



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Economy, Energy and Fair Work Committee

**Tuesday 26 November 2019**

**Session 5**



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Pàrlamaid na h-Alba

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**Tuesday 26 November 2019**

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**ECONOMY, ENERGY AND FAIR WORK COMMITTEE**

**33<sup>rd</sup> Meeting 2019, Session 5**

**CONVENER**

\*Gordon Lindhurst (Lothian) (Con)

**DEPUTY CONVENER**

\*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

**COMMITTEE MEMBERS**

\*Jackie Baillie (Dumbarton) (Lab)

\*Colin Beattie (Midlothian North and Musselburgh) (SNP)

\*Jamie Halcro Johnston (Highlands and Islands) (Con)

\*Dean Lockhart (Mid Scotland and Fife) (Con)

\*Richard Lyle (Uddingston and Bellshill) (SNP)

\*Gordon MacDonald (Edinburgh Pentlands) (SNP)

\*Andy Wightman (Lothian) (Green)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Dr Ross Anderson

Professor George Gretton

Dr Hamish Patrick (Shepherd and Wedderburn)

Dr Andrew Steven

Bruce Wood (Morton Fraser Lawyers)

**CLERK TO THE COMMITTEE**

Alison Walker

**LOCATION**

The David Livingstone Room (CR6)



## Scottish Parliament

### Economy, Energy and Fair Work Committee

*Tuesday 26 November 2019*

*[The Convener opened the meeting at 09:48]*

### Decision on Taking Business in Private

**The Convener (Gordon Lindhurst):** Good morning, and welcome to the 33rd meeting in 2019 of the Economy, Energy and Fair Work Committee.

Agenda item 1 is to decide whether to take agenda items 3 and 4 in private. Do members agree to do so?

**Members indicated agreement.**

## Moveable Transactions Bill

09:48

**The Convener:** Agenda item 2 is the draft moveable transactions bill. I shall introduce our witnesses. Dr Andrew Steven is a former commissioner with the Scottish Law Commission, Dr Ross Anderson is an advocate, Professor George Gretton is emeritus Lord President Reid professor of law at the University of Edinburgh and a former commissioner with the Scottish Law Commission, Bruce Wood CVO is a consultant at Morton Fraser Lawyers, and Dr Hamish Patrick is head of financial sector at Shepherd and Wedderburn. Good morning, and welcome to you all.

Before we come to questions from other committee members, I will start by asking about the difference that the draft moveable transactions bill from the Scottish Law Commission would make. I note that the commission's press release said:

"Current Scottish law is badly outdated, unclear, and unduly restrictive. It inhibits economic growth by making it harder for entrepreneurs to get the finance they need."

Perhaps Professor Gretton could explain from the academic point of view why the bill is considered important by those who are involved in the field. Practitioners might then comment from a practical point of view.

**Professor George Gretton:** Thank you, convener. Yesterday, when I was preparing for this meeting, I re-read the letter that Bruce Wood wrote to *The Scotsman* about a year ago—if any committee members have not seen it, I can pass round a copy. It says the right things in the right way, and I am not sure if I could summarise it better than he did.

Scots law in the area is extraordinarily out of date, and the process has become worse as other countries have updated their law. We are badly behind English law. With the measure, we could not only catch up; we could even have a more advanced system. It has become a bit of an embarrassment. When we speak to foreign lawyers, there is a bit of eye rolling when we explain to them what Scots law is in the area. Scotland survives with workarounds, but we should not be just surviving. The Scottish economy needs something a lot better.

I could go on, but I will simply add that I do not think that the measure is controversial. There might be one or two little things in it that one could discuss but, in essence, it commands general support. I am a little surprised that it has not been taken forward very fast, particularly by a

Government that is so committed to making Scotland a business-friendly place.

I will mention small and medium-sized enterprises, because the draft bill is a pro-SME measure.

I have probably said enough for an introduction.

**The Convener:** Before we come to the practitioners, can you give us a specific example of why the law in the area is a difficulty?

**Professor Gretton:** It is difficult to access finance under the current law. Workarounds have to be used that are, like all workarounds, not terribly good. The fact that our law is so backward puts off international finance. When I was young, if a business wanted to raise finance, it would do so from Scottish institutions, but that is no longer necessarily the case; finance has become much more international in recent years. My colleagues who are in practice will tell members better than I can how our current law puts off inward investment to Scotland. Finance companies look at Scots law and say, "No, we are not touching that." It is about factoring, invoice discounting and security over tangible assets. All those things are much more difficult in Scotland than they are in many of our competitor economies.

**Bruce Wood (Morton Fraser Lawyers):** I will speak from the practical side of things and will split the answer with Hamish Patrick. I will speak about the problems that are faced by asset finance and Hamish Patrick will talk about the problems that are faced by invoice finance—we will explain what each of those is.

I will set the scene and follow on from what Professor Gretton has said.

When I was a student—you can tell by my hair that that was a certain period of time ago—I learned that Scots law focused on land and buildings in looking at the security that was given to lenders. This was by a standard security, our version of what people tend to refer to as a mortgage. In the balance sheets of businesses nowadays, across the board around 80 per cent is in intellectual property. Our law is simply not fit for raising finance on intellectual property. Hamish Patrick will talk about that.

My area, which I call asset finance, covers the things that a business needs to do its business with, such as machine tools, computer systems, truck fleets, vans or cars—the list goes on and on. Those things can be financed in Scots law by using techniques such as hire purchase and finance leasing, but they are not always appropriate or what a borrower—if we can call them that—would want to use to get the asset. They might want something as simple as a loan. We all know that people can get a loan secured

over land and buildings. That is fine if their business consists of land and buildings, but few do. If someone's business consists of a machine tool and all that they want is some money to buy that machine tool, they cannot, under Scots law, get a loan that is secured by way of a fixed security for that machine tool in the same way that they could get a loan for their house or factory that is secured by a fixed security over that house or factory.

That leads to various difficulties. First of all, it removes from the commercial area the simplest form of lending imaginable, in which a person wants the amount of money that is required to buy an asset for use in their business. Secondly—I do not want to go into too much detail on this, unless the committee wants me to—there are various areas in Scots law in which hire purchase and finance leasing are simply impossible. One of those areas is where a business already owns the asset that it wants to raise finance on. The law militates against selling that asset to the finance company and hire purchasing it back. That problem does not exist in English law. Refinancing an asset that a business already owns is difficult in Scots law.

The area that I will mention more specifically, because it leads to a very good example that I think the committee will find very uncomfortable, is what one might call "wholesale funding". I will explain what I mean by that. An SME would typically get its finance for the machine tool that I talked about from a financial institution that is not—to put it colloquially—one of the big boys. The big boys look at deals that are bigger than those that involve a small machine tool for a small business. That kind of finance is typically arranged through what one might call "intermediate finance companies"—that is, smaller finance companies whose business is the financing of equipment and assets for SMEs. Of course, those businesses in turn require finance so that they have money to advance to SMEs.

I am speaking here in a different capacity. I am a director of an asset finance company that was set up in the west of Scotland last year. Its only office and all its staff are in the west of Scotland. We knew when we set up that company that, in order to get finance for it, we would need to establish it with a registered office in England—its registered office is in London—and that all the agreements that we entered into with our customers, wherever they may be, must be written under English law with the sole jurisdiction of the English courts. That is because, if that were done under Scots law, with a Scotland-registered company, we could not get the finance.

That situation is, to put it at its mildest, most unfortunate for Scotland as a place to do

business. However, it is the reality that people such as me and Hamish Patrick face every day in life. We advise clients who come and ask us where they should set up their business, and the answer is not always Scotland. Sometimes we have to be blunt and say, "I'm sorry. You just can't do that, because you won't get the finance. You would be better to do it elsewhere." I would be happy to go into that in more detail.

**The Convener:** Perhaps we could hear from Dr Patrick and then come to questions from other committee members, which might develop some of those points and bring in our other witnesses.

**Dr Hamish Patrick (Shepherd and Wedderburn):** I reinforce the comments that Bruce Wood has made. Depending on the context, we routinely tell clients to set up their company in England, have their bank accounts in England and write their contracts under English law because, in many situations, the marginal benefit that is to be derived from the operation of English law is such that it can tip the balance.

Before I go on to invoice discounting, I will talk about intellectual property. I think that Bruce Wood mentioned that intellectual property—or intangible assets—is 80 per cent of companies' assets. Over a remarkably short time—the past 20 years or so—the ratio between tangible and intangible assets has flipped round. I see the whole reform as being like mechanical infrastructure reform to deal with how modern Scotland is in a business sense for its operations in the future.

10:00

There is currently a lot of discussion about the need for better transport infrastructure, better technical infrastructure, such as fibre broadband, and many other things to take us forward over the next 20 years and to deal with technological change. Technology features highly in where the economy is going and where growth is coming from, and I am sure that it will feature very highly in your discussions and various other things.

I see the proposed reform as an infrastructure one that goes along with those other infrastructure reforms and that will tip the balance when people are considering why to come to Scotland. It is about good education, good people and improving technical infrastructure. We need to improve our regulatory and legal infrastructure, as well, and the proposals are the pipework, as it were, that will critically improve certain parts of that infrastructure, so that I will not say to people, "Go to England"; in fact, I will say to people in England, "You're better coming here, because it works better." The reform will tip the balance. I am not saying that I tell everyone that they have to go to

England, but we are talking about the sort of thing that can tip the balance.

On intellectual property, an early-stage company will nearly always be funded by equity, just because of the risks involved. That is the nature of the beast and the economy. Once the company grows to a certain stage, it becomes more feasible for it to be financed by secured debt of one sort or another. What assets does it have at that stage? Depending on its stage of development, it might not have a lot of revenue that could be used to provide finance in the way that I will come on to in a minute; it will have intellectual property, software licences, trademarks and registered and unregistered designs with licences for them all. At the moment, such assets are difficult to subject to fixed security to provide funding.

A low to mid-growth tech company that is based in Dundee, Edinburgh, Glasgow or somewhere like that might come to me and say that it is having difficulty getting a loan from the banks using conventional funding techniques, or that that is a little too expensive or more difficult. That is because the company would have to transfer its intellectual property to the lender and the lender would then give the company a licence back for that intellectual property. Instead of the company giving the lender some sort of security right over the intellectual property, the lender owns it and then gives the company a licence back.

You can do that, but it causes a lot of grief when, in this sector of the finance market, you do not have a lot of cash to pay transaction costs, and it has to be relatively standardised. In some situations, in thinking about how the company will grow, the answer might be that it is better just to move to Old Street in London, because the company can finance itself under English law, and there are specialist funders there that can do that and are well used to doing so.

I am not saying that that happens routinely but, when Bruce Wood and I are faced with that sort of client asking where they should set up or where they will grow—where they should move to and what they should do—such companies might be considering whether it will be in Scotland, Berlin, California or London and, from that particular perspective, the answer for most of those companies is that it will be easier for them in those other places. There will be a marginal benefit for a company in being in those other places or expanding there because of the way that the law operates. I am not trying to say that that will happen to everybody; there are many other factors that affect business location. It is a bit like somebody saying, "You haven't got fibre broadband, so why would I set up there?" The issue is the sort of thing that might tip the balance.

I will move on to the invoices later.

**The Convener:** You could deal with that very briefly now if you want.

**Dr Patrick:** I will do so.

Taking my example of a tech growth company, once it has produced something and starts to sell it, the company's assets are the revenue that it receives from its sales, assuming that they are commercial sales and are business-based. How will that company raise working capital to operate its business? Secured credit is cheaper than unsecured credit. People often will not supply unsecured credit for certain types of businesses if those businesses do not have assets that are easy to get hold of. So what does the company do? It sells its invoices—its debts due from its customers. The bank buys them at a discount, which is called invoice discounting. At the moment, the company has to transfer that, sit the invoices in a big list and give notice to its customers that it has done that. Alternatively, the company can jump through some of the hoops that Professor Gretton mentioned by using trusts and all sorts of other mechanisms.

That is a highly used financing technique for small and large businesses. On Friday, I was sent documents by a US bank that is considering Scotland and a Scottish loan. The bank has a document with every jurisdiction in the world on the back of it. Looking down that list, the only countries that were worse than us were, I think, Spain and Poland. It is not impossible that, once that bank has spoken to me, it will think that it is not worth the candle, because it would not be able to do everything entirely electronically and upload everything. Scotland will therefore be what that bank calls ineligible, which means that the bank will not fund in Scotland because it is too difficult and too much hassle, or it will fund but at a more expensive rate.

That is the invoice finance side.

**The Convener:** When you say that it would be too difficult and too much hassle, do you mean in terms of lawyers' fees or just the technicalities?

**Dr Patrick:** It is about what a bank would have to do. It is the same throughout the invoice finance industry to greater and lesser degrees of sophistication, because everyone is going electronic. People want to upload invoices every day, every other week or whatever. What I am saying to them, which is also what Bruce Wood is saying, is that in Scotland they will probably need to sign a bit of paper every time that they upload their invoices and that it will be a bit risky if they do not do that. They have to list all the invoices and they might have to give notice to everybody, but we are not sure whether they can do that electronically.

The Americans who come to me are slightly amused by our backwardness because they find that they cannot just upload everything, that things do not work that way and that they have to sign for everything every day. That is the sort of inconvenience that they see. The system works fine sometimes and sometimes they will accept the risk that what they are doing might not work because they are not utterly sure how the system works. However, at other times, they will say that it is not worth taking Scottish invoices, but they will take French, German, US or English invoices. If they take Scottish invoices, they will give us less money or, in effect, a higher interest rate.

**The Convener:** To put it briefly, the draft bill is intended to modernise that aspect of the law.

**Dr Patrick:** Yes. When I consider how the process would work under the proposed new law, the answer is that it would be much easier and more effective.

**The Convener:** We have questions now from Richard Lyle.

**Richard Lyle (Uddingston and Bellshill) (SNP):** Your comments have quite shocked me. I am shocked because I used to be a credit collection manager with the Royal Bank of Scotland. Are you seriously suggesting that you cannot get finance in Scotland and that everyone has to move to England or elsewhere? That is what you said in the first few minutes.

**Bruce Wood:** Do you mean what I said?

**Richard Lyle:** It is what you all said. Basically, you said that it is hard to get finance in Scotland, so you recommend to your clients to move to England.

**Bruce Wood:** The type of businesses that we are talking about might get finance in Scotland, but it would be at a higher rate of interest, such as 50 or 75 basis points more than in England. They might find that their sources of finance are circumscribed. There is no doubt that it is more difficult in Scotland.

An example that might bring that home is Scotch whisky production. A large company such as Diageo gets its money on the international capital markets, which is absolutely fine. However, we are all aware that there are quite a few start-up distilleries around at the moment. Those are small companies with a bit of equity that have set up distilleries. In Scots law, it is not possible to give a creditor a fixed security over whisky stocks. There are ways round that problem in Scotland, but they are time consuming and legally expensive, and they tend to lead to more expensive credit.

For example, a small company can arrange for its whisky stocks to be stored in a warehouse that does not belong to the company producing the



whisky. A creditor can then get a security on the warehouse through the warehouse keeper. That is fine—it is a workaround that works. However, it is more expensive, because the company has to pay an independent warehouse keeper and set up the legal system for that to work. Hamish Patrick gave a good example of where the workaround is so time consuming and irritating that people sometimes cannot be bothered to do it. We are not saying that people cannot raise finance in Scotland; we are saying that people cannot raise finance for the types of things that we are talking about as quickly, cheaply and easily in Scotland as they can in England.

**Richard Lyle:** People deal in money markets all over the world, in different time zones and areas. You talked about a company owning machines or equipment. Surely, that equipment would be in a building that the company leases or owns. A machine would not be sitting out in a field, would it?

**Bruce Wood:** No, but it is not part of the building—it is just a machine.

**Richard Lyle:** Yes—it is a moveable asset.

**Bruce Wood:** Yes.

**Richard Lyle:** If it has not been paid for or is on hire purchase and has been assigned to someone else, it could be repossessed at any time.

Members have several questions, but I have to ask one more, and I apologise if this offends anyone. No businessman has ever come to me to suggest what is proposed. Is it just another way for lawyers to make money?

**Dr Patrick:** We will probably make less money, in fact.

**Richard Lyle:** Why?

**Dr Patrick:** After an initial phase during which the funder's systems are set up, the systems will then run without anyone needing to speak to us. To take Bruce Wood's whisky example, at the moment, a whisky funder would normally have to go to external lawyers to deal with that sort of whisky financing in order to deal with the custodian and all the rest of it but, once the new system is in place and the system is set up, the funder will take a simple electronic document, press a button and it will happen. Bruce Wood and I will have made a little money telling the funder how to set up its systems but, after that, it will not need to come to us, unless something goes wrong.

In no way is the proposal a self-serving lawyers' reform. Bruce Wood and I have been somewhat altruistic in spending eight years of our lives assisting Andrew Steven and George Gretton with our practical comments and seeking to improve

the final result. The proposal would definitely benefit small business, improve access to finance and enable the modernisation of the Scottish legal infrastructure.

**Professor Gretton:** The current system in Scotland is lawyer heavy. If we look at the systems in other places, such as the United States, doing the same thing is lawyer light. It is actually the other way round.

**Dr Ross Anderson:** I support what is being said. There are several markets that a businessman can get money from and, as has been suggested, one solution may be to do it with an English company, an English market and an English lender, so that everything is subject to English law and not in the jurisdiction of the Scottish courts. The point that is being made is that it is important to try to make the Scottish legal system fit for purpose.

I understand that one of the Scottish Government's aspirations is that Scotland should be one of the best places in the world to do business. We are trying to bring Scotland into the 20th century, never mind the 21st century. We also want to reduce transaction costs so that, in this country, we can offer the types of financing techniques that are available elsewhere.

Mr Lyle's question was about whether businessmen care and whether there is an issue for them. That presupposes that a solution is available elsewhere. However, it seems to us that there is a major problem with the legal system if it cannot service the needs of its native businesses. It should be possible for businessmen to operate under the law in their own country. That is one of the primary purposes of the bill—to reduce transaction costs.

Dr Patrick and Mr Wood can provide advice on where else to go for advice and how to do things here, but the transaction costs here are higher. That seems to us to be a major problem.

**The Convener:** I press you on the point that Mr Lyle asked about. You are a litigation lawyer: are you aware of issues that arise for companies because of the current state of the law?

10:15

**Dr Anderson:** Much of the draft bill is concerned with what might be termed under-the-bonnet detail. It is the type of detail in which most people in business are not interested unless or until something goes wrong. One can use the information technology analogy: we do not care much about the coding or all the things that underlie our devices until they do not work.

Taking the example of part 1, which deals with the register of assignments, the major difficulty is

simple. In order for that to be effective under our law—in which the governing statute dates from 1862—a business needs to give notice or intimation to each individual account debtor if it wishes to factor its debts. To put the situation in Scotland in context, in England, that is not required for the invoice financier to be secured.

More widely, if one looks at other small countries of comparable size to Scotland in the rest of the European Union, over the past 20 years, there have been extensive reforms to remove such technical and, it is thought, unnecessary requirements. Scotland is lagging behind the big international legal systems such as those in England, New York or Germany, but the changes are also needed to make us competitive with other smaller countries.

Those changes of detail may be uninteresting when all is seen to be fine, but they can become important when things are not going well. In a litigation sense, the notice requirement can raise all sorts of arguments and increase further the costs of enforcement. For example, all sorts of arguments can take place as to whether effective notice was given.

**Gordon MacDonald (Edinburgh Pentlands) (SNP):** I would like help with understanding what difference the bill would make. If I understand the present situation correctly, businesses can raise finance in the form of a loan by having a floating charge over their tangible assets. What practical difference would the bill make and would it make it easier or harder for businesses to obtain those funds?

**Dr Andrew Steven:** A floating charge can be granted only by incorporated companies, and many SMEs are not incorporated companies; they are partnerships or sole traders.

A second point is that, if a company goes insolvent, a floating charge has a relatively low priority. It does not have as high a priority as something called a fixed security, which is what my colleagues have been referring to. The draft bill would allow fixed security to be granted by businesses, and the general view is that, when a lending institution can take security, interest rates will be lower. That will help businesses. More broadly, taking forward the bill would make access to finance easier and cheaper, because it is expensive to use lawyers to dream up workarounds.

The project was long; it was started by George Gretton, and I eventually finished it, producing three volumes. Towards the end of the project, we spoke to the Federation of Small Businesses, which said that it liked the proposals because they are facilitative and provide extra options for its members. The FSB said that it is normally fighting

Government in relation to red tape and extra regulations that small businesses have to cope with, but it supports the proposed change because it would give additional financing options to companies and should make it easier for them to get finance.

**Willie Coffey (Kilmarnock and Irvine Valley) (SNP):** For my benefit, will the panel explain why the proposed remedy makes it more likely that businesses will access finance? What is the magic ingredient that will change anything? As I understand it, setting up the two registers—the statutory pledge register and the register of assignments—does not change anything in terms of ownership of assets. What is it about the proposed change or remedy that makes it more likely that a company will get finance?

**Dr Steven:** On the security side—the statutory pledge side—the proposals would change the situation regarding ownership. At the moment, the problem, particularly in relation to intellectual property and shares in a company, is that, to take security in Scotland, it is necessary to transfer those to the bank's name. That means that, as Dr Patrick said, it is then necessary to enter into contractual arrangements so that the small business can still use its patent or whatever.

Under the new security, the bank would simply have a security right rather than being the title holder of the intellectual property. That would make a significant difference as regards the ability of the business to manage the asset. The bank wants the asset only if there is default. Similarly, with regard to physical assets, banks do not want to have to store vehicles, computers or other equipment—they do not have facilities to do that—but they want to be able to enforce against those assets if the company or business becomes insolvent.

The broad idea of increasing the ease of access to finance is that, by making security easier, banks will lend with more confidence, knowing that, if repayment does not happen, they have assets that they can go against. Current Scottish law is highly restrictive in that regard.

On the assignment side, a small business's invoices are one of the most typical assets that it will have. By selling its invoices to a bank, it can get the money immediately and stay afloat. The Federation of Small Businesses in Scotland told us that around 3,500 small businesses go insolvent each year because they have not got in all the income that is due to them. Our current law on assignment dates back to 1862; it is necessary to intimate, and it is probably necessary to use paper and pen to do so, as there is nothing on electronic intimation. That means that the law is a bar to raising finance.

Implementing the bill would make the process easier, as it would be easier for banks to have security when they lend. We hope that making the security process easier would have an economic effect on access to finance. For small businesses, access to finance for assignment would mean that they could sell their invoices and get the money immediately and that banks would be more confident about willingly entering into such transactions.

**Willie Coffey:** Is it not already the case that businesses can put up their assets as security? What is the difference between being able to do that and having a register of statutory pledges, the setting up of which would achieve the same effect?

**Dr Steven:** I will answer that in one sentence, before passing over to my colleagues. It is a question of ease and avoiding having to use costly workarounds.

**Bruce Wood:** There are all sorts of comments that I can make in response to that last remark.

Let us take the example of invoice finance. It is now regarded by business as a far better method of finance than bank loans or bank overdrafts because, by definition, it keeps pace with the level of the business owner's business, because they are asking for finance for the invoices for work or business that they have actually done. In other words, it is not based on historical accounts, as a bank loan would be.

The problem that we have with invoice finance, which would be solved by the draft bill, is that in Scots law, under the Transmission of Moveable Property (Scotland) Act 1862, for a lender, a funder or whatever we want to call them to take a security or ownership of an invoice, it is necessary to have a signed piece of paper and to give notice to every individual, as Dr Patrick said. If there are thousands of those individuals who change every month, that is simply impracticable. Therefore, we have an expensive workaround that is done a wee bit on a wish and a prayer, and because the funders know that that is the case, they react accordingly. That does not mean that they will not do it; it simply means that they will say, "I've got 90 per cent of my invoices in England, which are secure, and 10 per cent in Scotland, which are not quite so secure. I'll play it a wee bit safe by not advancing quite so much money on the Scottish ones, but I'll still do it." That is one example.

That ties in with the point about floating charges. I remind members that floating charges can be granted only by companies so we are already disenfranchising unincorporated small businesses. Incorporated small businesses can grant a floating charge, typically over all their assets, which will have a lower priority in insolvency. You can take a

floating charge over limited assets, but there are legal problems with that, so lenders do not like it and, by and large, people do not do it.

If you take a floating charge over all assets and then finance some invoices or a machine tool, you are immediately in the realm of having to negotiate with the bank, which has a floating charge over all assets because it has given a loan somewhere over all assets. There is, therefore, an immediate extra legal cost. To go back to the analogy of buying a house or factory, if you want to raise money on your house or buy a house, the mortgage company will take a mortgage over the house. It will not say, "That's very nice, Mr Coffey, but actually we need security over your whole estate—over absolutely everything you've got." It will want only the house.

I am talking about people who want to finance invoices, a whisky distillery or a machine tool—they do not need security over all their assets. They want what is known in international legal terms as a purchase money security interest. That simply means that the funder says, "I'm giving you money so you can buy that machine, and if you can't pay me back, all I get is that machine and I sell it for the best that I can get." The funder does not interfere with all your other lending or anything else in your business. The money is provided over a machine that the funder thinks will be worth X in five years' time. Over those five years, it will depreciate at a certain rate and therefore the money will depreciate in line with the depreciation of the machine. If things go wrong, the funder will take the machine away and, if things go well, the funder will never have anything to do with the machine again.

That is a much simpler system that is universally available, except in Scotland. There are one or two other places where things can be more difficult—I have no idea what happens in the Maldives, for example—but, among European countries, Scotland is behind the money.

**Dr Patrick:** In addition to Bruce Wood's point on invoice discounting, I note that many funding institutions these days see it as a potential overdraft alternative for the safety and matching reasons that he mentioned and, from the banks' perspective, for capital cost reasons. Under the banks' regulatory regimes, they have to hold less capital against an invoice discounting facility than against an overdraft, so using the former as opposed to the latter potentially feeds into the cost of working capital. A number of institutions push that option as an alternative mainstream working capital tool, but of course it is more difficult to use in Scotland, for the reasons that we have discussed.

**The Convener:** Gordon MacDonald has a brief follow-up question before we come to questions

from Andy Wightman. I should have said at the outset—although I think that you are all aware—that if you want to come in on a particular subject, you should indicate with your hand so that I can try to bring you in as appropriate.

**Gordon MacDonald:** I am trying to understand the alternatives to what is proposed in the bill. What role do finance leases play? Someone can buy a machine tool—as Bruce Wood described—over a period of years on a finance lease and, at the end of the lease, they will have the option to buy out the ownership for a small sum. For 20 years, I worked for a company that bought double-decker buses on that basis.

10:30

**Bruce Wood:** That is perfectly true. The process that you describe is actually hire purchase. I do not want to go into too much detail, but if the debtor has the right to acquire title to the asset at the end of the period, that is hire purchase. With finance leasing, there is a similar workaround in which the funder sells the asset and shares the sale proceeds with the person who has now paid out the full funding cost of the asset in question. However, what you say is quite right.

The business of hire purchase and finance leasing is a major part of the industry that I am involved in. The company in the west of Scotland in the example that I gave you does hire purchase and finance leasing—its customers are getting hire purchase and finance leasing products—but, as I said, for that company to function and make that money available it needs money. It needs many millions of pounds to be able to build up a portfolio of hire purchase assets. For that money to be raised, the funder that makes the money available has to have security for its advances, and that security exists in relation to the hire purchase and finance leasing agreements that my company has entered into with the customers you are talking about. That security is not currently possible under Scots law without giving notice to all the hirers and lessees under the customer hire purchase and finance leasing agreements. It is not possible, practically, to give notice, month on month, to all the hundreds of potential customers who have agreements with the finance company. Therefore, it is not possible under Scots law to give the funder of the intermediate lender security over the assets. That is why they are written under English law.

We are not saying that there are no available facilities such as hire purchase and finance leasing—there are. What we are saying is that there are a lot of areas where finance is required, and could perfectly legitimately and reasonably be advanced under Scots law, which our current law prevents. One of them involves that example of

the intermediate finance company that needs to raise money so that it can enter into its own agreements with its customers. Another one that I gave you is the refinancing of equipment that you already own, which involves the person who already owns a machine tool, a bus or whatever selling it to the funder and then hire-purchasing it back. That is questionable in Scots law—to the extent that it is too questionable for people to do it. When you need a bit of dosh, you cannot get money in Scotland for assets you already own if those assets are in Scotland, because Scots law prevents it. The proposal in the draft bill presents a simple way around that problem.

At the moment, that is the way that the world is moving. I could give you another anecdote in that regard. Because the banks are pulling in their horns a bit, because they are worried about Brexit and about recession, a growing number of people in the market cannot get money from the banks, so they are looking for refinance on their assets. I was speaking to a major funder last week—I have to be careful what I say, but it is a very big funder—who told me that it has a policy about selling hire purchase back and refinancing. Its policy is simple: it does not do it in Scotland, even though there is a huge demand for this product at the moment as the banks pull in their horns. The bill solves that very simply: you just put your assignation on the register.

**Andy Wightman (Lothian) (Green):** The proposal seems to be a pretty elegant solution. One of the earlier speakers—it might have been Professor Gretton—said that it would put Scotland beyond a number of jurisdictions. I am not sure what the reasoning for that is, but the draft bill creates these registers, you could continue to create securities over movable property by gaining possession as creditor and it would remain possible to use intimation. For some companies those things might be a bit more difficult than for others, but we would be creating more flexibility in the system.

The Scottish Law Commission has been critical of Government for simply ignoring work that the commission has done—there are a number of reports sitting on the shelf from 2001, 2002 and 2003 that have never been implemented. As I understand it, the Scottish Law Commission reached an agreement with the Government that it would respond within six months—I believe that that response is usually something like, “Thanks very much for your wonderful report and this is what we intend to do or not do about it.”

The commission has been at work on the issue that we are discussing today since 2005—which was 14 years ago. I want to reflect on the fact that your report states that you

“had numerous meetings with consultees”

and other stakeholders, including CBI Scotland, Companies House, the Asset Based Finance Association, the Consumer Credit Trade Association and the FSB, which has already been mentioned. However, in her response, the Minister for Community Safety, Ash Denham, says:

“I understand the business sector is very keen to see the proposed legislation move forward. But as you know, the Bill would require the Keeper of the Registers of Scotland ... to establish two new registers.”

In response to that, I would say that creating new registers is not a big deal. She then says:

“As a result, we will need to consult with business and the financial sector on the proposals.”

She also says:

“We also need to decide who would be best placed within Government to take the recommendations of this report forward.”

Given that this work has been under way for 14 years, do you read that as a sign of an intention to move forward soon, or just as some excuses to hide the fact that it is all a bit too inconvenient?

**Professor Gretton:** I will make one point about the registers. Those registers would be expected to be self-financing. There are similar registration systems in many other countries, and they are all self-financing. As such, the possibility that the registers would be a drain on the public purse is remote in the extreme. As for the rest of the question, perhaps Dr Steven could answer it.

**Dr Steven:** The Scottish Government and the civil service have a certain level of resources, and there is only a certain amount of legislative time. Therefore, taking forward reports of the Scottish Law Commission, ultimately, comes down to priorities for Government. The reason for setting up the law commissions in the 1960s was to allow the legal systems in England and Scotland to be updated in a more efficient way. The civil service is more focused on the more political priorities of Government, so the idea of the law commissions is, in the broad sense, to do the work that keeps the legal system up to date.

As the committee knows, there is a special procedure that uses the Delegated Powers and Law Reform Committee, which has, in recent years, dealt with a number of Scottish Law Commission bills. However, in broad terms, in recent years, the rate of implementation is one per year. The current Scottish Law Commission bill is on defamation—I do not think that it has been introduced yet, but it is in the legislative programme.

As I said, the rate of implementation, in broad terms, has been one a year. There are five commissioners in the Scottish Law Commission at any one time, and the commission generates, on

average, more than one report a year. To put it more broadly, we have produced a number of reports, because there are five commissioners. However, the implementation rate is not as fast as many would want it to be. The idea of putting projects to the commission is that it will consult widely and—as far as possible—reach a view that would be acceptable to a Government of whatever political colour. As to the question of Government taking forward Scottish Law Commission reports, that is a matter of Government priorities.

**Andy Wightman:** I am aware of that. It seems that the criteria for the Delegated Powers and Law Reform Committee to take forward a bill would probably be met in the particular circumstances of this draft bill, in that it is not criminal law, it does not have significant financial or human rights implications and the Government is not planning wider work in the area.

I want to reflect on the economic impact of the draft bill. You said that it provides more opportunities and enables us to catch up with other jurisdictions, which is important because, at the moment, there is an opportunity cost, as companies are choosing to operate or borrow in other jurisdictions and not here. Is there any sense in which we can quantify that? I know that it is a difficult question, because it is—if you like—about counterfactuals. Nonetheless, has any work been done on that?

**Dr Steven:** As you know, the report is accompanied by a business and regulatory impact assessment, which puts figures on the value of intellectual property and invoice financing. However, the commission must prepare such a document for each report that is produced, and the work is done in-house—we are not able to employ an economist to work on that. The report gives some figures in that area, but I am not in a position to give precise figures for the implementation of what is proposed—

**Andy Wightman:** I would not expect precise figures, but you are practitioners—

**Dr Patrick:** Perhaps I can come in on that. It is quite difficult to give precise figures, but if we look at the volume of invoice finance—the BRIA quotes some figures from what was formerly the Asset Based Finance Association, which is now part of UK Finance—there is no doubt that the difficulties with invoice finance in Scotland are such that there is an unmet demand. I suspect that quantifying that unmet demand is perhaps for bodies such as UK Finance to comment on, and I hope that they will do so. Bruce Wood and I have both spoken to UK Finance and other lender bodies—quite recently, in fact—in relation to the specific proposals. They entirely support them and see the potential benefits.

How one would quantify what would have been done if the situation had been a little bit easier in comparison with other countries, as a marginal gain on the large figure for invoice finance that already takes place in Scotland as a result of implementation being easier and cheaper, is a question for UK Finance. I suppose that if—as Bruce Wood mentioned—institutions are saying, “We’re not doing that in Scotland at the moment, but we would do otherwise”, they will probably have the figures. They would have to say, “What have we not done for this reason?”

If they collect those figures and are able to collate them, there may be something for the trade bodies to assess. There is no doubt in my mind that the invoice finance sector is likely to be the early adopter of these reforms, but they are likely to spread in a series of other directions. I would have thought that, within a pretty short period from when the reforms are introduced, we would have some hard data for invoice finance in particular to show the increase in take-up as a result.

**Bruce Wood:** I have a couple of points. First, our confidence in the registers being self-financing is driven by what we were told by bodies such as the Finance & Leasing Association and the predecessors of UK Finance about what they thought that the demand would be.

I will give a second example—I do not have the exact figures, but I know this for a fact. Billions of pounds—the number is in the many billions, perhaps as high as £7 billion—are advanced in the UK under invoice finance year on year. One would therefore expect that although the amount of finance advanced in Scotland would be less than the 10 per cent-ish of the population that we represent, given that the City of London is finance heavy, the figure would be around 7 or 8 per cent, but it is much less than that. That is partly because many members of UK Finance will not trade in Scotland because of the difficulties. The big boys all do so, but they are aware of, and take into account, the difficulties, and arrange their finances accordingly.

With regard to the refinancing market in asset finance that I spoke about, I do not have exact figures, but it would potentially be worth millions of pounds in advance money being made in Scotland per year on the refinancing of already-owned assets. That opportunity is not currently available in the Scottish market.

10:45

**Andy Wightman:** That is very helpful. As Professor Gretton said, the registers should be self-financing. The Registers of Scotland are self-financing—when the minister talks about incurring expenditure, that is not public expenditure.

The minister’s concern seems to be that the Scottish Government needs to be sure that the registers would be used. You are arguing that you want to bring the law up to date to allow companies to exercise options around financing that it are currently difficult to exercise here and in relation to other jurisdictions, so there is a prima facie case for the change, because we are disadvantaged in that respect. To what extent do we need to be sure that the options will be used? It is a matter of passing a law and making options available to businesses.

**Dr Steven:** I will give you a figure: in 2015, the value of invoices assigned by UK businesses was £276 billion. We are talking large sums of money.

The minister is concerned about the question whether the registers would be used. When the Scottish Government policy officials came to see our advisory group, about 18 months ago, we went around the table and in addition to Bruce Wood and Hamish Patrick, there were representatives from the major Scottish law firms that do such work, as well as an in-house lawyer from one of the big banks: to a man and woman, they said that they would use the registers. Inevitably with a bill of this size, there will be differences on the detail, but there is unanimity among stakeholders that the registers will be used. The Scottish Government officials have heard that directly.

Although I have concerns about whether I have got all the detail right in drafting the bill—given that it is such a large piece of legislation—I have no doubt whatsoever that the registers will be used to a significant extent.

**Bruce Wood:** If we go back to the £7 billion of Scottish invoice financing that I was talking about earlier, all of that business would be done under the new register. Those people are already coping with the difficulties and have decided to get on with it, using the workarounds that we were talking about. However, they have all said that the new register is fine and that they will just use that—all that business will go through the new register. That is one of the reasons that we can be so confident that it will be used.

**Dean Lockhart (Mid Scotland and Fife) (Con):** Thank you for appearing before the committee this morning. I declare an interest as a member of the Law Society of England and Wales.

It sounds as though there are several good reasons to modernise the securities system in Scotland and it sounds like that is a priority. The example was given of other European countries that have made the change in recent years, but have there been any downsides or unintended consequences arising from such changes in those countries? How long will it take the marketplace to

adjust to the new system? How long will that transition be?

**Professor Gretton:** I do not want to sound like a vacuum cleaner salesman, but I struggle to see a downside. The proposed legislation is pretty much in line with modern international legal norms. There are variations in the detail: Australia, New Zealand and Canada are not quite the same. However, the broad thrust of the bill follows modern international norms. If you look at the countries that have introduced the new systems, you will find it very hard to find anyone who is critical of them.

As I say, Persil washes whiter. I do not really see a downside.

**Dr Patrick:** On take-up, as Bruce Wood mentioned, the invoice financiers will be straight in there. They will be early adopters. They want to jettison the Scottish workarounds and will put all their existing business through the new system. There is also scope for new opportunities.

Who comes next is an interesting question. Bruce Wood spoke about the difficult situation in Scotland now, and the part of the asset finance industry that he talked about will be straight into it.

The mainstream asset finance industry may be slightly slower, because it is used to operating with leases throughout the UK and internationally. The entire asset finance industry in Scotland will not be transformed overnight, but the probability is that there will be a gradual change. The new system will be used in more specialist sectors such as corporate lending to high intangible property companies.

Will it gradually be used by everybody in mainstream lending? That is not impossible, in due course, although there is inertia in people's systems. Throughout the process, I have kept a firm eye on ensuring that we do not create something that jars on a UK-wide basis, because most of the funding businesses and borrowers operate UK-wide. If we create something that jars with England operationally, it would be very difficult for people to introduce.

There is a possibility of Scotland leapfrogging over England. At the moment, parallel discussions are going on in England about updating the system there. As I say to people in England, our system needs updating because it is rubbish and theirs needs updating because it is too clever by half. I can do all this in England, but it is really complicated. Two weeks ago, I was at a seminar at University College London where the various English parties were discussing how they may take the matter forward. The core changes to English law and the problems with that look to be not a million miles away from ours, so I said,

"Here's an oven-ready version that you could be using."

Looking at the way that the lending businesses operate, I think that there will initially be high take-up by some and various other people will take it up more gradually. Overall, the optionality will mean that people can carry on doing what they want to do in some circumstances.

**Professor Gretton:** As a brief footnote, the bill is purely facilitative, so if businesses and financiers want to keep on using their current systems, including their current workarounds, they are completely free to do so. It does not ban anything; it puts extra options into place.

**Dr Anderson:** There is just one point from me. Certain aspects of the bill will provide not just an extra option but an option where there is no practical one at the moment. Shares and intellectual property rights are perhaps the best examples. At the moment, one cannot take an effective security over them that is practical. One does not want to create the company in which the shares are being held as a subsidiary of the bank. It is difficult to see why the option that the bill will provide would not be used, because there is no other practical option.

**Dr Steven:** Can I give another metaphor? In England, there is dissensus about the extent to which English law should be reformed. When a leading figure who favours more fundamental reform was told that the current law generally works, he replied, "Yes. Steam trains still work." If the English law is a steam train, the Scottish law is a steam train with several carriages missing.

**Dean Lockhart:** Thank you. That is a helpful analogy.

**The Convener:** Professor Gretton, you said that the bill would not ban anything. Would it not affect agricultural charges? They are still used by some people.

**Professor Gretton:** Middle stump, convener. Yes, agricultural charges under the Agricultural Credits (Scotland) Act 1929 would disappear. There are no official figures on the uptake of those. As far as I am aware, they are virtually unused—and possibly not used at all. Dr Steven may have more information on that.

**Dr Steven:** We spoke to agricultural co-operatives specifically about that, because I wanted to check that my predecessor had not been too ambitious in suggesting that such charges could be abolished. The answer that we got was that agricultural co-operatives can grant floating charges. Under what is now the Co-operative and Community Benefit Societies Act 2014 and under its predecessor legislation, they have been able to grant floating charges. An

agricultural charge is effectively a floating charge for agricultural co-operatives. The evidence that we got from the co-operatives was that they use floating charges, but not agricultural charges. Floating charges would continue under the bill.

**The Convener:** The point is that floating charges are normally just used by companies, but agricultural law in Scotland is a very specific area of law. Is there any reason why agricultural charges could not be left in existence? Can we not just delete that part of the bill?

**Dr Steven:** It is a short provision that could be deleted, but floating charges can be granted by limited liability companies, building societies and one or two other corporations in addition to companies.

**The Convener:** We are getting into some technicalities. I just wanted to check on that one point.

**Dr Steven:** The evidence on that was that it would be okay to remove agricultural charges because of the option of the floating charge.

**Colin Beattie (Midlothian North and Musselburgh) (SNP):** I would like to explore a couple of points that we have already spoken about, but from a different angle. The Scottish Government has said that more consultation is needed to ensure that there is demand for the proposals in the bill. Listening to what has been said today, I have heard no hard figures or indications of numbers, but just the assertion that the demand is there. Do you agree that more consultation is needed?

**Bruce Wood:** We think that we have done all the consultation that can be done—as far as we can see. We have spoken to UK Finance, the Federation of Small Businesses, the Law Society of Scotland, the Consumer Credit Trade Association, the Finance & Leasing Association and the banks. They are the people who have the principal interest in the matter. We have also spoken to the chartered accountants and we have consulted widely. We have reported on the consultation that we have done. It is not for us to second guess what further consultation the Scottish Government believes is required politically. We think that we have done all the consultation that is actually required, but the politics of it are beyond us.

Do you agree that that is a fair comment, Andrew?

**Dr Steven:** Yes, I agree with that. It seems that the Government has a particular concern about setting up new registers, the expense of that and whether they will be used. However, we have addressed that already this morning. We are entirely confident that the registers will be used. I

understand that Scottish Government officials are checking that what the Scottish Law Commission has said about setting up new registers and whether they will be used is true, but as I said, all the evidence given to me is that the registers are desired on the assignments side. One simple electronic registration would replace thousands of notification letters that need to be sent through the post. On the asset finance side, it would mean that we would create security over a physical asset without handing it over, and over an intangible asset without giving title. All the evidence that we have received suggests that the registers would be used.

It is more difficult to ascertain the economic benefit to come, but there is evidence internationally that the economy of a country will improve as it modernises its secured transactions law. That evidence is referred to in our report. The United Nations Commission on International Trade Law, which is the UN's commercial law body, has said that, and one of its aims is to modernise secured transaction laws throughout the world. Numerous African countries, including Malawi, have modernised this area of law in recent years. It is internationally accepted that a modern secured transactions law is of economic benefit.

11:00

**Colin Beattie:** Clearly, there is a cost to the Government in doing this. Public money will have to be spent on a technological solution. I very much doubt that there is an off-the-shelf solution; it may have to be constructed. It would seem reasonable that the Scottish Government should follow a consultation path to ensure that the public purse is being spent in the right way. Have you costed your proposals in any way?

**Dr Steven:** The ballpark figure from Registers of Scotland for each register is £500,000. However, I understand that under the Land Reform (Scotland) Act 2016, registers that have so far had a variable amount of use are in the same ballpark. In other words, Registers of Scotland has recent experience of setting up registers but, as we said earlier, it is entirely accepted that the registers will have to be self-funding. There will be start-up costs and running costs that cannot be paid by the taxpayer and must be paid by the registration dues. The evidence from New Zealand was that when the register was set up 20 years ago, it was paid for, in round figures, within about six months. I will need to check that in the SLC report on moveable transactions, but it was a relatively short period. The scheme that we are proposing is less extensive than that in New Zealand. We wanted to be facilitative, so we did not want a dramatic overhaul, which, as Dr Patrick has said, would



cause difficulties in the relationships with companies working on a UK-wide basis.

International evidence is that the costs of setting up such registers and the running costs will be met entirely by registration dues, and also by searching dues—people will search the register to check, if they are taking security over an asset, that it has not already been given in security to someone else. The register will get income from the registering of the security in the first place and the searching of that register. Bruce Wood and Hamish Patrick will confirm that when the new registers come into operation, as I hope they will, it is likely that there will be an initial surge because existing transactions will be put on. Is that correct?

**Bruce Wood:** Yes.

**Colin Beattie:** From what I have seen in the public sector, £500,000 does not seem much for an IT project. I hope that it is close to that. I want to touch on something that Dr Patrick brought up a couple of times in connection with what I used to call forfeiting. Obviously, that is a reserved matter. I am interested in exploring where there is a crossover between reserved matters and matters that are within the jurisdiction of the Scottish Government. Does anything need to be done to join things up?

**Dr Patrick:** That question is probably more for Dr Steven than for me, but I think that the project was put together with a view to it being capable of implementation by the Scottish Parliament alone. One might have included such things as floating charge preferences and broader things on intellectual property as part of the project, but those aspects are reserved. I shall pass this on to Andrew.

**Dr Steven:** Can you explain what you mean by forfeiting, Mr Beattie?

**Colin Beattie:** I am referring simply to the discounting of invoices. If a company has invoices to a certain value, it would sell the value of those invoices forward before they are actually collected. It is a way of raising funds.

**Dr Steven:** I do not see any reserved legislative competence—

**Colin Beattie:** It used to be called factoring.

**Bruce Wood:** Factoring is what Hamish Patrick has been talking about.

**Dr Steven:** The area that you have just described, Mr Beattie, is not reserved to the Westminster Parliament.

**Colin Beattie:** So forfeiting is not reserved.

**Dr Steven:** No.

**Colin Beattie:** I am surprised, but you are the experts.

**Bruce Wood:** There is a type of forfeiting that is used for commercial paper, such as bills of exchange, drafts and promissory notes—that is a specific category of forfeiting—but this whole project does not touch commercial paper. Maybe that is not the type of forfeiting that you are talking about.

**Colin Beattie:** I want to be sure on this. If, for example, a company decides to raise money by discounting its invoices on receiving payment for that, is that a reserved matter or not?

I see that you are all shaking your heads. It is not a reserved matter. That is interesting.

**Bruce Wood:** That is what Hamish Patrick has been talking about.

**Dr Patrick:** The Scottish Parliament has the power to deal with rights in assets under Scots law. It is a simple private law point. That is full-square within the Parliament's power. Just as you can deal with Scottish land, you can deal with Scottish debts. There is no issue around it at all.

**Dr Anderson:** Part 1 of the bill deals with the register of assignments. The whole of the law of assignment is part of Scottish private law, as set out in the Scotland Act 1998.

**Dr Steven:** The areas that are reserved are set out in chapter 1 of the report. As has been mentioned, intellectual property is probably one of the most important areas. The proposals in the report only facilitate the security over intellectual property—they do not change intellectual property law.

Three or four other areas such as financial markets are at the edges of the report. As has been said, the Scottish Law Commission deliberately took the approach of keeping its proposals within Holyrood's competence, because there is sadly a long history of a lack of speed from Westminster in commercial law reform of Scots law.

**Gordon MacDonald:** We have talked a lot this morning about the impact that the proposed legislation could have on businesses. However, it would also apply to sole traders and individuals. Someone's next biggest asset after their home or business premises will, in many cases, be their vehicle. One form of lending that is applicable down south is logbook loans.

When you listed the consultees on the draft bill, you did not mention the debt advice sector. I will highlight what that sector has had to say about logbook loans. In a blog post, the Money Advice Trust states:

“This is a form of high-cost lending that has been a source of considerable problems for vulnerable borrowers and innocent vehicle purchasers. The advice sector has repeatedly raised concerns about consumer harm arising from this type of lending.”

It goes on to set out six areas where the Financial Conduct Authority might be able to intervene, which include ensuring that “proper affordability checks” are carried out, that there is a price cap for very high interest rates, that “adequate explanations” are provided and that there is

“adequate information on the costs of borrowing”.

In addition, the FCA could take

“action in relation to default charges”

and enhance

“the protection of borrowers in debt in relation to forbearance and poor debt collection activities by lenders.”

What protections are in place for consumers? Are they adequate?

**Bruce Wood:** It is left to me to speak about consumers, as I deal a lot in the consumer credit area, although I sometimes wish that I did not.

We need to look at this area again in the context of what it is that we are facilitating. Before I get into the detail, I will offer an analogy with insolvency law. We are suggesting that fixed securities, as opposed to floating charges, should be possible in Scots law over various types of asset. We are not amending insolvency law, which is reserved. Insolvency law tells you what you get once you have one of those things; it does not dictate what it is that you can take. The same analogy applies here in that there are two quite different issues. One is the type of charge or security that a consumer can give to raise money and the other is how the process should be regulated so that the consumer—especially the vulnerable consumer—is not treated unfairly.

All that we are trying to do is to set up a system whereby the consumer can grant a security over an asset that he wishes to acquire. It will be for the FCA to regulate, as it currently does with logbook loans, although I could argue that it has been very slow in doing that. It has managed to put two of the biggest high-cost credit lenders out of business. It has done very little so far, but it is now addressing the subject of what to do with logbook loans.

I will give you some examples in a minute, but there is something that we need to be clear about first. As we see it, the primary purpose of the draft bill is to make Scotland a fit place to do business in. As far as the Scottish Law Commission and everybody around this table is concerned, there is a crying need to bring Scotland into the 21st century as a suitable place in which to do business in this regard. If, therefore, it is felt that consumers

are too hot to handle from the point of view of the political consequences, we would regret that but would be happy to accommodate that view, because it is for business that the proposed reform is vital, including sole traders.

Let me carry on: why did we include consumers?

**The Convener:** Will you clarify what you mean by “happy to accommodate”?

**Bruce Wood:** What I mean is that this reform is needed for business lending. We think that it should extend to consumers but if, politically, the Government is only happy to accommodate reform for business, we can live with that. Is that a fair way to put it? My fellow witnesses are nodding agreement that it is for business that it is vital.

**The Convener:** Are you talking about taking out of the bill the bits that relate to individual consumer lending and restricting it to business lending?

**Bruce Wood:** Yes. That is correct.

**The Convener:** Thank you. I just wanted to clarify that.

**Bruce Wood:** May I carry on to explain why we included consumers in the bill?

**The Convener:** Yes, but we are limited for time.

**Bruce Wood:** I realise that. We know that there can be problems with consumer lending, but it is for the FCA to deal with that.

I will give two simple examples, the first of which involves a talented young musician who needs a very expensive musical instrument. Why is it contrary to policy in Scots law for that young musician to be able to raise a loan secured over that valuable instrument? That would facilitate his career, and it is probably the only way in which his career could be thus facilitated.

A slightly more highfalutin and less sympathetic or empathetic example would be one in which somebody in this room wanted to buy an expensive painting and did not have the money to do that. Why is it contrary to public policy for that person to be allowed to borrow money secured over that painting, which has a real value?

Those are the reasons why we felt that consumers should be included. We do not doubt for a minute that consumers need protection in certain circumstances, and we put some protections in the bill. There are limits to what consumers can grant security over. Nevertheless, in consumer credit, the protections come not from what type of product is available but from how the FCA regulates conduct in relation to that product.

**The Convener:** We will hear briefly from Richard Lyle.

**Richard Lyle:** Basically, you are suggesting bringing in a new transaction in Scotland. If it is introduced, is there anything to stop a company from lending on equipment, doing an asset swap with another company and that being traded on the stock market or financial markets? I would like a simple, quick yes or no answer.

**The Convener:** Who would like to answer that?

**Dr Patrick:** I do not think that I understand your question. What do you mean by “asset swap”?

**Richard Lyle:** You have suggested that we should bring in a new transaction—a system that is not in Scotland at the moment. If we bring that in and I, as a company, give you a loan on your equipment, will I be able to do an asset swap on that with another company—yes or no?

**Dr Patrick:** Well, the equipment is mine, so I am the person who can do anything with it.

**Richard Lyle:** But I have given you a loan.

**Dr Patrick:** Sorry?

**Richard Lyle:** I have given you a loan. Will I be able to sell that loan to another company?

**Dr Patrick:** Are you asking whether you could trade that loan?

**Richard Lyle:** Yes—could I trade it?

**Dr Patrick:** That is not within the ambit of the bill.

**Richard Lyle:** Right—that is fine. You have answered that.

This morning, you have said that you believe that the bill will unlock finance and make Scotland open for business, but the Scottish Government has not committed to introduce the bill in the current parliamentary session. What is your view on that fact?

11:15

**The Convener:** I have to say that, on this occasion, I did not follow the question, Mr Lyle. Could you repeat it?

**Richard Lyle:** Okay. The Scottish Government has not committed to introduce the bill in this parliamentary session. This morning, the witnesses have told us that they believe that the bill would unlock finance and make Scotland more open for business, so I would like to know what their view is of the fact that the Government has not committed to introduce the bill and wants to consult more.

**Bruce Wood:** All of us can probably give a view on that, except Dr Steven, because I think that the Scottish Law Commission is circumscribed in how

it can comment on what the Scottish Government does or does not do.

I think that the view of the four of us here—Professor Gretton, being ex-commissioner, is probably free to comment as well—is that we have made it very clear that we believe that the proposed reform is essential for business and for making Scotland a place in which people can do business. If Scotland being one of the best places in the world to do business in is what you want to achieve, the reform that we are talking about is an essential part of that.

I do not think that we can tell the Scottish Government, politically, how to balance the needs of business against the need for reform of the law for families or for reform of the law on the criminal side; we cannot say that. However, we can say that, if it is interested in helping business to advance and in Scotland being the best place in the world to do business in, this reform is an essential part of that. As to where that goes from there—with respect—it is for members of the Scottish Parliament and the Scottish Government to decide what they can deliver.

Is that a fair comment, chaps?

**The Convener:** I see a lot of nodding heads.

What should the next steps be on the bill? Is it the view of our witnesses that the work has been done to implement it, subject to certain provisions being removed? For example, given all the different considerations that have been mentioned, the view could be taken that it might be wise at this stage simply to take out the provisions that relate to individual consumers and to restrict the bill's effect to those who trade as a business or businesses. If there were the political will or a decision were taken that this could be done in terms of the other priorities and pressures that are placed on Government and the Parliament, does anything else need to be done at this stage—on that or on another basis—before the bill could be progressed?

**Dr Steven:** The Scottish Government is undertaking a targeted consultation at the moment. I will be a glass-half-full person, which is not always what I am. In the legislative programme for last year, the Government announced its defamation consultation, and the defamation bill is in this year's legislative programme. This time, the Government has announced the consultation on the draft moveable transactions bill, so I will be optimistic and hope that it will appear in next year's legislative programme.

As to the detail, the current targeted Government consultation might bring up issues in relation to which the Government might wish to make adjustments.

**The Convener:** I am sorry, but my question is not so much about what the Government might want to do to the bill; it is more about whether, having considered the matter, there is anything specific that you think needs to be done. As you said, the Government is undertaking a targeted consultation, and the Government and the Parliament have their own priorities and views on things—there are political realities as well.

However, from the point of view of the panel, stepping back from political or other considerations and looking at the law neutrally, is there anything that needs to be done?

**Dr Steven:** I was hesitating, because I was thinking about quoting a politician from elsewhere, who has been using the phrase “oven ready” so much recently. [*Laughter.*] I would suggest that the bill is oven ready.

**The Convener:** We will try to take that as a neutrally intended comment rather than as political in any sense.

I now close this particular portion of the meeting and thank all our witnesses for coming.

11:20

*Meeting continued in private until 12:43.*

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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