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Moveable Transactions (Scotland) Bill

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The Moveable Transactions (Scotland) Bill would reform the way moveable property - such as vehicles, legal claims and intellectual property rights - can be used to access credit in Scotland.



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Purpose of the Bill

The purpose of the Moveable Transactions (Scotland) Bill ('the Bill') is to make financing a business easier by modernising the law covering how moveable property can be used to access credit. It would do this in two ways:

- Assignment is the way in which ownership of a claim (usually a claim to be paid money) is transferred. The Bill would reform the law in this area using a new **Register of Assignations**.
- Pledge is the term for using physical moveable property as security for a loan. The Bill would introduce a new kind of pledge, to be registered in a **Register of Statutory Pledges**. It would also be possible to create statutory pledges over [intellectual property](#).

The main focus of the Bill is to improve access to finance for businesses. However, its provisions (with some modifications) would also apply to individuals

This briefing looks at:

- current problems with the law in Scotland and issues with accessing business finance
- what the Bill's provisions would do
- consumer issues in relation to some of the proposals in the Bill.

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The Bill: important dates and documents

The Moveable Transactions (Scotland) Bill was introduced in the Scottish Parliament on 25 May 2022. It was introduced by Keith Brown, Cabinet Secretary for Justice and Veterans. It is a Scottish Government Bill.

The [Delegated Powers and Law Reform Committee is the lead committee for Stage 1 scrutiny](#) of the Bill. Stage 1 scrutiny looks at the general principles of a bill.

The Bill originated in work carried out by the Scottish Law Commission, which is responsible for making recommendations to improve the law. This briefing also looks at [the role of the Scottish Law Commission](#) and the [special Scottish Parliament procedure for dealing with Scottish Law Commission bills](#).

Documents relating to the Bill are available on the [Moveable Transactions \(Scotland\) Bill page on the Scottish Parliament website](#). They include:

- the [Moveable Transactions \(Scotland\) Bill \[as introduced\]](#) ¹
- the [Explanatory Notes, which explain the purpose of the Bill](#) ²
- the [Policy Memorandum, which explains the policy context as well as the objectives the Scottish Government aims to meet](#) ³.

Technical language and definitions

The Bill deals with a complex area of law which, in turn, influences a technical area of business finance. The specialist terms used in this briefing are explained below.

How Scots law defines property

Scots law divides property - that is things that can legally be owned - into two categories.

Heritable property covers land and the things attached to land, including buildings.

Moveable property covers everything else.

Moveable property is itself sub-divided into corporeal moveable property and incorporeal moveable property. **Corporeal moveable property** covers physical moveable things, like machinery, stock, cars or furniture. **Incorporeal moveable property** covers property without physical form, like shares in a company, intellectual property rights or the right to pursue a legal claim.

Definitions for other terms used in the Bill

Assignment - the process by which ownership of incorporeal moveable property is transferred in Scotland. The Bill deals with one specific type of assignment, that of transferring ownership of a legal claim.

Assignee - the person or body to which ownership of incorporeal moveable property is transferred.

Assignor - the person or body who transfers ownership of incorporeal moveable property to someone else.

Common law - the traditional law as developed by judges in decisions in individual cases. The other source of law is legislation.

Company - a specific type of legal entity, created and regulated by legislation. A company has a separate legal personality from the people involved in running it. This means, for example, that creditors can only usually seize the assets of the business, rather than the assets of the people involved in running it.

Consumer credit - credit regulated under the Consumer Credit Act 1974 and Financial Conduct Authority rules for consumer creditors. It includes most types of credit taken out by individuals, but notable exceptions are mortgages (standard securities in Scotland), loans from credit unions and short-term credit where no interest is charged (although this is set to change).

Court-sanctioned debt enforcement action - creditors who take successful court action (or take other action with the same authority as court action) have access to a range of methods to enforce payment of debts which are not available to other creditors. These are called "diligence". They include being able to seize assets, like money in a bank account or stock for a business belonging to the debtor.

Encumbered property - property (either corporeal moveable property or incorporeal moveable property) over which there is a statutory pledge.

Floating charge - a form of security for loans which can only be granted by companies and limited liability partnerships (and some other corporate bodies). It covers property (usually moveable property) of a company as may have been agreed. However, it does not attach to specific assets. Instead it floats over all the relevant assets of the business at any given time until an event happens (usually insolvency) which causes it to crystallise over the specific assets held at that point.

Good faith - a general legal concept, so its requirements vary depending on the context. It can often be easier to explain it in the absence. Generally, someone shouldn't be able to benefit from actions undertaken in bad faith. So, if a debtor deliberately pays the wrong person, for some actual or perceived advantage to themselves, then they shouldn't be able to benefit from it.

Intellectual property - ideas, such as patents or copyright, which can be registered and owned. Intellectual property is a category of incorporeal moveable property.

Intimation - the formal term for giving notice to a debtor in an obligation that it has

been assigned.

Partnership - a formal arrangement between two or more people to carry out business together. There are a range of laws and legal principles which govern how partners are liable for different actions between themselves and to customers of their business. Partnerships are treated more like people than companies. They do not benefit from limited liability. However, there is an exception for limited liability partnerships, which are treated like companies and have many of the same legal obligations. Note that limited partnerships are different from limited liability partnerships. With limited partnerships, some partners have only a financial stake rather than an active role in running the business and their liability is limited to their investment.

Pledge - a type of security taken over moveable property. Traditionally only possessory pledge has been possible in Scotland - where the pledged property is in the possession of the creditor. The Bill would create a new type of pledge called statutory pledge. This would be registered in a public register rather than delivered to the creditor.

Provider - the person providing the moveable property over which a pledge is secured.

Secured creditor - any creditor with additional security in the event that loan payments are not made. However, in relation to the Bill, a secured creditor is a creditor whose debt is secured by a pledge.

Small and medium-sized enterprises (SMEs) - businesses that fulfil two of the following three criteria: 1) have a turnover of less than £25 million; 2) have fewer than 250 employees; and 3) have gross assets worth less than £12.5 million.

Sole trader - a person who runs a business in their own name rather than under any formal legal structure. The law generally makes no distinction between the personal affairs or finances and the business affairs or finances of a sole trader. Their personal assets can be seized by creditors to pay business debts.

Statutory debt solution - a process for dealing with unmanageable personal debt set out in legislation. The three statutory debt solutions in Scotland are bankruptcy, the Protected Trust Deed and the Debt Arrangement Scheme.

The role of the Scottish Law Commission

The [Scottish Law Commission](#) has the statutory role of making recommendations to government to simplify, modernise and improve the law. It has a rolling programme of projects looking at reforms to the law in particular areas.

The Commission can be requested to look into particular areas of law by the Scottish and UK governments. It can also identify priorities from consultation and feedback from stakeholders.

It is up to the Scottish or UK governments to decide whether to take proposals made by the Scottish Law Commission forward. They may carry out further consultation before deciding what to do.

The Scottish Law Commission has been looking at the area of moveable transactions for some time. Its efforts follow on from previous reform proposals in the 1980s and 1990s. It published its final [Report on Moveable Transactions](#) ⁴ (including a draft bill in Volume 3) in 2017.

The Scottish Government announced its intention to bring forward a bill on moveable transactions in its [programme for government 2021-22](#) ⁵. The bill which is before the Scottish Parliament is broadly the same as the bill developed by the Scottish Law Commission. However, it no longer covers financial instruments, such as shares and bonds, because the Scottish Government believes this is outwith the legislative competence of the Scottish Parliament.

Special Scottish Parliament procedure for dealing with Scottish Law Commission bills

Both the Scottish and UK parliaments have special procedures for dealing with non-controversial Scottish Law Commission bills. These are intended to get round the barrier of lack of parliamentary time in relation to technical bills which do not deal with high profile issues.

The [Standing Orders of the Scottish Parliament](#)⁶ allow the Delegated Powers and Law Reform Committee, rather than the relevant subject committee, to consider a bill which implements all or part of a Scottish Law Commission report.

The bill must also meet other criteria, as decided by the Presiding Officer. The current criteria are that the bill would⁷ :

"(a) simplify, modernise or improve the law to

- (i) ensure it is fit for purpose,
- (ii) respond to developments, or address deficiencies, in the common law, or
- (iii) respond to other developments in the law;

"(b) make provision which is not likely to generate substantial controversy among stakeholders."

Previous Scottish Parliament Scrutiny of moveable transactions proposals

The Scottish Parliament's Session 5 Economy, Energy and Fair Work Committee carried out some work on the Scottish Law Commission's moveable transactions proposals before the Scottish Government had announced its intention to take legislation in this area forward.

The Committee held an [evidence session on 26 November 2019](#)⁸ with witnesses from business and academia who had been involved in the development of proposals. It also issued a call for views and [produced a summary of the responses received](#)⁹.

Key issues highlighted in responses to the call for views were the disadvantages faced by Scottish businesses because of the current state of the law. Respondents also discussed the need for complex and uncertain legal workarounds to deal with the current law. Citizens Advice Scotland highlighted its concerns about the lack of protections for consumers in the draft bill.

Current problems with the law in Scotland

The Bill seeks to modernise the law to make it easier for businesses to raise finance using their moveable property. There are three principal barriers to doing this at the moment in Scotland:

- [assignment of a claim requires intimation to the debtor](#)
- [moveable property used to secure a loan must be in the possession of the creditor](#)
- [it is not possible to create a security right over incorporeal moveable property except by transferring ownership.](#)

Assignment of a claim requires intimation to the debtor

Assignment is the process by which ownership of incorporeal moveable property is transferred in Scotland. The Bill deals with one specific type of assignment - that is transferring ownership of a legal claim.

Assignment of a claim must be intimated to the debtor in the obligation

A claim is the right to demand performance of an obligation. Usually, this will be the right to be paid money, but it can cover a range of obligations. The transfer of a claim is not legally effective until the debtor - the person who owes the obligation - has been notified in writing. Notification in this way is called intimation.

The requirement for intimation can cause difficulties in practice. A particular example is businesses trying to access invoice financing. Invoice financing is where a business uses the money owed (now or in the future) by customers as an asset for raising finance. It is an important form of finance for lots of businesses, including small and medium-sized enterprises.

Under Scots law at present, assigning a bulk claim of to be paid invoices would require notification, including a copy of the document setting up the arrangement, to all of a business's current customers. That is likely to be administratively burdensome, costly and undesirable for a business which wishes to keep its financial affairs private.

In addition, it is not possible to know what debts will exist in the future. It is therefore not possible to notify customers in relation to future invoices.

There is an impact on Scottish businesses from this legal complexity and uncertainty

The Scottish Law Commission suggests that the uncertainty of the law here means that invoice financiers may charge Scottish businesses more for their services than English businesses¹⁰.

[Respondents to the Session 5 Economy, Energy and Fair Work Committee's call for views](#)

⁹ noted that legal workarounds cost more money in terms of legal advice. The increased risk may also mean that some forms of finance are not available to all Scottish businesses.

Moveable property used to secure a loan must be in the possession of the creditor

At present, if a loan is secured on moveable property, the property must be in the hands of the creditor. The exception is where a company grants a [floating charge](#).

The classic example of a possessory pledge is pawn. An individual wishing to raise money from a watch they own could take the watch to a pawn shop. The watch would remain at the pawn shop until the individual was able to pay back the loan or the legal requirements for the pawn shop to be able to sell it on were met.

The requirement for moveable property on which a loan is secured to be in the hands of the creditor is meant to give a clear indication to everyone else of the creditor's interest in it.

However, this means that, if a business wants to raise finance on its moveable property, the property is effectively put out of use for the business. Raising finance secured on a business's machinery or vehicle fleet becomes a significantly less attractive proposal if the business can no longer use the machinery or vehicles.

The requirement for moveable property used as security for a loan to be in the possession of the creditor is not a feature of the law in England, or in many other countries. This is argued to put Scottish businesses at a disadvantage.

It is not possible to create a security right over incorporeal moveable property except by transferring ownership

Businesses may want to use incorporeal moveable property, such as shares or intellectual property rights, as security for a loan. Scots law usually achieves this by transferring ownership of the rights to the creditor. There is an exception for the [floating charge](#).

The assignation document doing this will usually state that the assignation is "in security". However, the process still gives the creditor a greater right than is needed in the situation. It may also require complex ancillary arrangements - for example, so that a business can continue to use its intellectual property after transferring ownership. This increases the cost of securing finance in Scotland, in comparison to many other countries.

There are situations where a creditor may not want to take ownership of incorporeal moveable property. In particular, ownership of shares can bring with it obligations, such as a requirement to be registered as a "person with significant control" in relation to the company. This may mean that a creditor is not prepared to accept certain types of security from businesses in Scotland.

Finally, the requirement to transfer ownership means that it is only possible to use incorporeal moveable property as security in relation to one creditor. This is the case even where the right transferred to the creditor may be worth more than the credit provided. In other countries, it is possible to create more than one security interest in incorporeal moveable property, giving businesses more flexibility when raising finance.

Accessing business finance

Access to finance is seen as a key part of a supportive environment for businesses, especially for small and medium-sized enterprises. By modernising the law in Scotland, the Bill seeks to increase the finance options available to businesses as well as reducing the cost.

This part of the briefing will look at:

- [current trends in business finance](#)
- [the role of security in business finance](#).

Current trends in business finance

The figures below look at both the demand for finance and the current size of the market affected by the Bill's proposals.

Close to half of small and medium-sized enterprises accessed finance in 2021

The [SME Finance Monitor](#) provides information on access to finance by [small and medium sized enterprises](#). The [most recent analysis covers quarter four of 2021/22](#). An important caveat is that business finance was, at that stage, still significantly affected by the impact of the COVID-19 pandemic, including easier than usual access to government-backed loans and grants.

It reports ¹¹ :

- 43% of SMEs used external finance in 2021, in line with the 2019 (pre-pandemic figure) of 45%.
- 12% of SMEs reported a need for funding in 2021, up from 3% in 2019.
- Of those SMEs with a need for funding in 2021, 81% needed it for cash flow support, compared to 24% for business development. In 2019, the split was 49% for cash flow and 58% for business development.

A proportionate share of the invoice financing and asset-based lending markets could be worth £1,302 million to Scottish businesses

UK Finance is the trade association for the UK financial services industry, including the invoice financing and asset-based lending sectors that are amongst those targeted by the Bill's reforms. It has provided SPICe with figures estimating the approximate size of these sectors in Scotland at present.

The calculation is based on the proportion of UK businesses registered in Scotland. This is likely to create an over-estimation. Given the difficulties businesses in Scotland can face accessing these types of finance, they are likely to be using them less than their English counterparts.

Note again that 2020 was not typical in terms of business finance. Figures for 2019 are included for context. IF stands for invoice finance. ABL stands for asset-based lending.

The figures in the final column represent the total amount of finance being advanced at the end of the relevant quarter. They are therefore a snapshot, rather than a total figure for lending for the year or the quarter.

Size of the invoice financing and asset-based lending sectors in Scotland

	Total UK business population	Total Scottish business population	Scottish businesses as a proportion of UK businesses	Estimated number of Scottish businesses using IF/ABL	Advances to Scottish businesses (in £million)
Quarter ending Dec 2019	5,980,500	369,900	0.061851	2,420	1,302
Quarter ending Dec 2020	5,590,900	342,000	0.061171	2,210	852

The role of security in business finance

This section of the briefing looks at some of the factors which influence decisions on what sources of finance a business can access and how much it costs them:

- [calculating the cost of credit](#)
- [the role of personal guarantees](#)
- [the floating charge](#).

Calculating the cost of credit

The cost of credit depends, broadly, on the risk to the lender. Thus, if a lender considers the risk of default on the loan terms to be higher, they will usually charge more (or not lend at all).

One way to reduce the risk of non-payment is for the lender to have some form of security from the borrower. Security refers to a fallback right the lender has to recover their money should the borrower fail to pay. Reducing the risk of non-payment should reduce the cost of credit.

The most well-known example is a mortgage, where the lender has the security of being able to sell the house if the borrower can't repay the loan. However, businesses may want to use things like their machinery, vehicles or intellectual property rights as security for a loan. They may also sell their payments due (invoices) as a way of improving cashflow or accessing credit.

The Bill would make it easier for businesses to use moveable property to raise finance. This is expected to reduce the cost of borrowing for Scottish businesses. It is also expected to increase options for accessing credit.

The role of the personal guarantee

Company directors may be asked to give personal guarantees that a loan will be repaid.

Companies and limited liability partnerships are particular forms of business entity created by legislation. They have what is called "limited liability". This means that only the assets of the business can be seized by creditors should the company be unable to pay. Unlike for [sole traders](#) or standard [partnerships](#), it is not usually possible for creditors to access the personal assets of the directors.

Banks often ask for a personal guarantee when lending to smaller companies. This essentially means that, should the company not be able to repay, the director or directors giving the guarantee become personally liable.

Directors may be less prepared to take risks in the growth of their companies if their personal assets (such as the family home) are at risk. There may be less need for personal guarantees if other forms of security can be provided.

The floating charge

Companies and limited liability partnerships can access a specialist form of security called the floating charge.

Floating charges are a form of security which can operate over all the assets of a company (or a certain group of assets, depending what is agreed), usually moveable property. The security does not attach to specific assets, but "floats" over all of them until something happens which entitles the creditor to exercise their security right. This means companies can, for example, sell or buy assets without affecting the security right.

Floating charges can operate to reduce the cost of credit, while still giving companies flexibility to deal with their assets. However, the floating charge is only available to [companies](#) and limited liability partnerships (and some other types of corporate body). It is not available to standard [partnerships](#) or [sole traders](#).

Respondents to the [Session 5 Economy, Energy and Fair Work Committee's 2020 call for views](#)⁹ on the then Scottish Law Commission draft moveable transactions bill suggested that, due to the uncertainty of the law in Scotland, businesses may be asked to grant creditors a floating charge as an additional security when accessing invoice financing. Because of this, it was possible that invoice financing was only readily available to companies in Scotland, whereas it was available to all types of business in England.

In addition, a floating charge provides less security to creditors than a fixed charge on specific moveable property (as is available in England). This is particularly so in insolvency situations. Recent changes to the law mean that, on insolvency, tax debts must be paid before debts to floating charge holders (but after money owed to those with a fixed charge). Tax debts can be significant, reducing the chances of a floating charge holder being paid.

It is therefore possible that even businesses in Scotland which are able to grant a floating charge may be paying more for credit.

Administration of the registers created by the Bill

The Bill would establish two new registers as part of its reform proposals - the Register of Assignations and the Register of Statutory Pledges.

Both these registers would be maintained by [Registers of Scotland](#). Registers of Scotland is a public body which maintains a number of other public registers in Scotland, including the land registers (which record ownership of land and buildings in Scotland).

The official in overall charge of Registers of Scotland is known as the **Keeper of the Registers of Scotland**. The Bill places a range of new duties on the Keeper.

It is expected that registration and searches will be competed electronically. This is intended to reduce costs and speed up processes. There will, in some cases, be competition to register an interest (eg. where an assignor has mistakenly assigned the same claim twice) so it is important that processes are quick and robust.

Sections 37 (for the Register of Assignations) and 109 (for the Register of Statutory Pledges) of the Bill would give Scottish Ministers wide rule-making powers in relation to the format and administration of the registers.

Defining and protecting consumers

Generally, it is considered fair to give consumers additional protections in various areas of law because of the likely information imbalance between them and the person selling a product or service.

A seller is likely to have specialist knowledge about the products or services they deliver, whereas a consumer is not. This information imbalance could be used to take advantage of the consumer - for example, through terms and conditions which are significantly in the seller's favour.

The Bill contains a range of additional protections for individuals not acting in a business context

These are discussed in the sections dealing with:

- [protections for consumers in relation to assignation](#), and
- [protections for consumers in relation to statutory pledge](#).

These protections are specifically formulated as for individuals not acting wholly or mainly for business purposes, or for individuals whose assets are not used wholly or mainly for business purposes. The effect of this is to exclude [sole traders](#) from the protections.

As they are not individuals, other types of small business are also excluded from the protections.

Should protection extend to sole traders and other small businesses?

On the one hand, excluding sole traders and small businesses from additional protections serves an important policy purpose. The purpose of the Bill is to improve access to business finance, especially for small and medium-sized businesses. If sole traders or other small businesses have additional protections, then lenders may reflect this in higher interest rates.

However, sole traders and small businesses, where they are making a purchase which is outside their area of business expertise, can suffer from exactly the same information imbalance as individuals not acting in a business context. They, arguably, also need increased protection.

There is no standard definition of consumer in legislation. The definition can include sole traders and other small businesses. For example:

- Consumer Credit Act 1974 protections cover sole traders, partnerships of two or three people and unincorporated bodies (for example, informal sports clubs).
- The Consumer Scotland Act 2020 established a body to advocate on behalf of consumers in Scotland. A Scottish Government amendment during Stage 2 consideration extended the definition of consumer to include small businesses.

What would the Bill do?

The Bill would reform the law in Scotland to remove the current barriers to using moveable property as security for loans. It would do this by:

- removing the need for intimation to the debtor when assigning a claim - instead assignments could be registered in a new **Register of Assignations**
- creating a new form of security over moveable property called the statutory pledge - statutory pledges would be registered in a new **Register of Statutory Pledges** rather than needing to be physically delivered to the creditor.

Note though that the reform options would operate in addition to current methods of assignment and pledge. It would therefore still be possible to assign claims using intimation to the debtor or create a security over moveable goods by delivering them to the creditor.

The reforms in the Bill would apply to individuals as well as businesses, although there are additional protections for individuals not acting in a business context.

The proposals are discussed in more detail in the following sections:

- [what is assignment?](#)
- [the requirements for assignment as set out in the Bill](#)
- [the requirements for intimation as set out in the Bill](#)
- [protections for the debtor in a claim](#)
- [the operation of the Register of Assignations](#)
- [assignment - consumer issues](#)
- [what is pledge?](#)
- [the requirements for pledge as set out in the Bill](#)
- [setting up a statutory pledge](#)
- [disposing of property encumbered by a statutory pledge \(including protections for buyers\)](#)
- [steps which must be taken before enforcing a pledge](#)
- [enforcing a pledge](#)
- [the operation of the Register of Statutory Pledges](#)
- [statutory pledge - consumer issues.](#)

What is assignation?

Assignation is the way in which ownership of incorporeal moveable property is transferred in Scotland. The English term is assignment. The Bill deals with one type of assignation - that is assignation of a legal claim.

Assignation is usually used in relation to claims to be paid money, e.g. the right to be paid for a service to a customer or for a loan. However, other rights can also be assigned.

This part of the Bill is particularly concerned with facilitating access to invoice financing for businesses in Scotland. This involves using the right to be paid by customers as a way to raise finance. It operates by transferring ownership of customer invoices (including, in some cases, future invoices) to the invoice finance provider.

The current rules for assignation are found mainly in the common law and the Transmission of Moveable Property (Scotland) Act 1862. The **assignor** is the person or body transferring the right to the claim and the **assignee** is the person or body to whom it is being transferred. The document setting up the assignation is called an **assignation document**.

The current law requires that, for assignation of a claim to be effective, the debtor in the obligation (usually the person required to pay money) must be notified. This is referred to as **intimation**. The Bill would enable assignation to take place either by intimation or by registration in a new Register of Assignations.

It would also reform and restate other aspects of the current law.

The requirements for assignation as set out in the Bill

Section 3(2) of the Bill sets out the requirements for an assignation to be effective. These would be:

1. that the assignor is the holder of the claim in question
2. that either:
 - a. intimation of the assignation is given to the debtor in the claim, **or**
 - b. the assignation document is registered in the Register of Assignations
3. the claim can be identified as a claim to which the assignation document relates (although it can be identified as a class of claim rather than a specific claim)
4. where the assignation is subject to a condition (e.g. a period of time passing) before it is effective, that condition is satisfied.

Note that it is possible for an assignation document to cover a claim that does not yet belong to the assignor (section 1(4)). However, ownership of the claim cannot transfer to the assignee until it does.

Similarly, it is possible for a claim to be subject to a condition which must be satisfied before it can be transferred (section 2(1)). This could include a condition which may never happen (e.g. that planning permission is granted). Again, the claim can only transfer once any related conditions have been met.

Importantly, this means that the execution of an assignment document, or an entry in the Register of Assignations, does not itself demonstrate ownership of the claim by the assignee. [The Bill contains additional information rights](#) to allow those affected by an assignment to clarify their position.

The requirements of intimation as set out in the Bill

It will still be possible for an assignment to be effected by intimation to the debtor in the obligation.

Under the proposals in section 8 of the Bill, intimation could happen in three ways:

- by the assignor or the assignee serving notice on the debtor
- by the debtor acknowledging assignment to the assignee (e.g. by paying the assignee rather than the assignor)
- By the assignee raising court action against the debtor on the basis of the assignment.

Intimation would be by way of a notice to the debtor in most cases. In those circumstances:

- notice must be in writing
- it must include the name and address of both the assignor and the assignee
- it must identify the claim in question.

However, there would no longer be a requirement to include the assignment document in the intimation. [The debtor would instead have various rights to request information](#) to deal with situations where the nature of the assigned claim was not clear.

The notice must be delivered personally to the debtor, sent by post or transmitted electronically. Postal notice must be sent to the address provided by the debtor to the assignor, or to what the Bill describes as the "proper" address of the debtor. This would be the registered or principal office of a corporate body or partnership or the last known address of an individual debtor.

One of the ways in which the Bill reforms the law is to set out rules on electronic notification. It would be possible to send notice of an assignment to an email address provided by the debtor to the assignor. It would also be possible for the email to provide a link to a website or other portal where the required information can be accessed or downloaded.

Note that these are the requirements where intimation rather than registration is used to legally transfer ownership of a claim. The Bill does not include any formal requirements for intimation to a debtor for the purpose only of making them aware that ownership of their

obligation has changed hands.

Protections for the debtor in a claim

The debtor is the person who owes the obligation which is being transferred by the assignation. Debtors may be businesses, and assignations can be an important part of sharing rights and responsibilities in commercial contracts. However, debtors will often be individuals, usually those who owe money as customers who have bought goods or services, or as borrowers who have taken out loans.

The Bill would allow assignation to be effective without intimation to the debtor, which increases the risk that a debtor would not know that the creditor in their obligation has changed. In addition, where intimation has occurred, it is possible for the debtor not to be aware of it.

Debtors who make payment in good faith are protected

Where a debtor makes payment to the assignor rather than an assignee because they are unaware that the claim has been transferred, they will not be penalised (section 10). So, if someone pays a £50 monthly loan instalment to the wrong creditor, their debt will still be reduced by £50 if they do so in good faith.

Similarly, if a debtor receives notice of an assignation and makes payment to a purported assignee, they are protected if the assignation is not in fact effective. This may be because it is not clear who the true assignee is (e.g. because the same claims has been mistakenly assigned twice)(section 11) or because it is not possible to assign a particular type of claim by intimation (section 12).

Note that the fact that an assignation document has been registered, or intimation correctly sent (by post or electronically), would not prevent a debtor being considered to have acted in good faith (section 10(3)).

Debtors have rights to request information from assignors and assignees

Section 14 of the Bill deals with the debtor's rights to request information from the assignor or assignee about a potential assignation.

Where an assignee serves notice of an assignation on a debtor, the debtor can ask for "reasonable evidence" of the assignation before being required to perform any part of the obligation. Reasonable evidence could be, for example, written confirmation from the assignor or an extract from the Register of Assignations.

A debtor who believes that an assignation document has been granted in relation to a claim, but has not received notification, can request confirmation from the assignor. They are not required to perform until the assignor has given them a written statement setting out the status of the claim.

Where a debtor knows that an assignation document has been granted in relation to a claim, they can ask either the assignor or the assignee for a written statement describing whether the assignation is subject to a condition, and whether that condition has been satisfied. They are not required to perform until they have received the statement.

The operation of the Register of Assignations

Section 3(2) of the Bill provides that an assignation may be effected by registering the assignation document in the Register of Assignations as an alternative to intimation. It is expected that this will become the most common way of making an assignation.

The Register of Assignations will be maintained by [Registers of Scotland](#).

The Register of Assignations will not be comprehensive

It will still be possible to assign claims via intimation. This means that a search of the register may not reveal all assignments which could be relevant.

The reasons for this policy choice are described in paragraphs 44 to 56 of the [Policy Memorandum](#)³. Broadly, it is thought that some people will prefer the privacy involved in assignation by intimation. Retaining this as a valid way of carrying out an assignation avoids creating opposition to the proposals in the Bill.

Scottish Ministers would have regulation-making powers to require that some types of assignation can only be carried out by registration (section 3(8)).

The Register of Assignations will only provide evidence that an assignation document has been granted, not that an assignation has occurred

The register is only intended to provide evidence that an assignation document has been granted and then registered at a specific time. There are a range of factors (e.g. an assignation being subject to a condition before it is effective) which may mean that an assignation to which an assignation document relates has not occurred.

This part of the briefing looks at:

- [the structure of the register](#)
- [searching the register](#)
- [rights to request information](#)
- [liability for errors in the register](#).

The structure of the Register of Assignations

The register would be made up of two parts, the assignments record and the archive record.

The archive record would be used to document changes to the assignments record. This is likely to be important where an aspect of the record turns out to be contentious - e.g. a correction is made in error.

The assignments record

Section 20 of the Bill sets out the information which an entry must contain. This includes:

- the assignor's name and address (and, where they are an individual, their date of birth)

- the assignee's name and address (and, where they are not an individual an address - which may be an email address - to which requests for further information can be sent)
- a copy of the assignation document
- a description of the claim (with the more detailed requirements for this to be set out in rules brought forward by Scottish Ministers)
- a registration number for the entry
- the time and date of registration (where there are competing claims - e.g. where an assignor has mistakenly assigned a claim twice - the first assignee to register will get the right).

Scottish Ministers would have powers to create more detailed rules about the register, including the ability to require additional information to be supplied.

It is intended that the rules will enable some of the information in the register to be kept confidential - for example, dates of birth for individuals ([Policy Memorandum](#), paragraph 91).

The registration process

Only the assignee or someone acting on their behalf, such as a solicitor, would be able to register an assignation document. Registers of Scotland would be required to process applications in the order in which they are received.

There would be a fee for registration. The fees generated by registration and searches are intended to cover the costs of maintaining the register.

Under section 25, the registration of an assignation document would be ineffective if:

- the entry does not include a copy of the assignation document
- the entry contains an inaccuracy that is seriously misleading (defined in section 26, broadly, as situations where the relevant information would not be returned under a properly constituted search, as well as some other circumstances)
- the assignation document is invalid.

Registration would become effective if the entry is corrected.

Registers of Scotland would have the power to correct obvious inaccuracies. It could also be directed to correct an entry by the courts following a decision in court proceedings. Rules made by Scottish Ministers may detail a process for other parties to apply for the record to be corrected.

Searching the Register of Assignations

It is not intended that it will be possible to search the register by the names of assignees. This could enable competitors to access commercially confidential information about the activities of a business.

However, it is not clear what impact this may have on a debtor who wishes to check the rights of a particular assignee. The Scottish Government has stated that ¹² it does not expect debtors to look at the register. Instead, it is expected to be used by prospective assignees (to check the status of an assignor's right to a claim) and insolvency practitioners.

Under section 31, it would only be possible to search the register by reference to:

- the names of assignors (including month and year of birth for assignors who are individuals)
- the identifying number of an assignor, as set out in the register's rules
- registration numbers allocated to entries
- any other factor specified in the register's rules.

Rights to request information from the assignee

The Register of Assignations would only provide evidence that an assignment document has been registered at a particular time. It would not comprehensively demonstrate that an assignment has occurred. The Bill therefore gives third parties the right to request further information from an assignee to clarify the status of a particular obligation.

In particular, an assignment document may cover a number of claims, including future claims. These may pass to the assignee in stages. An assignment document could also contain a condition which must be satisfied before the assignment takes place. It may not be clear from the information in the assignments record whether this has happened.

Section 34 of the Bill deals with information requests.

The people or bodies which are entitled to make information requests are:

- those who may have the right to carry out formal debt enforcement against the claim in question
- someone with the consent of the assignor.

Note that this list does not automatically include the debtor in the obligation, although it might be hoped that the assignor would consent to them making a request in most circumstances.

Scottish Ministers have regulation-making powers to specify additional people or bodies who would be able to make an information request.

An entitled person can ask an assignee for a written statement covering:

- whether a particular claim specified by the entitled person has been assigned by the assignment document
- whether a particular condition specified by the entitled person has been satisfied.

An assignee must respond within 21 days unless one of the exceptions listed in section 34

applies. They can recover their reasonable costs from the person making the request.

Liability for errors in the Register of Assignations

The Bill would require people - including the [Keeper of the Registers of Scotland](#)- to pay compensation in certain circumstances, where errors in processing cause loss to other parties.

Situations where the Keeper's errors could cause compensation to be paid include:

- making an error in compiling the assignments record
- issuing an inaccurate extract of the record
- processing applications in the wrong order.

Other people or bodies could also be liable to pay compensation where their actions create errors in the records and cause loss to other parties. Situations where this might apply include failing to take reasonable care that information in an application is accurate or failing to supply information about an assignment within the deadline.

There would be no liability under the Bill:

- where the person or body claiming compensation could have taken reasonable steps to avoid the loss
- where the loss was not "reasonably foreseeable". Reasonably foreseeability is a complex legal test which can be described, very broadly, as requiring that the consequences of an action could be predicted by a reasonable person
- for distress or hurt feelings.

Assignment - consumer issues

The Bill's focus is increasing access to finance for business but its provisions, including those on assignment, will apply equally to individuals.

Separately, [consumer credit](#) agreements can be transferred between creditors by assignment. So changes in the law also impact on consumers as debtors in consumer credit agreements.

This part of the briefing looks at:

- [protections for consumers in legislation in relation to assignment](#)
- [issues for consumers as debtors in consumer credit agreements](#).

Protections for consumers in relation to assignment

There are several protections - in the Bill and in other pieces of legislation - designed to protect consumer and individual interests in relation to assignment.

It is not possible to assign the right to be paid wages

The Bill (section 7) would prevent an individual from assigning a right to be paid wages. This would include things like bonuses and commission, as well as expenses and redundancy payments.

It is not possible to assign pension or social security benefit entitlements

Separate legislation mean that occupational pension rights, certain social security benefits and tax credits cannot be subject to assignment.

Any defences a debtor has to paying the assignor also apply to the assignee

A debtor may have a legitimate reason for not making payment in relation to a claim. For example, the amount owed may be wrongly calculated, or there may have been a problem with the goods or services supplied.

The [common law](#) allows a debtor to exercise any defence they had to making payment to the assignor against the assignee. Essentially, it is not possible for the assignor to pass on a better right to payment than they had in the first place.

So, a florist may have raised an invoice against one of its customers for a £50 delivery of flowers. That invoice may then be sold on to an invoice factoring business. However, if the flowers were never actually supplied, the customer is entitled to refuse to pay the invoice factoring business, just as they would be entitled not to pay the original supplier.

Section 13(1)(a) restates this rule in the Bill. Note though, it would provide that the rights are exercisable "except in so far as the debtor and the assignor agree otherwise". This means that it would be possible for the debtor to agree not to exercise their rights. The Scottish Law Commission referred to this as a "waiver of defence clause".

A claim is likely to be more valuable to the assignor and assignee if there is no risk that a debtor has a legitimate defence to making payment. However, it is difficult to think of situations where it would be in the debtor's interests to sign away their rights in this manner.

Assignment between creditors is common in [consumer credit](#) agreements. There appears to be a risk that debtors could be disadvantaged by the use of waiver of defence clauses. This is discussed in more detail in the section dealing with [issues for consumers as debtors in consumer credit agreements](#).

A debtor can "set off" money owed to them by the assignor

Broadly, set-off is a legal rule which allows one party to deduct money owed to them by their creditor from money they owe to the creditor. So, if I owe my friend £100 for holiday accommodation, but they owe me £50 for food, I only need to pay my friend £50.

Section 13 of the Bill would also provide that a debtor can exercise against the assignee any right of set-off they have against the assignor. The debtor can only set off debts owed up until the point they become aware of the assignment (e.g. via intimation). New debts accrued by the assignor to the debtor after than point cannot be set off.

Issues for consumers as debtors in consumer credit agreements

It is common for [consumer credit](#) agreements to be assigned between creditors for various commercial reasons. In particular, when a customer has difficulty making repayments on their credit agreement, the original creditor may choose to sell the debt to a business that specialises in dealing with customers in financial difficulty.

The debts are sold for a discount - representing the risk of non-payment. The new creditor makes their money from getting partial or full repayment from some customers, with the aim of recovering more money overall - across all the debts they have bought - than they paid to acquire them. There are businesses which specialise in buying debt which is the subject of insolvency and other [statutory debt solutions](#).

Thus, assignment can affect consumers as debtors at a point where they are vulnerable due to financial difficulties.

Currently, creditors are required to notify debtors of the assignment before it can become effective. The Bill would allow for registration in the Register of Assignations as an alternative to intimation.

It can be expected that assignees will continue to intimate to debtors in most cases, in order to ensure they get payment. However, where registration is used to effect at assignment, the urgency of doing so would be removed. This is because intimation would no longer be the point where legal ownership transfers.

Consumer creditors will still be required to notify customers of an assignment

Nevertheless, creditors in [consumer credit](#) arrangements would remain under a separate legal obligation to notify customers of an assignment. This comes from European Union legislation - Directive 2008/48/EC on credit agreements for consumers - and currently appears in [Financial Conduct Authority](#) Rules for consumer creditors. Note, though, that there is an exception where the assignor and assignee have agreed that payments should still be made to the assignor (the original creditor).

The requirement only applies to agreements regulated under the Financial Conduct Authority's consumer credit powers. Intimation would not be required (although it would remain practical) for other types of credit agreements involving consumers. Examples include loans from credit unions, or buy now, pay later arrangements (which are not currently regulated, although the UK Government plans to change this).

There may be an impact on debtors and money advisers from changes to the requirements on intimation

Failure to provide notification that a debt has been assigned - or a lack of urgency in doing so - can have implications for the debtor. For example, it can be difficult to keep track of who they owe money to in multiple debt situations, and it can be stressful to sort out payment errors.

However, it can also have an impact on money advisers and the administration of [statutory debt solutions](#) for those with debt problems. Money advisers need up-to-date information about who their clients owe money to in order to, for example, confirm balances or make challenges to the amount owed. Formal communications in relation to statutory debt

solutions such as the Debt Arrangement Scheme must be sent to the right creditor.

Money advisers have suggested that practice by some creditors is already poor in this area. They have expressed concern that removing the requirement for intimation to make an assignation legally effective may increase the administrative burdens they face ¹³.

Risks for consumers from "waiver of defence clauses"

As discussed in the [section on protections for consumers in relation to assignation](#), it would be possible for debtors to agree not to enforce against the assignee any defences to payment they have against the assignor. Note that the Scottish Government's view is that this was probably already a feature of the [common law](#), so the Bill is just putting it into legislation ¹².

It is not clear how this may operate in the context of selling on the debts of customers who are struggling to pay. However, there is at least a possibility that creditors will take steps to utilise this provision to reduce the risk of not being able to recover payment. Consumers could come under pressure to agree to new terms and conditions including a waiver of defence clause in order to be able to negotiate lower repayment rates.

The Scottish Law Commission considered how the law should apply to consumers in paragraphs 12.35 to 12.38 of Volume 1 of its [Report on Moveable Transactions](#) ¹⁰. It noted that there is protection from unfair contract terms in consumer contracts in the Consumer Rights Act 2015. However, in order to benefit from those protections, a consumer would need a detailed understanding of consumer rights legislation. They are also likely to need to take legal action to enforce their rights, exposing them to costs and risks for an uncertain outcome.

What is pledge?

Pledge is a form of security over corporeal moveable property. In a consumer context, pledge is known as pawn and regulated by the Consumer Credit Act 1974. It is also possible for businesses to pledge items to their creditors as security. However, the current law requires that those items are in the possession of the creditor.

The requirement to deliver pledged items to the creditor makes this form of security unattractive to businesses because it means they cannot continue to use their assets. Businesses in England (and many other countries) can use corporeal moveable property as security for a loan while retaining possession of it. This puts Scottish businesses at a disadvantage.

The Bill would create a new form of pledge, called "statutory pledge". A statutory pledge would be created by registration in the Register of Statutory Pledges, rather than by delivering the asset to the creditor.

The requirement for creditors to take ownership of incorporeal moveable property offered as security can also put Scottish businesses at a disadvantage.

The Bill's statutory pledge provisions would extend to [intellectual property](#) rights, getting round this problem for this one form of incorporeal moveable property. Scottish Ministers would be given regulation-making powers to enable statutory pledges to be created over

other types of incorporeal moveable property.

The person or body providing a pledge is referred to in the Bill as the **provider**. The person or body receiving the pledge is referred to as the **secured creditor**. Property which is the subject of a pledge is called **encumbered property**.

Priority when there are competing security rights

Note that there is nothing in law which prevents a provider creating more than one pledge over the same moveable property. The secured creditor who benefits from the first-created pledge is entitled to payment before the secured creditor in the second-created pledge. This is described as the claim of the first secured creditor having "priority" or "ranking" above the second secured creditor.

Arrangements for statutory pledges involving shares and bonds

The Scottish Government intends that it will be possible to grant a statutory pledge over financial instruments, such as shares or bonds issued by companies. However, it has concluded that legislating on this subject is reserved to the UK Government (see paragraphs 148 to 151 of the [Policy Memorandum](#)).

The Scottish Government has therefore asked the UK Government to make an order under section 104 of the Scotland Act 1998 to deal with the issue. This section provides a procedure for the UK Government to make changes to reserved laws which are consequential to legislation passed by the Scottish Parliament.

The requirements for pledge as set out in the Bill

Section 40 of the Bill sets out the legal requirements for creating a pledge.

Where a pledge is created over corporeal moveable property these are:

- either that the property is delivered to the secured creditor - where the property does not belong to the provider at the time it is delivered, the pledge would only be created when the provider does become the owner
- or by registration in the Register of Statutory Pledges.

It would only be possible to create a pledge over incorporeal moveable property by registration in the Register of Statutory Pledges.

Where a pledge covers both incorporeal moveable property and corporeal moveable property, registration would also be necessary. The only form of incorporeal moveable property which would be covered under the Bill's current provisions is [intellectual property](#) rights.

Delivery (section 42) must involve:

- physically handing over the encumbered property to the secured creditor
- giving the secured creditor control of premises where the encumbered property is located

- instructing a third party who currently has possession of the encumbered property to store it on behalf of the secured creditor, or
- delivering a bill of lading (a receipt issued by a transportation business, representing the goods being transported) to the secured creditor.

Setting up a statutory pledge

The details of a statutory pledge must be set out in a formal document - referred to as the constitutive document. This must (section 43):

- be executed (e.g. signed) or authenticated by the provider
- identify the property covered by the pledge - this can be as a class of items rather than specifically, although where the provider is an individual not acting in the course of business, each asset must be identified separately. It would also be possible for the document to cover property not yet owned by the provider, but the pledge would only become effective at the point the provider becomes the owner
- identify the obligation secured on the property.

A statutory pledge would be created (section 45(2)) when:

- the property covered by the statutory pledge is in the ownership of the provider
- the statutory pledge is registered, **and**
- the property can be identified as the property covered by the constitutive document.

It would be possible to add further property to the statutory pledge at a later date (or change the property covered). This would require an amendment to the Register of Statutory Pledges.

Disposing of property encumbered by a statutory pledge

The provider would need the consent of the secured creditor before they can sell - or otherwise transfer - the encumbered property. If this is not obtained - and one of the other protections in the Bill does not apply - then the property would remain encumbered by the statutory pledge.

The impact of a subsisting statutory pledge on the new owner would depend on the circumstances. They would not be compelled to perform the obligation themselves. However, they would be unlikely to be able to sell the property to someone else at its full market value, unless they took steps to discharge the obligation. The secured creditor would retain the right to sell the property if the terms of the secured obligation were breached, unless the obligation was discharged.

Consent by a secured creditor must relate to the specific transfer and must be granted no

more than 14 days before the transfer takes place (section 49).

There are additional protections in a range of circumstances for people who might unwittingly acquire rights in property encumbered by a statutory pledge. The protections can apply in the following circumstances:

- [buying from a seller acting in the ordinary course of business](#)
- [individual buyers acting in good faith](#)
- [buying motor vehicles](#)
- [where the Register of Statutory Pledges contains inaccurate information](#)
- [where a person is relying on a statement from a secured creditor](#).

The protections generally require the person acquiring the right to be in good faith. This isn't a strictly defined term, but it would include the requirement that the person couldn't actually know, or suspect, that the property was encumbered.

In most cases, a person won't be in bad faith just because they haven't searched the Register of Statutory Pledges. This reflects the policy intention that people would not generally be expected to check the register before making a purchase. However, where a protection relates to inaccuracies in the register, the person would have to be relying on a search.

Additional protections where property bought from a seller acting in the ordinary course of business

Someone acquiring property in good faith from a seller acting in the ordinary course of business would get it unencumbered by the statutory pledge. This would mean that people could generally shop with confidence from retail businesses.

However, the exception would not apply where a seller was not acting in the ordinary course of their business. So, for example, if you bought a second-hand piano from a business which sells stationery, you would not necessarily be protected, unless one of the other exceptions applied.

Additional protections for individual buyers acting in good faith

Under section 52, an individual who buys encumbered corporeal moveable property would get it without being affected by the statutory pledge if:

- the property was bought mainly for personal, domestic or household purposes
- the buyer paid (in money, or via some other exchange) for the property
- the buyer was in good faith - and being in good faith does not require the buyer to have searched the Register of Statutory Pledges.

Scottish Ministers would have the power to modify this section to set a financial cap on the value of property which could be acquired under this exception.

Additional protections for buyers of motor vehicles

Under section 53, people or bodies buying motor vehicles would get them unencumbered by any statutory pledge so long as they were acting in good faith.

There is an exception where the buyer runs a business selling motor vehicles, as buyers in these circumstances would be expected to check the Register of Statutory Pledges. In this context, buying and selling motor vehicles would include hire purchase and conditional sale agreements.

Where a motor vehicle business does buy a vehicle encumbered by a statutory pledge, the secured creditor would be entitled to receive the lesser of the amount outstanding in the secured obligation or the amount received for the sale of the car. The motor vehicle business would be entitled to claim compensation from the provider of the statutory pledge.

Additional protections when the Register of Statutory Pledges contains inaccurate information

There are additional protections under section 91 of the Bill for someone who has carries out a search of the Register of Statutory Pledges where the record in question is inaccurate. They apply where the person is in good faith and acquires a right in the encumbered property for value (which may be money or some other exchange).

If the entry:

- does not contain an identifying number for the encumbered property where one is required, or contains the wrong number
- has become seriously misleading (e.g. contains the wrong name for the provider)
- has been wrongly removed from the record

then the person would acquire their right without it being encumbered by the statutory pledge in question.

Additional protections for people relying on a statement from the secured creditor

Under section 105 of the Bill, [certain people will have a right to request further information](#) about property which may be encumbered, or about the nature of the secured obligation, from the secured creditor. This would include someone with the consent of the provider - for example, someone the provider may hope to sell property to.

Someone may buy - or take some other right - in property on the basis of a statement from the secured creditor that it is not encumbered property. If the statement later turns out to be incorrect, the person would still acquire the property without it being encumbered by the statutory pledge where (section 106):

- they are acting in good faith, and
- they acquired their property right within three months of getting the statement from the secured creditor.

Steps which must be taken before enforcing a pledge

The Bill provides for secured creditors to be able to sell - or otherwise benefit from - encumbered property should the secured obligation be breached. The enforcement provisions would apply to statutory pledge as well as pledge created by delivering the property to the secured creditor.

Where a secured obligation is covered by the Consumer Credit Act 1974, the secured creditor would have to follow its provisions as well

The enforcement provisions would not apply to pawn, which has its own regime, set out in the Consumer Credit Act 1974.

Where the obligation secured on the encumbered property is a [consumer credit](#) agreement, the secured creditor would have to follow any relevant requirements in the 1974 Act, as well as the requirements in the Bill. For example, the 1974 Act sets out requirements for issuing default notices before a creditor can take enforcement action.

Note that some types of credit commonly provided to consumers are not regulated under the Consumer Credit Act 1974, for example loans from credit unions.

Secured creditors must act reasonably

Section 62(4) of the Bill requires a secured creditor to "conform to reasonable standards of commercial practice" when enforcing a pledge.

The secured creditor must issue a pledge enforcement notice

Before enforcing a pledge, a secured creditor must give notice to the following parties:

- the provider
- the debtor (if they are not the provider)
- the holders of any other security rights in relation to the encumbered property (where the secured creditor could reasonably be aware of the rights)
- any other creditor who has taken [court-sanctioned debt enforcement action](#) against the encumbered property (where the secured creditor could be reasonably aware of the action)
- where a statutory pledge is over property which can be occupied (such as caravans or houseboats), any occupiers.

Scottish Ministers would be able to make further provision for the pledge enforcement notice via regulations.

A court order will not usually be necessary to enforce a pledge

Section 64(2) provides that a court order will be necessary where the provider is an individual. However, an individual provider and the secured creditor can agree in writing that a court order will not be required.

However, an agreement can only be made once the pledge becomes enforceable, rather than in advance. This means it cannot form part of the standard terms of a loan.

In addition, where the provider is a [sole trader](#) and enforcement is against property used mainly for business purposes, a court order will not be needed.

Section 64(3) provides that a court order will also be necessary to enforce a statutory pledge covering property which is someone's home (such as a caravan or houseboat). This will not be required if the secured creditor, the provider and the occupier all agree in writing. As with enforcement against the property of an individual, agreement must be after the pledge becomes enforceable.

Where court action relates to property that is someone's home, the court must only agree to the enforcement where this is "reasonable having regard to all the circumstances of the case".

Note that there are costs associated with going to court. The usual rule is that the loser pays the winner's legal expenses (such as lawyers' fees and court fees), as well as their own.

It therefore seems likely that, in most cases, the whole costs of the action will fall on the provider (or occupier, if they are represented instead). It is not clear whether the risk of being liable for legal expenses may be used to pressurise a provider or occupier into agreeing that a court order would not be needed.

Enforcing a pledge

In most circumstances, a secured creditor's simplest option will be to sell the encumbered property. However, the Bill would also make provision for the secured creditor to let the property, grant a licence in relation to [intellectual property](#), manage the property and appropriate it. The term appropriate refers to taking the property for their own use.

A creditor in a possessory pledge will already have possession of the property in question. Where a statutory pledge is in place, a secured creditor would be entitled to take possession of the encumbered property. However, under section 65, they must use officers of the court to do so, unless they have the consent of those affected or the permission of the court to act personally.

This part of the briefing looks at the Bill's provisions for:

- [enforcing a pledge by selling the encumbered property](#)
- [situations where more than one creditor has an interest in the encumbered property](#)
- [enforcing a pledge by appropriation.](#)

Enforcement by selling the pledged property

A secured creditor must try to get the best price when selling encumbered property

Section 66(2) of the Bill requires the secured creditor to take reasonable steps to get the best price "reasonably obtainable" for the property. The secured creditor can buy the property themselves, but only at a public auction and for a price which has a "reasonable relationship to market value".

Situations where more than one creditor has an interest in the pledged property

The secured creditor may not be the only person with an interest in the encumbered property. Other people or bodies may have additional or competing interests.

For example, moveable property may be the subject of more than one pledge. In this situation the first-created pledge would rank above (and be entitled to payment before) a second-created pledge. It would also be possible for another creditor to seize items which are the subject of a pledge as part of [court-sanctioned debt enforcement action](#).

Section 67 provides that where someone buys encumbered property sold by the secured creditor, they would get it unburdened by the pledge in question and any security right ranking equal to or lower than that pledge. However, they would only get it free of security rights ranking higher than the pledge in question with the consent of the affected creditors.

In practice, the value of an asset which remains encumbered by a security right will be reduced, perhaps significantly. It may be difficult to sell it, making other options such as letting more relevant.

Section 75 of the Bill deals with sharing the proceeds generated from the enforcement of a pledge in circumstances other than sale:

- the secured creditor is firstly able to get payment of reasonable expenses arising in relation to the enforcement
- next payment must be made to the holders of security rights (including the secured creditor who has enforced the pledge), and to creditors who have taken [court-sanctioned debt enforcement action](#) against the property. Where there is more than one claim, payment is distributed by the ranking of the claims. However, holders of claims which rank above the claim of the enforcing secured creditor can choose not to consent to enforcement, with the property instead remaining encumbered by their security or enforcement rights
- finally, any money left over would be paid to the provider.

The enforcing secured creditor must issue a written statement detailing how proceeds have been distributed to the provider, the debtor and any other creditor who has consented to the enforcement. Where the enforcement is ongoing - e.g. where the encumbered property is being let - the enforcing secured creditor must issue a statement every month.

Enforcement by appropriating the pledged property

A secured creditor would be entitled to enforce a pledge by taking the encumbered property for their own use. This has an increased risk of prejudicing the rights of the provider and other secured creditors so is more heavily regulated.

Under section 71 of the Bill, it is not possible to appropriate:

- the property of an individual, unless they are a [sole trader](#) and the property is used mainly for business purposes
- corporeal moveable property, unless it is in the possession of the secured creditor (which means the secured creditor may have to go through the process set out in section 65 to get possession of the property first)
- property which has a value greater than the amount remaining due under the secured obligation plus the secured creditor's reasonable expenses. However, it is open to the secured creditor to put in trust a sum equal to the excess in value of the property to be distributed among the other parties with an interest in the property.

Section 72 would make it possible for a provider and secured creditor to agree in advance, in writing, that the secured creditor can appropriate the encumbered property. The agreement must set out a method for easily determining a reasonable market price.

Section 73 would allow a secured creditor to appropriate encumbered property without prior agreement. However, the amount obtained by the appropriation must bear "a reasonable relationship to the market value of the property appropriated".

Other creditors, and in some cases the provider, can block an appropriation

In both cases, before actually appropriating the property in question, the secured creditor must notify certain people. This covers the provider, the debtor, the holders of any other security rights and any creditor who has taken [court-sanctioned debt enforcement action](#) against the property (where the enforcing secured creditor could reasonably be aware of these latter two interests).

In situations where the provider has consented to appropriation, if other creditors or parties with enforcement rights object within the 14 day deadline, the appropriation cannot go ahead. Where the provider has not consented to appropriation, the objection of any of the notified parties is sufficient to block the appropriation.

The operation of the Register of Statutory Pledges

Section 40(4) of the Bill would establish a new form of pledge called "statutory pledge". A statutory pledge would be created by registration in the new Register of Statutory Pledges.

The Register of Statutory Pledges would be maintained by [Registers of Scotland](#).

The Register of Statutory Pledges will not be comprehensive

As with the Register of Assignations, the Register of Statutory Pledges will not necessarily be comprehensive. This is because it would still be possible to create pledges by delivery

to the creditor, so a search of the register may not reveal all relevant pledges.

However, given the convenience and commercial advantages of statutory pledge in comparison to pledges created by delivery, the Scottish Government does not consider this to be a significant issue. It is expected that registration will become the standard way of creating a pledge.

Separately, there is no ongoing requirement to update the register (except where a pledge has been enforced). For example, it is possible that a statutory pledge could have been assigned to a different creditor or discharged since the original entry was made.

The Scottish Government hopes that secured creditors will update records on a voluntary basis. It argues that it will be in the commercial interests of both providers and creditors to do this. This is discussed at paragraphs 143 to 146 of the [Policy Memorandum](#)³.

This part of the briefing looks at:

- [the structure of the register](#)
- [registering a statutory pledge and correcting an existing record](#)
- [searching the register](#)
- [rights to request information from the secured creditor](#)
- [liability for errors in the register](#).

The structure of the Register of Statutory Pledges

As with the Register of Assignations, the Register of Statutory Pledges would have a statutory pledges record and an archive record. Where changes are made to the statutory pledges record, relevant information would be moved to the archive record so that alterations are documented.

Section 81 of the Bill lays out the information which must be contained in a statutory pledges record, including:

- the provider's name and address (and date of birth where they are an individual)
- the secured creditor's name and address (and, where they are not an individual, an address or email address which can be used to request further information)
- a description of the encumbered property in line with any rules set out by Scottish Ministers for the register
- a copy of the constitutive document setting up the statutory pledge and, where there has been an amendment, a copy of the amending document
- the entry's registration number
- the date and time of registration (which will determine who has the highest ranking security right where there is more than one statutory pledge registered over the property).

Scottish Ministers would have powers to create more detailed rules about the register,

including the ability to require additional information to be supplied. For example, it is expected that for some property - the [Policy Memorandum](#)³ (paragraph 222) highlights motor vehicles - it will be possible to register a unique reference number. This would make searching easier.

Registering a statutory pledge and correcting an existing record

Only the secured creditor, or someone acting on their behalf such as a solicitor, can make an application to register a statutory pledge. Registers of Scotland would be required to process applications in the order in which they are received.

There would be fees for registration, searches and other requests to Registers of Scotland. The fees generated are intended to cover the costs of maintaining the register.

Under section 89, the registration of a statutory pledge is ineffective if:

- the entry does not include a copy of the constitutive document
- the entry is seriously misleading (defined in section 92, broadly, as situations where the relevant information would not be returned under a properly constituted search, as well as some other circumstances)
- the constitutive document is invalid.

Registration would become effective if the entry is corrected.

It would also be possible for the secured creditor to apply to amend an existing statutory pledge record, specifically to add to encumbered property or to increase the extent of the secured obligation (section 86).

Procedure for the secured creditor to correct the record

The [Policy Memorandum](#)³ (paragraph 143) envisages that parties may voluntarily record other changes to a statutory pledge over time - e.g. a discharge, or assignment to a different creditor. The secured creditor (including a previous secured creditor who has assigned the pledge) can do this via the corrections process set out in section 94.

Procedure for providers or those with an interest in encumbered property to correct the register

Under section 96, certain people can request that a secured creditor corrects an inaccurate record. Those people are:

- someone identified as a provider in the register, who either claims not to be the provider or believes that some or all of the property in question is not encumbered
- someone with a property right in property identified as encumbered property, who believes that some or all of that property is not encumbered.

They must issue a request in the prescribed form and give the creditor at least 21 days to respond.

If the secured creditor does not respond to a request for correction, the person in question can apply to Registers of Scotland directly, under section 97. Registers of Scotland must notify the secured creditor, giving them not less than 21 days to apply to the courts if they object to the correction. In the meantime, it must note on the entry that the request for correction has been received.

If the secured creditor does not apply to the courts within the deadline, Registers of Scotland must make the correction.

Powers for Registers of Scotland to correct the register

Separately, Registers of Scotland would have the power to correct, or note on the record, obvious inaccuracies. This power does not cover situations where other parties could be reasonably expected to apply to correct the record.

Registers of Scotland could also be directed to correct an entry by the courts following a decision in court proceedings.

Searching the Register of Statutory Pledges

It will not be possible to search the register by the names of secured creditors.

The Policy Memorandum is not explicit as to why this choice has been made. But, [in line with the policy of being able to search the Register of Assignations by assignor rather than assignee](#), it is understood to relate to concerns about the commercial confidentiality of secured creditors.

Under section 102, searches of the register can be made only in relation to:

- the names of providers (including month and year, where the provider is an individual)
- the identifying numbers of providers (where these are required by Register of Statutory Pledges Rules)
- any identifying requirements set out in register rules for encumbered property (for example, unique reference numbers for motor vehicles)
- the registration number of an entry
- any other factor specified in register rules.

Rights to request information from the secured creditor

Because a statutory pledges record won't always contain full information about the pledge, it would be possible for certain people or bodies to request additional information from the secured creditor.

For example, it may not be apparent exactly which property is affected (e.g. when the statutory pledge covers property to be acquired in the future). The extent of the obligation secured on the encumbered property may not be clear, and it would also be possible for the pledge to have been discharged, or the encumbered property sold.

For this reason, interested parties are given a right to request information from the secured creditor by section 105 of the Bill. The duty applies to the secured creditor whose name appears on the statutory pledge record.

The people or bodies who are entitled to make a request are:

- someone with a right in specified property
- someone with the right to take [court-sanctioned debt enforcement action](#) against specified property
- someone with the consent of the provider to make the request.

They can ask for a written statement in relation to:

- whether specified property is covered by the statutory pledge
- the nature of the secured obligation
- details of creditors to which the statutory pledge right has been assigned.

Section 105 also provides that a request can be made to confirm that the secured creditor who appears on the statutory pledge record has never actually been the secured creditor in the obligation.

Unless one of the exceptions in section 105 applies, the secured creditor must respond within 21 days. They can recover any reasonable costs relating to the request from the enquirer.

Scottish Ministers have regulation-making powers to specify additional people or bodies who would be able to make an information request.

Liability for errors in the Register of Statutory Pledges

The Bill would require people - including the [Keeper of the Registers of Scotland](#) - to pay compensation in certain circumstances, where errors in processing cause loss to other parties.

Liability would relate to errors in the Register of Statutory Pledges. But otherwise, the circumstances covered are the same as those discussed in the section dealing with [liability for errors in the Register of Assignations](#).

Statutory pledge - consumer issues

The policy intention behind reforming the law in relation to pledge is to improve access to finance for business. However, the Bill's proposals would also apply to individuals not acting in a business context.

The section on [the role of security in business finance](#) discusses how being able to provide security for a loan should reduce the risk of non-payment and therefore the cost of credit. In theory, the same principles should apply to lending to individuals.

The Scottish Government has therefore made the decision that the provisions of the Bill should also apply to individuals as consumers. The [Policy Memorandum](#)³ (paragraph 263) states:

“ The Bill will not, however, place consumer credit debtors in a worse position. It will lead to more options for mainstream lenders who are in fact likely to charge lower interest rates if they have the comfort of a security fixed on the asset which provides the collateral for a loan. Moreover, restricting the effect of the Bill to businesses only would mean that private individuals would not benefit from the new possibility of being able to use their moveable assets as collateral in order to raise finance.”

The Scottish Government notes that the Bill contains a range of additional protections for individuals not acting in a business context. There are also protections from other legislation - for example, where a loan constitutes [consumer credit](#), the provisions in the Consumer Credit Act 1974 (and Financial Conduct Authority Rules for consumer creditors) will apply, as well as the provisions in the Bill.

However, some consumer and money advice organisations, as well as several individual money advisers, consider it unlikely that the Bill's provisions would operate to benefit consumers. They don't think that mainstream lenders, who already have a successful business model for lending to consumers, will utilise the Bill's provisions.

Instead, they think it is more likely that high interest lenders will take advantage of the provisions. High interest lenders - such as payday lenders and home credit providers - charge higher rates of interest because they specialise in lending to customers who are less likely to be able to pay back their loan.

This may be because they have previous or current debt problems. It may also be because their financial circumstances are such that they cannot access mainstream credit - for example, their income is low, they rely on social security benefits or they have a poor credit rating.

High interest lenders often lend to people who are vulnerable due to their financial circumstances. People may be vulnerable for other reasons too - for example, having mental health issues is both a cause and a symptom of debt problems.

This part of the briefing looks at:

- [the protections for individuals \(not acting in a business context\) in relation to statutory pledge](#)
- [risks to consumers from the Bill's provisions](#).

Protections for consumers in relation to statutory pledge

The Bill contains a range of additional protections and restrictions for individuals utilising statutory pledge. The protections are generally formulated as applying to assets not used wholly or mainly for business purposes. This is intended to exclude [sole traders](#) from the definition of individuals with access to additional protections.

The following additional protections would apply to individuals not acting in a business context in relation to statutory pledge:

Property which is the subject of a statutory pledge must be identified separately

(section 48)

This means that, for example, it would not be possible to create a statutory pledge over "all my household goods". The [Policy Memorandum](#)³ (paragraph 155) states that this is intended to make it clear to a consumer what is at stake if they do not fulfil their obligations.

Property which is the subject of a statutory pledge must be owned by the consumer
(section 48)

This means that consumers would not be able to create statutory pledges over property they might acquire in the future. There is an exception for property which is going to be bought by the consumer using a loan secured on that property. This preserves the possibility of using statutory pledge as a way of financing the purchase of specific assets.

Each item of corporeal moveable property used as security in a statutory pledge must be worth more than £1,000 (section 48)

The [Policy Memorandum](#)³ states (paragraph 157) that this would prevent individuals using low value domestic items like clothing and furniture as statutory pledges. However, a sofa, smart TV or high-end computer equipment could easily meet this threshold.

Cars are more obvious examples of corporeal moveable property which might be the subject of a statutory pledge.

Note that Scottish Ministers would have regulation-making powers to change the monetary value threshold or exclude specific types of property from being the subject of a statutory pledge.

A court order will be needed to take possession of property which is the subject of a pledge or to enforce a pledge (sections 64 and 65)

Note though that the provider can agree - after the pledge has become enforceable - that a court order is not necessary. The need for agreement after a pledge becomes enforceable prevents a requirement to give consent being written into the standard terms and conditions of the loan. However, it is possible that consumers will come under pressure to agree to enforcement without a court order due to the risk of being liable for the costs of getting the court order.

A secured creditor will not be able to appropriate encumbered property as an enforcement option (section 71)

This means that secured creditors will not be able to take and use an individual's property for themselves. It will remain possible for a secured creditor to buy an individual's property - but with the additional protections that this must be at public auction and for a price which bears a reasonable relationship to the market value.

Risks to consumers from the Bill's provisions on statutory pledge

Some consumer and money advice organisations have concerns that statutory pledge will

mainly be used by high interest lenders. As these lenders usually lend to people who are struggling financially, there is an increased risk that the customer will be unable to meet the repayment requirements and therefore face having the encumbered property sold by the lender.

This section of the briefing looks at some potential areas of consumer detriment in relation to statutory pledge:

- [the logbook loans model in England](#)
- [statutory pledge as an alternative to hire purchase and conditional sale](#).

The logbook loan model in England and Wales

Logbook loans are a form of finance available in England. Borrowers use their car as security for a loan (although the concept could work with any corporeal moveable property).

This form of lending hasn't been available (to any legal extent) in Scotland because of the current requirement that corporeal moveable property used as security for a loan must be in the possession of the creditor. However, it provides an example of how some creditors have used the ability to secure a loan on corporeal moveable property in their lending model.

Logbook loans target people who cannot access mainstream credit

Logbook loans utilise an English law process known as a "bill of sale". This allows the owner of corporeal moveable property (or goods, in England) to transfer ownership while still retaining possession of the goods and the ability to use them. The bill of sale is registered at the English High Court instead.

For logbook loans, bills of sale are used to transfer ownership "in security" - this means for the purpose of providing security for a debt. If the debt is repaid, ownership is returned to the borrower. However, if the terms of the loan agreement are breached, the lender is entitled to sell the property. The lender does not need authority from the courts before forcing the sale.

Logbook loans target people who cannot get credit from mainstream lenders. They have very high interest rates. Logbook loans are a particularly effective tool for leveraging preferential payment from borrowers. This is because people may rely on their car - e.g. for travel to work. This means people can feel pressured into paying logbook loans in preference to other obligations - including important ones like rent or council tax.

Citizens Advice has campaigned on the issue of logbook loans. In 2015, it produced a [summary of the evidence on logbook lending](#)¹⁴ it had received from Citizens Advice Bureau clients.

Proposals for reforming logbook loans

The Law Commission for England and Wales made recommendations for reform of the law on bills of sale in order to better protect consumers. The [UK Government consulted on proposals](#)¹⁵ but concluded that, due to the decreasing market for logbook loans, and the work of the Financial Conduct Authority on high interest lending, it would not take legislation forward.

The Law Commission's proposed [Goods Mortgages Bill](#) has since been taken forward as a [private member's bill](#) ¹⁶. However, it has not yet progressed beyond its first reading.

Statutory pledge as an alternative to hire purchase and conditional sale

Hire purchase and conditional sale are two types of finance available for buying corporeal moveable property, such as cars, furniture or electrical items. Both contain specific consumer protections, outlined in the Consumer Credit Act 1974.

How hire purchase and conditional sale work

Hire purchase involves paying monthly rental payments towards items, with the option of buying them at the end of the agreement. With conditional sale, a customer agrees that they will purchase the item, and makes monthly payments towards the purchase price. However, the item remains the property of the seller until the final payment is made.

A type of finance known as Personal Contract Purchase is becoming increasingly common for cars. Here a customer makes monthly payments covering the depreciation in value of the car over the period they will be using it. They have the option of buying the car at the end of the period, but for a significantly larger amount than under a standard hire purchase agreement. This is because the monthly payments are not intended to cover the full value of the car.

Personal Contract Purchase is a form of hire purchase, and is regulated in the same way.

Protections in the Consumer Credit Act 1974

There are three key protections for customers using hire purchase or conditional sale in the 1974 Act:

- **A lender must get a court order if they need to enter premises (including any building, as well as the garden of a private house) to repossess items** (section 92 of the 1974 Act).
- **Where someone has paid at least one third of the total price, the lender must get a court order before they can repossesses the items** (section 90 of the 1974 Act). In addition, if a creditor repossesses goods without a court order, the customer is entitled to recover all money paid under the finance arrangement from them (section 91 of the 1974 Act).
- **A customer can terminate the agreement at any point, with their liability capped at a maximum of half the total cost of the item** (sections 99 and 100 of the 1974 Act). This is useful for customers who can no longer afford to make the agreed payments. A customer who has already paid half or more of the total cost will have no remaining liability. Where someone has paid less than half the cost of the goods, their liability will be capped at half the total value minus what they have paid already.

In addition, in most cases, the protections in the Consumer Credit Act 1974 apply to small businesses as well as individuals not acting in a business context.

Risks created by statutory pledge

It is possible that statutory pledge would be preferable to lenders as a way of financing the purchase of corporeal moveable property. This is because customers, especially business customers, would have fewer rights. If statutory pledge comes to replace hire purchase and conditional sale, there is a risk of consumer detriment.

The Scottish Law Commission recognised the potential for statutory pledge to compete with hire purchase and conditional sale. [Paragraph 21.22 of Volume 2 of the Report on Moveable Transactions](#)⁴ states:

“ If the experience in PPSA [Personal Property Security Actsⁱ] systems is repeated then motor vehicles are likely to be frequently the subject of the new statutory pledge, not least in relation to private individuals. The statutory pledge would offer an alternative to arrangements such as hire-purchase and conditional sale, and allow the debtor to have ownership of the vehicle rather than this being held by a finance company.”

Statutory pledge contains no right to return items. If a lender sells encumbered property, they are required to return any excess value to the customer. However, they'd be entitled to take interest and the expenses of the repossession and sale process from this amount.

Where encumbered property belongs to an individual not acting in a business context, there would usually be a requirement for the lender to get a court order before enforcing a statutory pledge. This would apply regardless of how much the customer had repaid. However, no court order would be needed for any type of enforcement against someone acting in a business context.

The Scottish Law Commission discussed whether protections like those available for hire purchase and conditional sale should be a feature of statutory pledge at paragraphs 27.18 to 27.26 of Volume 2 of the [Report on Moveable Transactions](#)⁴. However, they noted that, with these purchase options, ownership stays with the lender until the end of the agreement. They did not consider the protections suitable for statutory pledge, where ownership would be with the borrower.

ⁱ These include Australia, New Zealand and some provinces of Canada.

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