

Moveable Transactions (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders, in relation to the Moveable Transactions (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill Provisions

3. The policy objective of the Bill is to modernise the law of Scotland in relation to moveable transactions. This encompasses the law relating to:

- the assignation of a claim to the right to the performance of an obligation (typically the right to be paid money);
- security over corporeal moveable property (such as vehicles, equipment, whisky or livestock); and
- security over certain incorporeal moveable property, specifically intellectual property (IP), which includes copyright, trade-marks, design rights and patents.

4. Moveable transactions law is vital to the Scottish economy. It enables both businesses and individuals to use their assets to raise finance by selling debts or by granting security over moveable property. In these ways, businesses can secure crucial cash flow. If businesses cannot fully exploit their assets to raise finance, they might otherwise have to resort to riskier and more expensive types of lending.

5. For example, a business may wish to acquire funding by transferring to a financial institution its claims to payment of its customer invoices. This would be done by means of an assignation. Alternatively, it may want to retain assets such as vehicles, equipment and intellectual property, but to use these as collateral to obtain loan finance. Individuals might wish to use artwork or vehicles to secure finance.

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6. The existing Scottish law in this area is badly outdated, mainly non-statutory and unclear in some important respects (parts of it have scarcely changed from Roman law and the principal relevant statute on assignation dates from 1862). It is also unduly restrictive and unfit to meet the needs of modern Scottish commerce.

7. The Bill, if implemented, would make various types of commercial transactions more efficient, less expensive and less complicated than they currently are. This would lead to greater access to finance for individuals and businesses in Scotland. If enacted, the Bill would also clarify the existing law, encouraging people and businesses in Scotland to use Scots law with confidence.

8. The provisions in the Bill take forward recommendations from the Scottish Law Commission's (SLC) Report on Moveable Transactions (Scot Law Com No. 249), published on 19 December 2017¹.

Problems with the current law

9. The main problems with the current law are:

- If a business wishes to assign its unpaid invoices to a financial institution in order to raise finance, there has to be written intimation (notification) of the assignation to every invoiced customer. This is cumbersome, expensive and often impractical. In particular, it cannot be done in respect of future claims (such as invoices due by future customers) where the debtor cannot yet be identified.
- Some Scottish businesses write their contracts under English law in an effort to avoid the need for intimation. Because of doubts about the ability to assign claims under future invoices, invoice financiers can charge more for their services in Scotland than in England and Wales.
- The inadequate nature of the law of assignation causes difficulties in other transactions, such as project finance, assignation of rents and securitisations.
- The only way to use incorporeal moveable property for security (other than by means of a floating charge) is to transfer it into the name of the creditor. For example, intellectual property must be transferred to the lender and complicated licence-back arrangements put in place. Shares in a company similarly have to be transferred to the lender and the lender registered as the shareholder. Again, contractual arrangements have to be used to deal with the consequences of transfer, such as entitlement to dividends and voting rights.
- In Scotland there is no such thing as a mortgage over moveable, as opposed to heritable, property.
- Effectively the only "fixed" security (rather than a floating charge) over corporeal moveables is the pledge. In a consumer context this is known as

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

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“pawn”. It requires delivery of the encumbered property to the creditor. This is commercially impractical, as businesses require possession of their assets to trade.

10. In terms of alternatives available under the current law, floating charges are only available to corporate debtors. Sole traders and partnerships cannot grant them. They give a relatively low ranking in insolvency and lenders charge more than they would if they could take a “fixed” security.

11. The Bill will introduce a new statutory scheme for moveable transactions law. In relation to the law of assignation of claims, the main proposals are:

- Registration will be an alternative to intimation for the assignation of a claim.
- The option of registration will facilitate the assignation of future claims.
- Assignations will be able to be registered in a new Register of Assignations which will be electronic and administered by the Registers of Scotland.
- The Register of Assignations will be searchable electronically, primarily by reference to the assignor’s details.
- The rules on intimation of assignations will also be brought up-to-date and in particular electronic intimation will be facilitated.
- It will be made clear that assignations can be subject to a condition which must be satisfied before the assignation takes effect.
- It will also be made clear that the intimation of an assignation can instruct the debtor to continue to perform to the assignor.
- Debtors who perform to the assignor in good faith, because they are unaware of the assignation, will be protected.
- As under the current law, the parties to a claim will be able to provide for it to be unassignable.

12. In relation to the law of security over corporeal and incorporeal moveable property, the main proposals are:

- A new “fixed” security called a “statutory pledge” will be introduced in respect of corporeal moveable property, such as vehicles, equipment, whisky and livestock. The property will not require to be delivered to the creditor. This will be the equivalent of a standard security (i.e. a mortgage) over heritable property.
- The statutory pledge will also be available in respect of certain types of incorporeal moveable property, namely intellectual property. The property will again not require to be transferred to the creditor.
- Registration will be required for a statutory pledge to be created.
- While primarily aimed at businesses, the statutory pledge will be capable of being used by consumers to raise finance against assets they already own

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(above a level to be prescribed by the Scottish Ministers). It will also be capable of being used when purchasing an asset (above that same financial threshold), much like hire-purchase.

- The rules on possessory pledge will also be clarified. In particular it will be made clear that this type of pledge can be created by constructive delivery – i.e. by intimation to a third party holder, such as a warehouse.
- There will be a generally uniform enforcement regime for possessory and statutory pledges, with a range of remedies including sale, lease and licensing. Enforcement against a private individual will require a court order or express written agreement (which cannot be given in advance).
- A new Register of Statutory Pledges will be established in which statutory pledges will be registered. Like the Register of Assignations, this will be electronic and run by Registers of Scotland.
- It will be possible to update the Register of Statutory Pledges to take account of amendments, transfers and discharges of statutory pledges.
- The Register of Statutory Pledges will be searchable electronically, primarily by reference to the details of the party that provided the security. But it will also be possible to search by reference to the unique numbers of certain assets, notably motor vehicles.
- Floating charges will be retained (although this is not expressly provided for in the Bill).

Rationale for Subordinate Legislation

13. The Bill contains a number of delegated powers provisions. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against:

- the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
- the need to ensure proper use of parliamentary time;
- the possible frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

14. The relevant provisions are described in detail below. For each provision, this memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;

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- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

15. Subordinate legislation is required to implement the Scottish Government's policy and some form of parliamentary procedure is appropriate (other than in relation to commencement regulations). For the decision on negative or affirmative procedure, the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

Delegated Powers

Section 3(8) – transfer of claims

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

16. Section 3 sets out how a claim to the performance of an obligation, typically the payment of money, may be transferred by the assignor (the holder of the claim) to an assignee. Under subsection (2)(b), this may be effected by the registration of the assignment document in the Register of Assignations or by intimation of the assignment to the debtor. Intimation will be effected by the service of a notice of the assignment on the debtor by the assignor or the assignee (though it is usually served by the assignee since they are the new holder of the claim).

17. Section 3(8) permits the Scottish Ministers to make regulations, subject to the affirmative procedure, to stipulate that certain types of claim may only be transferred by the assignor to the assignee by the registration of the assignment document in the Register of Assignations. It will therefore not be possible to transfer the claim in those types of cases specified in the regulations by means of intimation to the debtor under section 3(2)(b)(i).

Reason for taking power

18. The policy objective is that the assignment of a claim should be possible by the requirement of an external act, but to give the assignee the choice between intimation or registration in the Register of Assignations. This flexibility has been welcomed by several stakeholders. Assignations in favour of financiers will almost invariably be registered because this will be simpler, easier and cheaper than intimations to multiple

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debtors. Intimation will also not be an option for future claims (because there is no debtor yet to whom intimation can be made).

19. It may therefore be that the vast majority of assignments will be effected by registration in the Register of Assignations and intimation may become increasingly rare. The existence of the possibility of assignment by means of intimation means that third parties cannot rely on a search of the register since this will not disclose an assignment which has been effected by intimation. There may be support in the future for removing the option of intimation in relation to particular types of claim as this would mean that all assignments of such claims would be registered and a third party would be able to rely on a search of the register.

20. A number of stakeholders pointed out, however, that some creditors will prefer to continue to assign by means of intimation since they will not want to publicise the assignment of a debt in a public register and would prefer the confidentiality offered by intimation. Obviously the decision may depend on how many debtors would have to be informed and whether the assignment relates to any future claims. Both of these factors may persuade parties to register rather than continue to use intimation.

21. The SLC noted that while financial institutions would know about registration, those involved in one-off transactions may not. If the option of intimation were to be removed completely, such parties might carry on as they always have and then discover that what they have done is invalid because of non-registration in a register of which they have never heard. There may also be particular types of commercial transaction where intimation is favoured over registration. One law firm wrote to the SLC in 2017:

“We understand the upcoming SLC report will propose an electronic [register]. Our understanding is that registration on this Register would replace intimation by post, although such intimation would remain as an option. Many of our clients may choose not to intimate on a public register, due to (i) confidentiality reasons and (ii) a reluctance to have information in respect of debt publicly available. In these circumstances, intimation by email would be a valued option and would mirror the efficiencies of an electronic filing on the Register.”.

22. The SLC nevertheless believed that there would be merit in giving the Scottish Ministers the power to specify types of cases for which registration would be compulsory to transfer the claim.

Choice of procedure

23. This power relates to one of the principal reforms in the Bill, the introduction of a combined system of intimation or registration to effect assignment of a claim. This is intended to provide assignees with flexibility and a choice as to how they give effect to the assignment of a claim. Since it is proposed that the Scottish Ministers should have the power to remove the option of intimation to the debtor as a means of assignment in certain cases, the Scottish Government believes that it is appropriate that this power is subject to affirmative procedure.

Section 4(7) – assignation of claims: insolvency

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

24. Section 4 of the Bill provides for the effect of an assignor's insolvency on the assignation of a claim which comes into existence subsequent to the grant of the assignation. The general rule, set out in subsection (2), is that an assignation will be ineffective in relation to any claim which, though identified by the assignation document as a claim assigned, is not held by the assignor before the assignor becomes insolvent. In other words, the assignation will be ineffective in relation to the claim if the assignor is insolvent at the time of becoming the holder of the claim.

25. Subsection (6) provides for the meaning of insolvency for the purposes of section 4, in respect of both individuals and legal persons (such as limited companies). Subsection (7) gives the Scottish Ministers power to amend the list of insolvency processes listed in subsection (6), as well as to apply subsections (4) and (5) to circumstances other than sequestration or the granting of a trust deed.

Reason for taking power

26. The SLC noted that there are many different types of insolvency and similar processes both within Scotland and elsewhere, with variations within some of the processes. The Commission commented that deciding on exactly which processes should be subject to the rules relating to an assignor's insolvency was not easy. Although section 4(6) of the introduced Bill provides a relatively comprehensive list of Scottish insolvency processes, the Commission believed, and the Scottish Government agrees, that the Scottish Ministers should have the power to amend the list of provisions by secondary legislation, for example to add further cases such as equivalent processes in other jurisdictions.

Choice of procedure

27. This is a power that is limited in scope and which may require to be used at relatively infrequent intervals. Nevertheless the regulations may impact on the financial position of assignors and debtors and any change will be effected by means of a change to primary legislation. For those reasons it is considered that regulations under section 4(7) should be subject to affirmative parliamentary procedure.

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Section 8(3)(d) – intimation of the assignment of a claim

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

28. Section 8 sets out how assignment of a claim may be effected. One of the possibilities is that a notice of assignment may be served on the debtor by the assignor or the assignee. Subsection (3)(d) gives a power to Ministers to set out the form of a notice of assignment if the claim is a monetary claim, though the form need not be followed.

Reason for taking power

29. The SLC reported support from some of those they consulted for a form of model notice. If such a model were to be provided, this would give the parties the comfort of the wording having been approved in statute and therefore not open to argument about being insufficiently clear. The Scottish Government agrees with this justification for taking the power.

30. The notice would be intended for the assignment of monetary claims, which will be the most common kind of assignment, but it would be possible to adapt it for an assignment of a non-monetary claim.

Choice of procedure

31. This is a power that is limited to providing a model notice of assignment. The power may require to be used only rarely. It is a power of an administrative nature and even if the Scottish Ministers prescribe a model notice, its use will not be compulsory. The Scottish Government therefore considers that negative procedure is appropriate.

Section 26(7) – seriously misleading inaccuracies in the assignments record

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

32. Section 26 makes provision as to whether an entry in the assignments record of the Register of Assignations is seriously misleading as a result of an inaccuracy or inaccuracies in it. This applies for determining whether a registration is an effective

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registration for the purposes of section 25 of the Bill. Section 27(3) of the Bill provides for the meaning of “inaccuracy” in the assignments record.

33. Subsection (1)(a) of section 26 provides that an inaccuracy will be seriously misleading if any of subsections (2) to (5) apply or if, despite none of them applying, the inaccuracy or inaccuracies are such that a reasonable person would be seriously misled by the entry. In other words, if any of the examples in subsections (2) to (5) apply then the inaccuracy will be seriously misleading (whether or not any person was actually misled), but those examples are not exhaustive and there may be other inaccuracies that are found by the courts to be seriously misleading. Whether an inaccuracy is seriously misleading or not is to be determined objectively.

34. Subsection (7) enables the Scottish Ministers to make regulations modifying section 26 to make provision about what makes an entry in the assignments record seriously misleading. Any such regulations are likely to be informed by the experience of the operation of the new Register of Assignations over a period of years. It is also thought that it may be helpful to users of the register to know what is not considered to be a seriously misleading inaccuracy.

Reason for taking power

35. The SLC considered, and the Scottish Government agrees, that there should be flexibility to make further detailed provision on what constitutes a “seriously misleading” inaccuracy if that is considered necessary, particularly in the light of how often seriously misleading inaccuracies occur, and in what circumstances, when the register becomes operational.

Choice of procedure

36. This power permits the Scottish Ministers to modify the Act to make provision about the circumstances in which an inaccuracy is seriously misleading. It may require to be used only rarely, but since it permits the Scottish Ministers to modify primary legislation and make fundamental changes as to what amounts to an ineffective registration of an assignation document, the Scottish Government believes that the power should be subject to affirmative parliamentary procedure.

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Section 30(1) – power to make provision about applications for corrections

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

37. Section 30(1) provides that the Scottish Ministers may by regulations modify Part 1 of the Bill to make provision for or about applications to the Keeper for the correction of an entry in the Register of Assignations. This would allow, for example, provision comparable to the corrections process for statutory pledges in Part 2 of the Bill to be introduced in respect of assignation documents. This section would also allow a fee to be imposed for such applications.

Reason for taking power

38. Supervening inaccuracies will not be relevant in the same way as for the Register of Statutory Pledges since the Register of Assignations, unlike the Register of Statutory Pledges, is not designed or meant to show the ongoing position in relation to a claim. It is simply a snapshot of the position when the assignation document was granted.

39. Under section 27 of the Bill, however, there is provision for the Keeper to correct the assignations record either when the Keeper is instructed to do so by the court or when the Keeper becomes aware of a manifest inaccuracy in the assignations record. In the latter case, such an inaccuracy may have been brought to the Keeper's attention by a member of staff or, perhaps more likely, an interested party. No process is provided in the Bill for an interested party to draw such an inaccuracy to the Keeper's attention since it is thought that this will simply be done by the party writing to the Keeper, but if, in the light of experience of the operation of the Register of Assignations, this is not the case or difficulties arise in some way in relation to the correction of inaccuracies in such circumstances, it may be thought necessary to provide a formal application route for such corrections.

Choice of procedure

40. This power permits the Scottish Ministers to modify the Act to make provision setting out a procedure for applications to correct the Register of Assignations. It may require to be used only rarely, or perhaps just once, but, since it permits the Scottish Ministers to modify primary legislation, the Scottish Government believes that the power should be subject to affirmative parliamentary procedure.

Section 34(8) – Assignee’s duty to respond to request for information

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

41. The information which will appear in entries in the Register of Assignations will not always be comprehensive. This is so even although a copy of the assignation document will appear in the entry. For example, an assignation may be of future invoices specified in schedules to be sent from the assignor to the assignee. Thus the register by itself would not reveal whether a particular invoice had been assigned. Another possibility is that the assignation document contains a suspensive condition. The register would not reveal whether the condition had been satisfied.

42. The SLC considered that there should be *limited* statutory information duties owed to a *limited* number of third parties. This is necessary because neither the details of individual claims (such as invoices) being assigned, nor information on whether a suspensive condition has been satisfied, will appear on the register. It is proposed that a third party should only be able to ask whether a particular claim is assigned by the assignation or whether a condition to which the assignation is subject has been satisfied. It should not be possible simply to ask for a list of all the claims that have been assigned.

43. It is not considered that there should be a general public right to information about assignations and only a limited category of persons should be entitled to make a request for information, namely those who are affected or potentially affected by an assignation. Third parties would, however, be able to make a request if they have the permission of the person identified in the entry as the assignor.

44. The SLC suggested, however, and the Scottish Government agrees, that certain persons should also have independent rights to request information. These would be persons who have a right to execute diligence against the claim, even if a charge for payment has not yet been executed. Both creditors of the person identified in the entry as the assignor and as the assignee should be able to make a request (depending on who actually holds the claim).

45. Section 34 therefore provides for an entitled person (as defined) to be able to request information about an assignation from the person identified as the assignee in the assignations record. The request does not require to be in writing, but the response does.

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46. The SLC also recommended that there should be power to prescribe other categories of person who would be entitled to make an information request and they had in mind insolvency officials and executors.

Reason for taking power

47. It may be that in the future other categories of person who should be entitled to make an information request will present themselves and this provision permits the Scottish Ministers to specify those parties. It would be disproportionate for there to have to be primary legislation to extend the categories of entitled persons.

Choice of procedure

48. The right to request information about whether a particular invoice has been assigned, or whether a suspensive condition has been satisfied, should not be granted or withheld lightly and, for that reason, and because the power is to modify primary legislation, it is considered that regulations under section 34(8) should be subject to affirmative parliamentary procedure.

Section 37(1) – Rules

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

49. Section 37 of the Bill provides for the Scottish Ministers to make rules for the operation of the Register of Assignations. They must consult the Keeper before doing so.

50. The subjects which might be covered in the rules are set out in section 37 and for the most part are self-explanatory. It will be possible for the rules to allow certain information in the assignation document, as well as any signatures, to be redacted in the interests of confidentiality and fraud prevention. This is the case when documents are registered in the Companies Register. It should also be possible for certain information that is registered not to be visible to persons searching the register or to appear in extracts. The SLC had in mind particularly dates of birth, where one possibility might be to withhold the day of birth, as is done for directors' details in the Companies Register. Another would be that while a name and date of birth would take the searcher to any relevant entries, the date of birth would not actually be displayed.

Reason for taking power

51. While the main aspects of the Register of Assignations are set out in the Bill, there requires to be more flexibility in other respects and secondary legislation is more

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appropriate. Such an approach follows the example of the Land Register of Scotland under the Land Registration (Scotland) Act 2012.

52. The Register of Assignations rules will provide detail to support the provisions in the Bill for the new register. While it is not expected that the rules will be subject to frequent change, it is foreseeable that they will require amendment as time goes on. In particular, the rules will allow the Scottish Ministers to regulate how the Register of Assignations is kept in light of changing circumstances and technologies. Amendments to the rules will also allow any application forms to be altered as required, where, for example, a development in the law requires the Keeper to ask different questions or be supplied with different information by applicants.

Choice of procedure

53. The Land Registration (Scotland) Rules 2014 are subject to negative procedure and this is also considered appropriate for the rules of the new Register of Assignations. The rules are concerned with the normal running of the register and will not affect the underlying principles of the Bill.

Section 44(3) – Competence of creating a statutory pledge over certain kinds of property

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

54. Section 44(1) sets out certain kinds of corporeal moveable property in relation to which it is not competent to create a statutory pledge. It is therefore possible to grant a statutory pledge over all other kinds of corporeal moveable property. Section 44(2) lists the kind of incorporeal moveable property over which a statutory pledge may be created. These are intellectual property and applications for, and licences over, intellectual property. The Scottish Government is, however, seeking an Order under section 104 of the Scotland Act 1998 which it hoped would, inter alia, make it possible to grant a statutory pledge over financial instruments such as shares.

55. Subsection (3) provides that the Scottish Ministers may by regulations prescribe other kinds of incorporeal moveable property over which it will be possible to create a statutory pledge.

Reason for taking power

56. The ability to create a statutory pledge over incorporeal moveable property is currently limited to intellectual property. There are several reasons for this:

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- this is the type of incorporeal moveable property where the case for reform and creating the ability to grant a fixed security is most compelling;
- permitting the statutory pledge over all incorporeal assets would have a more significant effect on unsecured creditors in an insolvency;
- making statutory provision for fixed security over all claims would be problematic without reform of insolvency law;
- the Scottish Government does not consider it to be within the legislative competence of the Scottish Parliament to provide that it would be possible to create a statutory pledge over financial instruments, which is why a section 104 Order is being sought from the UK Government which would make this possible; and
- the assignation in security would remain possible for all incorporeal assets so security can continue to be taken in that way.

57. Circumstances may change, however, and the Scottish Government considers it appropriate to take a power to add other kinds of incorporeal moveable property to the list of such property over which it is possible to grant a statutory pledge. Insolvency law may also be reformed or new kinds of incorporeal moveable property may come into existence over which it would be desirable to be able to grant a statutory pledge.

Choice of procedure

58. This power relates to one of the principal reforms in the Bill, the introduction of a statutory pledge as a fixed security over corporeal and incorporeal moveable property. Whereas it will be possible to create a statutory pledge over all kinds of corporeal moveable property beyond the three exceptions set out in section 44(1), the ability to create a statutory pledge over incorporeal property is restricted to intellectual property. Since it is proposed that the Scottish Ministers should have the power to extend the ability to create a statutory pledge to other kinds of incorporeal moveable property and to do so by modifying the Act, the Scottish Government believes that it is appropriate that this power is subject to affirmative procedure.

Section 47(4) – Creation of statutory pledge: insolvency

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

59. Sections 43(3)(b) and 56(4)(b) of the Bill set out that the property to be encumbered as described in the constitutive document of a statutory pledge, or an amendment document, may be property to be acquired by the provider of the pledge (although there are limitations upon that rule for individuals). This section provides for the effect of the intervening insolvency of the provider.

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60. Subsection (2) provides that a statutory pledge will not be created over property acquired at a time when the provider is insolvent (as defined in subsection (3)). The effect is that the property in question is treated as an asset of the provider for the purposes of the insolvency. It may, for example, be sold or realised for the benefit of the creditors as a whole.

61. Subsection (4) confers a power on the Scottish Ministers to modify subsection (3) by regulations. That power could for example be used to add a further type of insolvency to the list in subsection (3), such as an equivalent foreign insolvency.

Reason for taking power

62. The SLC considered that there should be a qualification to the general rule that a statutory pledge can extend to assets acquired after the granting of the pledge. This is where the provider becomes insolvent after the statutory pledge is granted but before the relevant assets are acquired.

63. Providers who have become insolvent should be entitled to a fresh start and not have new assets acquired by them taken away to satisfy pre-insolvency secured creditors. Property acquired after the commencement of insolvency is not covered. In practice, it is doubted that providers would acquire significant new corporeal moveables or intellectual property after they become insolvent because they would not have funds to do so.

64. The SLC noted that there are many different types of insolvency and similar processes both within Scotland and elsewhere, with variations within some of the processes. Although section 47(3) provides a relatively comprehensive list of Scottish insolvency processes, the Commission believed, and the Scottish Government agrees, that the Scottish Ministers should have the power to amend the list of provisions by secondary legislation, for example to add further cases such as equivalent processes in other jurisdictions.

Choice of procedure

65. This is a power that is limited in scope and which may require to be used at relatively infrequent intervals. Nevertheless the regulations may impact on the financial position of the provider of the pledge and creditors and any change will be effected by means of a change to primary legislation. For those reasons it is considered that regulations under section 47(4) should be subject to affirmative parliamentary procedure.

Section 48(5) – Providers who are individuals

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

66. Section 48 provides debtor protections for individuals granting a statutory pledge over their personal property. They complement the provisions of the Consumer Credit Act 1974, which apply to the grant of any security right by an individual (as defined for the purpose of that Act in section 189(1) of the Act). However, under subsection (4) the protections in this section do not apply where the individual is a sole trader and the pledge is over assets used wholly or mainly for the purposes of the trader's business.

67. The policy of the Scottish Government is that it should not be possible to grant a statutory pledge over ordinary household items. Rather than drawing up a list of goods over which it would not be permitted to grant a statutory pledge (which may require constant amendment by way of additions), the best way of achieving the desired policy would seem to be that there should be a prohibition against individuals granting a statutory pledge over items worth less than a figure to be set by statutory instrument.

68. Subsection (3) provides that any corporeal property to be pledged must have a monetary value exceeding £1,000 (or such other sum as may be prescribed by regulations made by the Scottish Ministers – see subsection (5)(a)). That will be the value at the time of granting the statutory pledge. The effect is that it will not be possible for an individual to grant a statutory pledge over low-value, but essential items, such as clothing, white goods or furniture.

69. The Scottish Ministers also have a specific regulation-making power to exclude particular types of property from being pledged (see subsection (5)(b)). For example, this could be used to exclude the pledging of a motor vehicle (or, using the power in section 114(1)(b) to provide for different purposes, to exclude the pledging of a motor vehicle unless it is being pledged to secure its purchase).

Reason for taking power

70. As a matter of social policy, individuals should not be able to grant a statutory pledge over, for example, their cooker, clothes, bedding or children's toys, even if in practice secured creditors may be unlikely to be interested in such items.

71. Over time, the threshold set will be devalued in real terms owing to inflation as the cost of even quite ordinary household items will increase and it will be necessary to raise the figure for the prohibition to ensure that the policy is maintained. The power will permit the Scottish Ministers to adjust the threshold as they see fit to keep pace with inflation. The Scottish Government considers that it would be unduly inflexible if the sums could only be changed by further primary legislation.

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72. The power to specify particular items is taken in addition in case the setting of a monetary threshold does not prove sufficiently nuanced to capture everything which it is considered appropriate to capture.

Choice of procedure

73. This is a power that is limited in scope which may require to be used at relatively infrequent intervals. Nevertheless, section 48 has the potential to impact on the financial position of individuals and their ability to grant a statutory pledge. These are important safeguards for individuals to avoid essential household items being pledged. Therefore, the monetary threshold level the figure is set at will be important, and, to maximise flexibility, the power to change this is not limited to taking account of inflation. Equally, the Scottish Government may consider that other things, the value of which are likely to be above the monetary value for the time being specified (e.g. cars), should also be excluded. Again, any such change will be of importance to those affected by it, as it will determine whether or not an individual can grant a statutory pledge. For these reasons, the Scottish Government considers that affirmative procedure is appropriate.

Section 49(4) – Property encumbered by statutory pledge: transfer by provider

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

74. The creation of a statutory pledge will in all cases be the result of the registration of the pledge in the Register of Statutory Pledges. The provider of the pledge (i.e. the debtor) will usually keep possession of the encumbered property. Section 49(1) gives statutory effect to a general principle of the law of rights in security, by providing that the statutory pledge will continue to encumber the property if it is transferred without explicit written consent by the secured creditor to the particular transfer. However, there are some exceptions to this—

- where it is transferred with the explicit written consent of the secured creditor to the particular transfer in a way that meets the conditions of subsection (2),
- where a third party acting in good faith acquires the property unencumbered under one of the Bill's protections for innocent acquirers under section 51 to 53, or
- where, in accordance with a provision of the Bill, the pledge is otherwise extinguished by the provider's transfer to a third party.

75. Under subsection (2), the consent cannot be to a transfer to any unnamed person, or to a class of persons. It must, first, be a consent to a transfer first to a

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specific person and, second, to that person taking the property unencumbered by the pledge.

76. Subsection (2)(b) ensures that the secured creditor will not be able to agree more than 14 days in advance that the provider is free to deal with the encumbered property. To permit the secured creditor to generally consent to the provider being free to deal with the encumbered property would enable the pledge to operate in the same manner as a floating charge.

77. Subsection (4) gives the Scottish Ministers power to amend the consent provisions in subsection (2) and modify the section so as to specify further matters relevant to the granting or withholding of consent.

Reason for taking power

78. The ability to amend the consent provisions in subsections (2) and (3) would, for example, enable Ministers to take account of possible future developments under English law, in relation for example to the fixed/floating characterisation of charges in an insolvency.

Choice of procedure

79. This is a power which may require to be used at relatively infrequent intervals. But since the introduction of a fixed security (i.e. the statutory pledge) over moveable property in Scotland is such a fundamental reform, any change to the arrangements for the secured creditor having to consent to any dealing with the encumbered property will impact on the financial position of individuals, their ability to grant a statutory pledge and to deal with encumbered property, and so the Scottish Government considers that affirmative procedure is appropriate. It is also relevant in this regard that any change would be effected by means of a change to primary legislation.

Section 52(3) – Acquisition in good faith for personal, domestic or household purposes

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

80. Section 52 protects an individual who acquires corporeal property for private or related purposes. Some other jurisdictions and international instruments have provisions protecting good faith acquirers of lower value goods, even where these are not acquired in the course of the seller's business.

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81. Subsection (1) sets out that an individual who acquires encumbered property without the consent of the secured creditor having been obtained under section 49(2) will acquire the property unencumbered if three conditions are met:

- The property must be wholly or mainly acquired for personal, domestic or household purposes (i.e. business purchasers are not protected),
- The person must give value for the property acquired – which normally means adequate monetary value (i.e. payment of a purchase price), but also covers, say, exchanging other property, and
- The acquirer must be in good faith.

82. The effect of applying the protection at the time of acquisition is to make it easier for the individual to prove the value of the asset, and therefore that the pledge is not effective, than would be the case if any other time was fixed for that purpose.

83. Subsection (3) allows the Scottish Ministers to introduce a further rule into subsection (1) that the value of the property at the time of acquisition must not exceed a specified amount, and then to vary that amount from time to time.

Reason for taking power

84. Taking a power to insert a threshold, rather than one being included by default, allows maximum flexibility in the event that, once experience of the statutory pledge is gained, it is considered appropriate not to place a threshold on this protection.

85. Over time, any threshold set will be devalued in real terms owing to inflation as the cost of even quite ordinary household items will increase and it will be necessary to raise the figure to ensure that the policy is maintained. The power will permit the Scottish Ministers to adjust the threshold as they see fit to keep pace with inflation. It may also be considered appropriate to change the value in light of experience, regardless of inflation. The Scottish Government considers that it would be unduly inflexible if the sums could only be changed by further primary legislation.

Choice of procedure

86. This is a power that is limited in scope which may require to be used at relatively infrequent intervals. Nevertheless section 52 has the potential to impact on the financial position of individuals and their good faith acquisitions and the Scottish Government considers that affirmative procedure is appropriate.

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Section 53(8) – Acquisition in good faith of motor vehicles

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or negative depending on how exercised

Provision

87. Section 53 protects any person who acquires a motor vehicle that is encumbered property. It is similar in effect to the measures in section 27 of the Hire-Purchase Act 1964 in respect of motor vehicles hired under a hire-purchase contract, or purchased under a conditional sale agreement.

88. If a company supplies a motor vehicle to A under a hire-purchase agreement with a three-year duration, A will not become the owner until they make the final payment at the end of the three years. But, if after six months, A sells the vehicle to B (who believes that A is the owner), under section 27 of the 1964 Act, B will become owner of the vehicle if they are in good faith and a private purchaser (rather than a trade or finance purchaser).

89. Section 53 achieves the same result where A is the owner of the vehicle, but grants a statutory pledge over it. B would take the vehicle unencumbered by the pledge if B is a good faith private purchaser from A.

90. Subsection (1) sets out four conditions which must be met if the encumbered vehicle is to be acquired unencumbered under subsection (2), despite the consent of the secured creditor to the transfer not having been obtained. The purchaser or acquirer must be in good faith, but subsection (6) makes it clear that the purchaser or acquirer is not to be regarded as not being in good faith only because the pledge is registered. In other words, the acquirer should not have to check the Register of Statutory Pledges in order to satisfy this test.

91. The hirer or purchaser of the encumbered property cannot be carrying on a business described in section 29(2) of the 1964 Act, namely a business which consists of:

- purchasing motor vehicles for the purpose of offering or exposing them for sale, or
- providing finance for purchasing motor vehicles for the purpose of hiring them under hire-purchase agreements or selling them under conditional sale agreements.

92. Subsection (9) provides that regulations under subsection (8) may modify sections 51 and 52 (in so far as those provisions apply to motor vehicles) to provide that

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either or both of those sections do not apply to some or all of the classes of motor vehicle specified under subsection (8).

Reason for taking power

93. The SLC suggested, and the Scottish Government agrees, that the Scottish Ministers should have the power to specify motor vehicles or classes of motor vehicle which are not to benefit from the rule in section 53. The rationale is that the Register of Statutory Pledges might in the future become so easy to check electronically that acquirers or certain classes of acquirer (possibly trade or finance purchasers) could be expected to check it. This may depend on the extent to which the registration of vehicle identification numbers becomes compulsory but could be achieved through the use of this power in conjunction with the power to make different provision for different purposes under section 114.

Choice of procedure

94. This power is limited to specifying motor vehicles or classes of motor vehicles which are not to benefit from the rule in section 53. It is likely to be used only rarely and the Scottish Government believes that the power should generally be subject to negative parliamentary procedure. However, as it also permits the Scottish Ministers to modify primary legislation (by amending sections 51 and 52), the Scottish Government believes that the power should be subject to affirmative parliamentary procedure where regulations make such modifications.

Section 63(1) – Pledge enforcement notice

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

95. Section 63(1) provides for a pledge enforcement notice to be served before any enforcement action by a secured creditor on the provider of a statutory pledge and other interested persons (if any). This would include holders of other rights in security in the encumbered property or creditors who have executed diligence against it, to let them know that enforcement is to take place. This duty would only apply in so far as the secured creditor knows or can be reasonably be expected to know of the other right in security or the diligence. Other security rights would often be discoverable from either the Register of Statutory Pledges or Companies Register. But the fact that someone has executed diligence may be less apparent.

96. The form of the notice will be set out in regulations made by the Scottish Ministers (see section 116 for the meaning of “prescribed”). Ministers are able to prescribe different forms of notice for different categories of provider or occupier (see section 114(1)(b) which allows the regulation-making power to be exercised in a way

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that makes different provision for different purposes). For example, a form for individual providers might contain information on how to obtain legal advice and the information that the creditor will need to obtain a court order before the pledge can be enforced. If the form used is not quite the same as the prescribed form, it may still satisfy the requirement to serve the notice, but it is likely that any divergence would have to be trivial.

Reason for taking power

97. In relation to the form of notice, the SLC considered that the Scottish Ministers should have the power to prescribe different forms of pledge enforcement notice for different types of provider. It is expected that the notice would have more extensive wording in consumer cases, advising the provider of the statutory pledge of information about obtaining advice in relation to the notice. The form for use in non-consumer cases is likely to be briefer. While it is considered appropriate for a form to be able to be specified, the subject-matter and level of detail means that it is not considered appropriate for this to be included in primary legislation.

Choice of procedure

98. This is a power that is limited to setting out the form of a pledge enforcement notice. It may require to be used only rarely and will only relate to the wording of a notice, which is a matter of administrative detail. The Scottish Government therefore believes that the power should be subject to negative parliamentary procedure.

Section 63(4) – Pledge enforcement notice

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

99. The Scottish Ministers will also be able by regulations under section 63(4) to require that a pledge enforcement notice must be given to specified persons who have statutory duties in relation to the provider's property (as is the case, for example, in an insolvency). Exceptions to this may also be provided for (for example, where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of the person).

Reason for taking power

100. The SLC suggested that an enforcement notice should also be served on, in addition to holders of other rights in security in the encumbered property or creditors who have executed diligence against it, any persons with statutory duties in relation to the provider's property who are prescribed for this purpose and they had in mind insolvency officials.

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Choice of procedure

101. This is a power that is limited to extending the group of people whom service of a pledge enforcement notice is served. It may require to be used only rarely, but since it will involve a right for person with statutory duties to be notified of a pledge enforcement procedure, as well as an amendment to primary legislation, the Scottish Government believes that the power should be subject to affirmative parliamentary procedure.

Section 65(8) – Secured creditor’s right to take possession of, or steps in relation to, corporeal property

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

102. For a possessory pledge, as the name indicates, the secured creditor does not need to seize the property in order to realise it. Possession is already held. But for a statutory pledge it would be the provider of the statutory pledge who would normally be in possession of the encumbered property. There requires to be a mechanism by which the secured provider can take hold of the asset. However, debtor protection is important. The circumstances under which possession can be taken require to be carefully regulated.

103. Section 65 therefore provides for enforcement of a statutory pledge by the secured creditor following service of a pledge enforcement notice, and where appropriate the obtaining of a court order. It enables the secured creditor to take possession of the encumbered property from, usually, the provider.

104. As well as the taking of possession being enabled under subsection (2)(a), subsection (2)(b) enables the creditor to take any reasonable steps necessary to ensure that the property is not disposed of or used in any unauthorised way. This is aimed at larger assets such as machinery where it might be more convenient to sell them on site. The secured creditor may simply want to immobilise the asset, so that it cannot be removed before any planned sale.

105. Subsections (3) and (4) have the effect that possession may only be lawfully taken using one of three methods. First, it may be taken with consent of the relevant persons set out in the section (usually the provider and any third party holding the item, or a person with a higher-ranking right over the property). Second, it may be taken by a person who is an authorised person for the purposes of this section (with the consent of the court, where required). Third, it may be taken by the secured creditor personally if authorised by the court.

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106. Subsection (7) provides that “authorised person” means a messenger-at-arms or sheriff officer, but subsection (8) enables the Scottish Ministers to modify section 65 by regulations to prescribe other persons as authorised persons under subsections (3)(b), (4)(b) and (6).

Reason for taking power

107. The SLC considered that the Scottish Ministers should be able to prescribe other persons who may act as authorised persons which may, for example, include insolvency practitioners with a relevant interest, in addition to messengers-at-arms and sheriff officers. This would provide the legislation with some flexibility.

Choice of procedure

108. This is a power that is limited to prescribing the group of people who will be authorised to take possession of encumbered property on behalf of the secured creditor. It may require to be used only rarely, but since its use would change who is authorised to take possession of property (including who is entitled to remove individuals from property), and since it would be effected by a change to primary legislation, the Scottish Government believes that the power should be subject to affirmative parliamentary procedure.

Section 72(9) – Appropriation with prior agreement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or negative depending on how exercised

Provision

109. The remedies which the SLC recommended in relation to the enforcement of statutory pledges were sale of the encumbered property, lease, licensing (in the case of intellectual property) and appropriation.

110. In relation to the last of these, appropriation, sections 71 to 74 of the Bill provide that the secured creditor who has served a pledge enforcement notice should be able, in specified circumstances, to appropriate the encumbered property on default by the provider. Sections 72 and 73 provide respectively for appropriation with, and without, an agreement to the use of appropriation by the secured creditor as a remedy on default. Under section 73, if there is no agreement between the provider of the statutory pledge and the secured creditor, the provider is entitled to object in principle to the use of appropriation in respect of the particular encumbered property. Under both sections 72 and 73, holders of other rights of security in the property are entitled to object to the use of appropriation.

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111. Sections 72(1) and (2) allow the provider and the secured creditor to agree in writing, in advance of any enforcement of the secured obligation, that the creditor may appropriate the encumbered property (subject to certain conditions).

112. An agreement to appropriate may only have effect as respects property in respect of which the agreement sets out a method of easily determining a reasonable market price (see subsection (3)). That might include, for example, an agreement in relation to appropriation of used cars which states that an average of the prices listed in a specified used car guide is to be used to determine the value on appropriation.

113. Under subsection (4), appropriation occurs only at the market value, as determined in accordance with that agreement, on the date of appropriation. If the value of the item is more than the secured debt, section 71(2)(c) will apply and the balance must be held in trust and applied in accordance with the provisions of the Bill.

114. Subsection (5) requires notice of the intended appropriation to be given to the parties it will affect. The list is self-explanatory, though it should be noted that it may be expanded by regulations under subsection (9)(a)(i). There are also exemptions under subsection (6) where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of certain persons. These can be expanded by regulations under subsection (9)(a)(ii) where a similar exemption is appropriate in respect of someone added to the list by regulations under subsection (9)(a)(i).

115. Subsection (7) sets out that the notice of intended appropriation must identify the property to be appropriated, and specify both the amount owing to the secured creditor and the amount expected to be obtained by the appropriation. It is recognised that in cases where the asset is insufficient to meet the full value of the debt, the exact amount to be obtained by the appropriation may not be known in advance since the asset's value is to be based on the date of appropriation. The notice must also give the parties notice of their right to object (where applicable) and explain the consequences of such an objection being received within the relevant time limit.

116. Subsection (8) gives a number of the parties on whom the notice is served a right to veto the appropriation, provided that their objection is received by the secured creditor within 14 days beginning with the day of receipt of the notice of the intended appropriation. However, the provider and the debtor are excluded from having a right of veto because the section is concerned with cases where the provider has expressly entered into a prior agreement allowing appropriation. Where the appropriation is vetoed, the secured creditor must inform the other recipients of the notice of the intended appropriation that it is no longer going ahead.

117. Subsection (9)(b) allows the Scottish Ministers by regulations to modify this section so as to require a notice under subsection (5) to be in a prescribed form and in consequence to remove the requirements in this section as to what the notice must contain. It also allows them to modify any such form from time to time.

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Reason for taking power

118. As with other provisions of the Bill where categories of persons are set out, it will provide the legislation with more flexibility if the Scottish Ministers are able to prescribe other persons on whom the secured creditor must serve notice of an intention to appropriate property. However, it would also be appropriate for this requirement to be waived where it is not reasonable for the person serving the notice to know of the other person's existence. Subsection (9)(a) therefore allows provision to be made extending subsections (5) and (6) to cover additional persons.

119. Subsection (9)(b) allows the Scottish Ministers to prescribe the form that must be used. This allows a form to be prescribed in the event that practitioners request this or there prove to be problems with how notice is being given in practice, without requiring a particular form as a default (given that appropriation notices may be fairly uncommon in practice and practitioners in the field may prefer to avoid the inflexibility of a prescribed form). In the event that a form were to be prescribed, it would no longer be necessary for the Act to set out requirements which that form must meet as Ministers would instead simply ensure that the form they prescribed met those requirements. The power therefore allows the section to be adjusted accordingly. It also allows them to modify any such form from time to time in the light of the experience of the legislation in operation.

Choice of procedure

120. The power in subsection (9)(a) is limited to circumstances where there is a prior agreement that the secured creditor in enforcing the statutory pledge may appropriate property under section 71(1). It may require to be used only rarely, but since it permits the Scottish Ministers to modify primary legislation, the Scottish Government believes that the power should be subject to affirmative parliamentary procedure.

121. Where the Scottish Ministers may decide to prescribe a form of notice under section (9)(b), it is considered that negative parliamentary procedure is sufficient in prescribing that form as this is purely an administrative matter. However, as the power also permits the Scottish Ministers to modify primary legislation (by removing the requirements in this section as to what the notice is to contain), the Scottish Government believes that the power should be subject to affirmative parliamentary procedure where regulations make such modifications. It is likely that this would only arise on the first exercise of the power.

Section 73(7) – Appropriation without prior agreement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or negative depending on how exercised

Provision

122. Section 73 is similar to section 72 but deals with the situation where there is no prior agreement to appropriation. Given that there is no agreement, the provider is entitled to object in principle to the use of appropriation in respect of the particular encumbered property, as is the debtor (who will often, but not always, also be the provider).

123. Under subsection (2), any appropriation must be for an amount which bears a reasonable relationship to the market value of the property on the date of the appropriation. Thus machinery worth £10,000 cannot be appropriated as being worth £1,000. However, where the value is greater, this is not a complete bar to appropriation: instead, the balance must be held in trust as envisaged by section 71(2)(c).

124. Subsection (3) requires notice of the intended appropriation to be given to the parties it will affect. The list, the exemptions in subsection (4), and the powers in subsection (7)(a) to expand each of those, are the same as in section 72.

125. Subsection (5) sets out the requirements in relation to the notice. These are the same as section 72 (see paragraph 115 of these Notes) with the only difference being that, as noted above, every recipient of the notice has a right to object under this section given that there is no prior agreement. Subsection (7)(b) provides the same ability as in section 72(9)(b) for the Scottish Ministers to provide that a prescribed form is to be used instead.

Reason for taking power

126. As with section 72, where categories of persons are set out, these powers will provide the legislation with more flexibility if the Scottish Ministers are able to prescribe other persons on whom the secure creditor must serve notice of an intention to appropriate property. The comments in paragraph 118 therefore apply equally here.

127. Similar powers are also proposed in section 72 to be able to replace the requirements as to what the notice must contain with a requirement to instead use a form laid out by Ministers in regulations. It also allows them to modify any such form from time to time in the light of the experience of the legislation in operation. The reason for taking these powers is therefore the same as that set out in paragraph 119 in relation to section 72.

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Choice of procedure

128. The power in subsection (7)(a) is limited to circumstances where there is no prior agreement that the secured creditor in enforcing the statutory pledge may appropriate property under section 71(1). It may require to be used only rarely, but since it permits the Scottish Ministers to modify primary legislation, the Scottish Government believes that the power should be subject to affirmative parliamentary procedure.

129. Where the Scottish Ministers may decide to prescribe a form of notice under section (7)(b), it is considered that negative parliamentary procedure is sufficient in prescribing the form as this is purely an administrative matter. However, as it also permits the Scottish Ministers to modify primary legislation (by removing the requirements in this section as to what the notice is to contain), the Scottish Government believes that the power should be subject to affirmative parliamentary procedure where regulations make such modifications. As with section 72, it is likely that this would only arise on the first exercise of the power.

Section 75(10) – Application of proceeds from enforcement of pledge

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

130. Section 75 provides for the distribution of any proceeds received by the secured creditor as a result of enforcing a possessory or statutory pledge. It provides that the secured creditor must first pay the expenses of the enforcement, and then pay the sums due to secured creditors or creditors who have executed diligence in accordance with the priority of their claims. Any residue is paid to the provider of the statutory pledge.

131. After applying the proceeds, the secured creditor will have to supply relevant parties who have an interest in the matter with a statement as to how the distribution of funds was done. This will enable them to check that the proceeds are applied properly. The parties whom the SLC thought had an interest are (a) the provider of the statutory pledge; (b) the debtor in the secured obligation if a person other than the provider; (c) other secured creditors or parties who have executed diligence against the property; and (d) any prescribed persons with statutory duties in relation to the provider's property. Where the property is sold, a single statement will suffice, but if it is leased or licensed then monthly statements are required.

Reason for taking power

132. The provision will permit the Scottish Ministers to prescribe persons with statutory duties in relation to the provider's property who should receive a written statement of how the proceeds of enforcement of the statutory pledge have been applied, in order to

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ensure that the provision is sufficiently flexible and can be expanded as necessary in light of experience. This might include, for example, specifying insolvency officials. Because the power is a power to amend the Act, this will ensure that all relevant information about who is to be given this information will remain in one place.

Choice of procedure

133. This is a power that is limited to prescribing persons who have statutory duties in relation to the estate of the provider of the statutory pledge which has been enforced in order to ensure that they receive a statement of how the proceeds from the enforcement have been applied. It may require to be used only rarely, but since it permits the Scottish Ministers to modify primary legislation, the Scottish Government believes that the power should be subject to affirmative parliamentary procedure.

Section 92(8) – Seriously misleading inaccuracies in the statutory pledges record

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

134. Section 92 makes further provision for the meaning of a “seriously misleading” inaccuracy in the statutory pledges record in the Register of Statutory Pledges for the purposes of sections 89 to 91 of the Bill.

135. Subsection (8) enables the Scottish Ministers to modify this section to make further provision about what does, and what does not, make an entry seriously misleading and how that is to be determined in the light of the operation of the register.

Reason for taking power

136. As with the Register of Assignations, the SLC believed that the Scottish Ministers should have a power to specify other circumstances in which an inaccuracy would be seriously misleading to ensure that future eventualities which cannot be foreseen at present may be dealt with.

Choice of procedure

137. This power is limited to specifying further instances where an entry in the Register of Statutory Pledges is seriously misleading or to make it clear where an entry is not seriously misleading and how these matters should be determined. It will be used only rarely, but since it permits the Scottish Ministers to modify primary legislation and would make fundamental changes as to what amounts to an ineffective registration of a statutory pledge or an amendment to a statutory pledge, or result in certain statutory

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pledges being extinguished, the Scottish Government believes that the power should be subject to affirmative parliamentary procedure.

Section 93(1) – Power of Scottish Ministers as regards duration of statutory pledge

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

138. The SLC noted that it was generally the case in the Land Register of Scotland that a standard security will be discharged when the loan is repaid and removed from the register. Purchasers of land will normally be unwilling to proceed until they (or perhaps more accurately, their solicitors) are satisfied that any standard security granted by the seller will be discharged.

139. The position in relation to moveable property is different, partly because there is no registration of title to moveable property: the Register of Statutory Pledges is only a register of charges over moveable property, but there is no requirement for entries to be removed when they are no longer effective, having been discharged. This could lead to a cluttered register.

140. One solution would be for registration to be time-limited, with the possibility of renewal. The alternative is for registration of pledges to be indefinite, though this does lead to the inconvenience of a register choked with dead entries. The SLC's consultees mostly opposed the suggestion that registration should lapse after a certain period unless renewed. There was limited support for a system under which the applicant had to specify a registration period.

141. The SLC concluded that registration in the statutory pledges record in principle should be for an indefinite period, as is the case for standard securities and floating charges. It did, however, suggest that the legislation should be future-proofed since there may come a time when the statutory pledges record needs to be decluttered and thus proposed that the Scottish Ministers should have power to set a period after which a statutory pledge would be extinguished unless the entry for it is renewed.

142. Section 93 therefore provides for the Scottish Ministers, in consultation with the Keeper of the Registers of Scotland, to be able (by regulations) to specify a period at the end of which an entry in the statutory pledges record will be deleted and the statutory pledge extinguished. This power could be used, for example, in the event that a large number of pledges continue to appear in the record many years after registration but are believed to have been extinguished or restricted off-register.

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143. However, the power would also allow for the creation of an application route which would allow the secured creditor to renew the pledge, to avoid its removal if the entry continues to be relevant. The concept of renewal would include renewal on more than one occasion.

144. The section relates only to removal of entries from the statutory pledges record. Nothing would be removed from the archive record under this section. The archive record would be affected only insofar as the any entries removed from the statutory pledges record would be placed on the archive record (see section 82(a)(i) which requires the archive record to include all entries and copy documents transferred from the statutory pledges record).

Reason for taking power

145. Section 93(1) provides for the Scottish Ministers, in consultation with the Keeper of the Registers of Scotland, to be able by regulations to specify a period at the end of which an entry in the statutory pledges record will be deleted and the statutory pledge extinguished.

146. This power could be used, for example, in the event that a large number of pledges believed to have been extinguished or restricted off-register continue to appear in the record many years after registration. Similar powers are seen in comparator legislation in other jurisdictions.

Choice of procedure

147. Because this provision will have profound consequences for the efficient and effective operation of the Register of Statutory Pledges, the Scottish Government believes that it is appropriate that this power is subject to affirmative procedure.

Section 96(4)(a) – Demand that application for correction be made under section 94

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

148. The Register of Statutory Pledges could contain an inaccuracy which prejudices (a) the provider of the statutory pledge or (b) a third party. An example of (a) would be where the secured obligation has been performed, but the statutory pledge has not been removed from the register. Another example would be where an individual item of property has been released from the statutory pledge, but the entry for it still refers to that property.

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149. Section 96 enables a person with a specified interest in the accuracy of the statutory pledges record, and who maintains that the record is inaccurate, to be able to:

- demand that the person showing on the register as being the secured creditor in respect of a pledge apply to the Keeper for a correction of the record under section 94 of the Bill, and
- if no such application is made, apply for the correction themselves.

150. Subsection (1), read with subsections (2) and (3), has the effect that a person identified in the record as the provider or a co-provider can make a demand on the registered secured creditor if the person making the demand asserts either that they are not in fact a provider despite being identified as such, or that property identified as being the subject of the pledge is not in fact encumbered property. In addition, a person with a right in property which is identified as the encumbered property can make a demand on the registered secured creditor if the person making the demand believes that the property is not in fact encumbered property.

151. In both cases, it may be that the record was once accurate but has become inaccurate due to supervening events (e.g. the pledge has been restricted or discharged off-register), or it may be that the entry in the record has had incorrect information in it from the moment it was created.

152. Subsection (4) indicates that the demand should be made in prescribed form.

153. In the event that the demand is not complied with within the period specified, the person becomes entitled to make an application themselves under subsection (6).

Reason for taking power

154. The Scottish Government believes that requiring a prescribed form for a demand for the secured creditor to apply to the Keeper for correction of the register will give the parties the comfort of the wording having been approved in statute and therefore not open to argument about being insufficiently clear.

Choice of procedure

155. This power is limited to specifying a form by which a person who satisfies the criteria in subsection (2)(a) or (b) may issue a demand to the secured creditor that the secured creditor should apply to the Keeper for correction of the statutory pledges record. It will be used only rarely and relates to a purely administrative matter. The Scottish Government therefore believes that the power should be subject to negative parliamentary procedure.

Section 105(8) – Secured creditor’s duty to respond to request for information

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

156. Section 105 provides for an entitled person (as defined) to be able to request information about a statutory pledge from the person identified as the secured creditor in the statutory pledges record.

157. Subsection (1) sets out that the information to be provided in response to a request will vary depending on the facts. If the person is the secured creditor, they can be asked to specify, first, whether property specified in the request is encumbered property and, second, to describe the secured obligation. If the person is no longer the secured creditor, or has never been the secured creditor, they must provide information to that effect and, if relevant, details of the person to whom they assigned the pledge and any further known details of subsequent assignees. The request does not require to be in writing, but the response does.

158. By virtue of subsection (2), an entitled person is:

- a person who has a right in the specified property,
- a person who has a right to execute diligence against the property (including, in the case of a charge for payment, where that right will only arise once the days of charge expire without payment), or
- a person who has the consent of the registered provider to make the request.

159. Subsection (8) enables the Scottish Ministers to modify this section in the light of experience of the operation of the register so as to amend the list of entitled persons, perhaps to specify further persons entitled to request information (for example, insolvency practitioners with a relevant interest).

Reason for taking power

160. The information which appears in entries in the Register of Statutory Pledges may not be up-to-date. The secured creditor may have discharged the pledge by means of a written statement, but not corrected the register to show the up to date position. The assignation of a statutory pledge will not require registration to take effect. Stakeholders were keen that it should remain possible for such actions to take place off-register. It should therefore be possible to seek information regarding to whom the statutory pledge has been assigned. Comparator legislation in other jurisdictions also gives limited information rights to limited classes of third party. It is appropriate to be able to add to the list of persons who are entitled to be provided with information.

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Choice of procedure

161. This power is limited to specifying further persons, or descriptions of persons, who are entitled persons for the purposes of this section and who will therefore be permitted to request information from the secured creditor. It will be used only rarely, but since it gives the Scottish Ministers power to modify primary legislation and because the right to demand information from a purported secured creditor is so important to the operation of the Register of Statutory Pledges, the Scottish Government believes that the power should be subject to affirmative parliamentary procedure.

Section 109(1) – Rules

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

162. Section 109 provides that the Scottish Ministers may, by regulations, make rules providing for the operation of the Register of Statutory Pledges. They must consult the Keeper before doing so.

163. The subjects which might be covered in the rules are set out in section 109 and for the most part are self-explanatory. It will be possible for the rules to allow certain information or signatures to be redacted in the interests of confidentiality and fraud prevention. This is the case when documents are registered in the Companies Register. It should also be possible for certain information that is registered not to be visible to persons searching the register or to appear in extracts. The SLC had in mind particularly dates of birth, where one possibility might be to withhold the day of birth, as is done for directors' details in the Companies Register. Another would be that while a name and date of birth would take the searcher to any relevant entries, the date of birth would not actually be displayed.

Reason for taking power

164. While the main aspects of the Register of Statutory Pledges are set out in the Bill, there requires to be more flexibility in other respects of the operation of the new register and secondary legislation is more appropriate to provide this. Such an approach follows the example of the Land Register of Scotland under the Land Registration (Scotland) Act 2012.

165. The Register of Statutory Pledges rules will provide detail to support the provisions in the Bill for the new register. While it is not expected that the rules will be subject to frequent change, it is foreseeable that they will require amendment as time goes on. In particular, the rules will allow the Scottish Ministers to regulate how the register is kept in light of changing circumstances and technologies. Amendments to the rules will also allow any application forms to be altered as required, where, for

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example, a development in the law requires the Keeper to ask different questions or be supplied with different information by applicants.

Choice of procedure

166. The Land Registration (Scotland) Rules 2014 are subject to negative procedure and this is also considered appropriate for the rules of the new Register of Statutory Pledges. The rules are concerned with the normal running of the register and will not affect the underlying principles of the Bill.

Section 115(1) – Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or negative depending on how exercised

Provision

167. The power in this section allows the Scottish Ministers to amend any enactment, including the Bill.

168. Section 115(1) provides that the Scottish Ministers may by regulations make freestanding ancillary provision (namely incidental, supplementary, consequential, transitional, transitory or savings provision) which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the enacted Bill or provision made under it. Subsection (2) provides that such regulations may modify any enactment (including the Bill).

Reason for taking power

169. The Scottish Government considers it appropriate to take power to deal with anything that might emerge in the course of implementing the Act (for example, interactions with secondary legislation or older statutes or rules of law, or simply making a consequential amendment to the interpretation section in the event that the various powers to specify persons in relevant sections are exercised so as to use a term which requires an Act-wide definition). Without the power proposed it would be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the policy intentions of the original Bill and this would not be an effective use of Parliamentary or Government resource.

170. It is considered that such matters can be best addressed through subordinate legislation. The power is restricted in that it can only be used for the purposes of, in connection with, or for the purpose of giving full effect to the Bill, or provision made under it.

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Choice of procedure

171. Regulations under this section will be subject to the affirmative procedure where they modify primary legislation by adding to, replacing or omitting any part of the text of an Act. Otherwise, they will be subject to the negative procedure. This is the normal approach for ancillary powers of this type.

Section 116(3) – Interpretation of Act

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

172. Section 116(3) enables the Scottish Ministers to make alternative provision in relation to the definitions of “authenticated” and “executed” than those provided for by the Requirements of Writing (Scotland) Act 1995.

Reason for taking power

173. Subsection (3) permits the Scottish Ministers to prescribe a different standard for executing paper documents or authenticating electronic documents than those provided for by the Requirements of Writing (Scotland) Act 1995. This power is taken to allow for flexibility; it enables future-proofing because these definitions can be more easily changed to take account of technological developments.

Choice of procedure

174. This power relates to how certain terms are interpreted in the Bill, but as it would permit the Scottish Ministers to make alternative provision to that contained in the Requirements of Writing (Scotland) Act 1995 (as amended) and make changes to primary legislation, it is appropriate that this power is subject to affirmative procedure.

Section 117(2) – commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid only

Provision

175. Section 117 enables the Scottish Ministers to commence the Bill by conferring a power on Ministers, by regulations, to bring the substantive provisions of the Bill into force on such day as the Scottish Ministers appoint. Section 117(3) provides that such regulations may make different provision for different purposes.

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176. The provisions in the Bill will, except as provided for in subsection (1), come into force on the day or days appointed by the Scottish Ministers in regulations made for that purpose under this section. Regulations under this section will be laid before the Parliament in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Reason for taking power

177. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable.

Choice of procedure

178. As is now usual for commencement regulations, the default laying requirement applies.

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Moveable Transactions (Scotland) Bill

Delegated Powers Memorandum

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