered, rather than any other less formal mechanism. Similarly, we consider that debt payment programmes and voluntary arrangements should only be relevant if they affect all the assignor’s liabilities, and regarding section 4(6)(b), we believe that consideration should also be given to the inclusion of arrangements under Part 26A of the Companies Act 2006 (Restructuring Plans). We also believe that the same comments apply in relation to section 47.

In addition, regarding the capacity of assignees and pledgees, it is possible for creditors to hold claims/pledges as trustees and/or agents for themselves and other creditors. We believe that both registration systems should be able to accommodate this (for example by a tick-box mechanism if the creditor is holding the right as agent or trustee), as it is an important part of corporate debt transactions.

We note the provisions of section 6 (Limitations as to assignability: general) and section 8 (Intimation of the assignation of a claim), and we consider that assignations which are linked to an underlying claim and are assigned will be subject to their own terms (in the same way that the amount that Person A owes to Bank B is subject to terms entered into between Person A and Bank B). We believe that sections 6 and 8 should both be made subject to such terms, to avoid mandatory proposals of sections 6 and 8 overriding commercially agreed terms.

We note the provision of section 10 (Protection of debtor who performs in good faith). Section 10 protects a good faith debtor, as it states that being notified of the assignation does not necessarily mean a debtor is not a good faith debtor. We believe that this has merit, however in such circumstances, we think that the onus should be on the debtor to demonstrate that they are in good faith, to give certainty to lenders.

We note the statutory pledge provisions, under sections 43 to 48.

We support the dual system for assignation - we believe that flexibility is key, and that the merits of this overrides the likely divergence of the register as a result of the dual system. The alteration to the requirement of intimation to allow assignation to be given legal effect through registration provides a more practical mode of assignation which we consider is better suited to modern commerce. We do, though, have some additional points to make in relation to the system’s proposed application to consumers.

We consider it important that the provisions which enable consumers to identify the party to whom the debt has been assigned should be clear and cost free to consumers. This is particularly important during a cost-of-living crisis, where more people might be seeking support from creditors, such as payment holidays.

We acknowledge that section 10 of the Bill (Protection of debtor who performs in good faith) offers a notable degree of protection in this area, as it will mean that if a debtor is not aware of a transfer that has taken place (including following registration of an assignation) and they perform in good faith to the assignor, they will still be discharged from the claim to the extent of the performance.

**Part 2**

Part 2 of the Bill relates to Security over Moveable Property. Chapter 1 concerns the Pledge (sections 40 to 41), Possessory pledge (section 42), Statutory pledger (sections 43 to 48), Property encumbered by statutory pledge: effect of transfer by provider (sections 49 to 53), Rights relating to matrimonial or family home where relevant to a statutory pledge (section 54), Assignation, amendment, restriction or extinction of statutory pledge (sections 55 to 57), Ranking of pledges etc. (sections 58 to 60), Enforcement of the pledge (sections 61 to 76), and Liability for loss suffered by virtue of enforcement (section 77), and Service of documents for purposes of Chapter 1 (section 78).

Chapter 2 concerns the Register of Statutory Pledges (section 79), Structure and contents of the register (sections 80 to 82), Registration Process (sections 83 to 88), Effective registration (sections 89 to 92), Duration (section 93), Corrections (sections 94 to 101), Searches and extracts (sections 102 to 104), Request for information (sections 105 to 106), Entitlement to compensation (sections 107 and 108), and rules (section 109).

Chapter 3 of Part 2 sets out the Miscellaneous and Interpretation of Part 2.

We note that section 50 (Extinction of statutory pledge where dealings inconsistent with a fixed security) provides that a pledge can be released if the secured creditor acquiesces to the sale of the property. We consider that clarity as to acquiescence is required – it is possible in large financial institutions that (a) one part provides acquiescence without appreciating the legal ramifications, or (b) that such acquiescence be provided on the assumption that it does not constitute the legal release itself (merely an agreement to effect such release, which may be associated with conditions (e.g. partial repayment of debt)).

We note the provisions of section 74 (Appropriation: unencumbered acquisition) and we believe that more attention needs to be given to the consequences where a secured creditor appropriates property. The provision states that the secured creditor acquires the property unencumbered by any right in security or diligence. As prior ranking creditors may not receive payment by virtue of for example section 75(3), we consider that it ought to be provided that the secured creditor appropriating the property should either make payment to such creditors up to the value of their prior ranking debts or the value of the appropriated property, whichever is less.

In relation to section 76 (Mandatory application for removal of an entry from the statutory pledges record), section 76(1)(c) provides for effects if the pledge has been extinguished by virtue of diligence being executed against the property. We consider that it is not clear that diligence extinguishes the pledge, and we suggest that the section should be clarified to provide that this only applies to prior-ranking diligence.

We doubt the utility of being able to search against property or claims other than by reference to unique numbers as suggested by the Scottish Law Commission for vehicles for the purposes of section 102(2)(b) (Searching the statutory pledges record). We believe that such a search result can never be conclusive, as the search can never show that a result of such identification means that the right still sits where vested/the pledge is still valid, or that a blank result means that there is not a valid pledge or assignation.

We suggest that any ability to search against property will need to be heavily caveated to avoid risk of confusion for the public.

We have concerns about statutory pledges in the business to consumer space, if consumers were to be actively encouraged down this route as an alternative to other consumer credit instruments which are more protective towards consumers (in the absence of such protections being extended to statutory pledges). We do note, however, that the provisions in the Consumer Credit Act 1974 regulate security rights granted by consumers (for example, sections 105-113), and will apply to the new statutory pledge and that the requirements in the Financial Conduct Authority’s sourcebook will also apply.

We note also that a court order will always be required for the enforcement of a statutory pledge granted by a consumer. We acknowledge that requiring court action to enforce a statutory pledge may be considered onerous, especially where the consumer may expressly agree to the enforcement/sale of the statutory pledge.

In addition, we believe that consumers may incur liabilities for legal expenses in such circumstances, and we accept that the statutory pledge will be particularly useful where a party already owns the collateral (as acquisition finance like hire purchase will not assist). We are concerned that consumers may end up being encouraged to borrow against essential household goods, which will result in consumer detriment if the pledged items are sold.

We are of the view that in order to support giving consumers the ability to grant a statutory pledge, personal and household items that are reasonably required by a consumer should be excluded from being the subject(s) of a statutory pledge, and we believe that the best way to achieve this is by having a limit on the value of the goods that can be used for a statutory pledge. We suggest that a limit of £3000 or £5000 be applied rather than the £1000 limit that is currently specified in section 48(3) of the Bill.

We believe that it is crucial that the regime established by the Bill applies to shares, whether included in the Bill (should it be competent to do so) or through co-operation with the UK Government through the statutory mechanisms. The Scottish Government has indicated that it intends to pursue the latter. As we stated in oral evidence to the committee, this would be a satisfactory approach provided that these reforms can be implemented at the same stage as the provisions in the Bill itself.

**Part 3**

Part 3 of the Bill sets out the Miscellaneous and General provisions. We have no comment to make.

**For further information, please contact:**

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1. [Moveable Transactions (Scotland) Bill (parliament.scot)](https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/moveable-transactions-scotland-bill/introduced/spbill15s062022.pdf) [↑](#footnote-ref-1)
2. [bci-moveable-transactions-scotland-bill-financial-memorandum-written-evidence.pdf (lawscot.org.uk)](https://www.lawscot.org.uk/media/373457/bci-moveable-transactions-scotland-bill-financial-memorandum-written-evidence.pdf) [↑](#footnote-ref-2)
3. [bci-ip-ob-con-moveable-transactions-scotland-bill-delegated-powers-and-law-reform-committee.pdf (lawscot.org.uk)](https://www.lawscot.org.uk/media/373456/bci-ip-ob-con-moveable-transactions-scotland-bill-delegated-powers-and-law-reform-committee.pdf) [↑](#footnote-ref-3)
4. SP Paper 273 [↑](#footnote-ref-4)
5. [Stage 1 Report on the Moveable Transactions (Scotland) Bill (azureedge.net)](https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2022/12/2/99faf738-a895-442c-9b12-f5ed6fb4c56c/DPLRS062022R64.pdf) [↑](#footnote-ref-5)
6. [Scottish Law Commission:: Moveable transactions (scotlawcom.gov.uk)](https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/security-over-corporeal-and-incorporeal-moveable-property/) [↑](#footnote-ref-6)