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# Moveable Transactions (Scotland) Bill - consideration prior to Stage 3 (Republished)

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The Bill would reform the law to make it easier for businesses to use moveable assets to access credit, including invoice financing. Amendments at Stage 2 excluded individual consumers from the provisions relating to statutory pledge.

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# Contents

# About this briefing

**This briefing looks at parliamentary consideration of the Moveable Transactions (Scotland) Bill prior to Stage 3.**

The Bill would reform the law relating to how moveable property (such as vehicles, machinery or intellectual property) can be used as security for a loan. This is intended to improve access to finance for businesses.

It deals in particular with transferring ownership of legal claims via a process called **assignation** and a new type of loan security called **statutory pledge**.

The key issues going into Stage 3 are:

- balancing protections for individual consumers and sole traders against the need for simple, low risk systems for creditors
- suitable reporting mechanisms to monitor how the provisions in the Bill operate in practice.

This briefing is a republished version of a previous briefing. A section discussing the impact of the Bill on assignation of consumer credit debts has been removed.

# About the Bill - key dates and documents

The Moveable Transactions (Scotland) Bill is a Scottish Government bill. It was introduced in the Scottish Parliament on 25 May 2022.

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
- the Explanatory Notes
- the Policy Memorandum
- the Financial Memorandum.

The SPICe briefing on the Bill [1] provides detailed consideration of its provisions and policy context.

**The Bill is based on proposals from the Scottish Law Commission**

The Scottish Law Commission has a remit to simplify, modernise and improve the law. It published a Report on Moveable Transactions [2] (including a draft bill in Volume 3) in 2017.

**There is a special procedure for considering Scottish Law Commission bills**

The Standing Orders of the Scottish Parliament (6th Edition, 6th Revision, 1 April 2022 - in force at the time) [3] 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.

# Specialist terms

The Bill deals with technical areas of law and commercial practice. Some specialist terminology is explained below.

- **Assignee** – the person or body to which ownership of incorporeal moveable property is transferred.
- **Assignor** – the person or body transferring ownership of incorporeal moveable property to someone else
- **Corporeal moveable property** - the legal term for physical, moveable assets such as vehicles, machinery or stock.
- **Debtor** – someone who owes an obligation but, for this Bill, more specifically the person who owes the obligation (usually money) when a claim is assigned.
- **Encumbered property** - property affected by a pledge, including a statutory pledge.
- **Incorporeal moveable property** - the legal term for non-physical moveable assets, such as intellectual property, legal claims or shares in companies.
- **Intimation** - the legal term for sending notification of an assignation to the debtor in the obligation. Under the current law, this is when ownership of incorporeal moveable property passes from assignor to assignee.
- **Invoice financing** - using money owed to a business in the form of unpaid invoices as a way of accessing credit to improve a business's cash flow.
- **Moveable property** - property which is not land, buildings or related structures. Moveable property can be either corporeal or incorporeal.
- **Provider** – the person providing the moveable property over which a pledge is secured. Note that the provider can be different from the debtor in the obligation.
- **Secured creditor** – in relation to the Bill, a creditor whose debt is secured by a pledge, including a statutory pledge.

# What the Bill would do

**The Bill would reform the law in relation to the assignation of claims and using moveable property as security for a loan. This is intended to make it easier to use moveable assets to raise finance.**

The Minister for Public Finance described the purpose of the Bill in the Stage 1 debate. He said:

> “ If implemented, the bill will make various types of commercial transactions more efficient, less expensive and less complicated than they currently are, through the introduction of the two new registers. It will assist business in raising finance to enable them to invest and expand, and it will thus benefit the Scottish economy generally.”

### Assignation

Assignation is the legal process used to transfer ownership of a claim (usually a claim to be paid money). Under the current law, ownership passes at the point the transfer is intimated to the debtor in the obligation. This can be administratively burdensome for bulk transfers (eg. of a business's customer invoices) and makes it impossible to assign future claims, creating problems for Scottish businesses trying to access invoice financing.

Businesses currently use a range of workarounds to avoid the need to intimate to the debtor when a claim is transferred. This increases the complexity and cost of setting up invoice financing arrangements.

The Bill would change the law so that a claim could be assigned either by intimation or by registration of an assignation document in a new **Register of Assignations**.

### Pledge

Pledge is the term for using corporeal moveable property as security for a loan. Currently the property in question has to be in the possession of the creditor, putting it out of use for the debtor. This may make it impractical for businesses to raise finance using pledge.

The Bill would create a new type of pledge, which would not require delivery to the secured creditor. Instead it would be registered in a new **Register of Statutory Pledges**. As well as corporeal moveable property, it would be possible to create statutory pledges over intellectual property. It is also intended that the provisions will apply to financial instruments such as shares and bonds in the future.

### Other reforms

The Bill would also clarify or reform aspects of the general law in relation to the assignation of claims and the use of pledge.

# Consideration of the Bill at Stage 1

The Delegated Powers and Law Reform Committee was responsible for Stage 1 scrutiny. The Committee held four evidence sessions:

- 27 September 2022 - Scottish Law Commission
- 4 October 2022 - Legal and then consumer/money advice stakeholders
- 25 October 2022 - Banking and small business representatives and then Registers of Scotland
- 1 November 2022 - the Minister for Public Finance, Planning and Community Wealth

The Committee published its Stage 1 report [4] on 2 December 2022.

The Scottish Government responded to the recommendations [5] on 12 December 2022. Follow up correspondence from the Scottish Government was received by the Committee dated 3 March 2023 [6] and 13 March 2023 [7] .

**During the Stage 1 debate, the Scottish Government announced that the statutory pledge provisions would not apply to individual consumers**

The Stage 1 debate was held on 13 December 2022.

The Minister for Public Finance used his opening speech to announce the Scottish Government's intention to use amendments at Stage 2 to exclude individuals not acting in a business context from being able to grant a statutory pledge. This was due to concerns from some stakeholders that it could create a market for predatory lending in Scotland.

Other key issues identified in the Stage 1 debate were:

- **the need to balance the interests of individual consumers and sole traders** - members welcomed protections for individual consumers as outlined by the Minister. But they were also clear that access to improved finance options enabled by the Bill should remain for sole traders and start-up businesses. There was agreement that careful consideration should be given to amendments to the statutory pledge part of the Bill to achieve this.
- **the importance of extending the Bill's provisions to financial instruments, such as shares and bonds** - the Scottish Government considered this issue to be outwith the legislative competence of the Scottish Parliament. Instead, it was intended that the necessary changes would be made by the UK Government via a "section 104 order" (under section 104 of the Scotland Act 1998).

# Consideration of the Bill at Stage 2

The Delegated Powers and Law Reform Committee considered Stage 2 amendments to the Bill on Tuesday 21 March 2023.

This briefing does not attempt to discuss every amendment to the Bill. Instead, it focusses on the main issues identified by the Committee and how they were dealt with at Stage 1 and Stage 2.

In particular, the Scottish Government brought forward a number of substantive amendments at Stage 2. These did not change the policy direction of the Bill and were generally considered to improve it. In the main, they are not discussed further.

The main issues highlighted in parliamentary scrutiny of the Bill so far are:

- application of the Bill's provisions to financial instruments
- assignation - debtor protections
- statutory pledge - protections for consumers
- statutory pledge - protections for sole traders
- the registers - accuracy and data protection
- the registers - fee exemption for money advisers
- electronic signatures
- reviewing the legislation.

## Application of the Bill's provisions to financial instruments

**Legislating to apply the Bill's provisions to financial instruments - such as shares and bonds - was considered to be outwith competence by the Scottish Government. However, progressing the issue was considered urgent by stakeholders.**

The Bill as originally proposed by the Scottish Law Commission applied to financial instruments. However, the current Bill does not, because the Scottish Government believes that legislating in this area is beyond the competence of the Scottish Parliament.

The current law in Scotland creates problems with using things like shares as security for finance. This can put Scottish businesses at a significant commercial disadvantage. Stakeholders are therefore keen for the issue to be addressed as soon as possible.

The Scottish Government proposes that the provisions in the Bill are extended to financial instruments using an order under section 104 of the Scotland Act 1998. This requires action by the UK Government. A section 104 order would be made after the Bill has been passed.

There has been agreement with the UK Government that the issue can be progressed in this way [6] , but there has been no commitment to a specific timetable for implementation.

### Stage 1 consideration

The Committee's Stage 1 report recommended that this issue was taken forward as a priority.

### Stage 2 amendments

During the Stage 2 debate, the Minister for Public Finance stated that he expected that it would be possible for a section 104 order to be brought forward before a likely commencement date for the Bill's provisions of spring/summer 2024.

| Purpose of amendment | Result |
|---|---|
| **Amendment 56**, in the name of Jeremy Balfour MSP, would allow Part 1 of the Bill on assignation to operate without prejudice to the rules on financial instruments. This was argued to provide greater flexibility. | Not moved - following concerns from the Minister that it would create further confusion |
| **Amendments 55, 57, 66, 68, 69, 73, 75 to 78, 80, 82 and 84**, in the name of Jeremy Balfour MSP, would extend the provisions in the Bill to financial instruments. | Amendment 55 was withdrawn and the rest not moved, as a result of assurances from the Minister about the section 104 order process |

## Assignation - debtor protections

**Waiver of defence clauses limit a debtor's ability to legitimately challenge an obligation. There was concern that the Bill as currently drafted was prejudicial to the interests of individual consumers and, potentially, sole traders.**

Generally, where a debtor has a defence against making payment to the assignor (the original owner of a claim), they can refuse to pay the assignee. However, it is possible for the debtor to agree with the assignor to waive this right. This is known as a "waiver of defence" clause.

The Bill permits the use of waiver of defence clauses. The Scottish Government states that this reflects the current common law and that waiver of defence clauses are widely used in commercial practice. The common law is the traditional law as developed by the decisions of judges in individual cases.

### Stage 1 consideration

The Committee recommended that the option of agreeing to a waiver of defence clause was removed for individuals not acting in a business context. The Committee asked the Scottish Government to consider whether the option should be removed for sole traders too.

### Stage 2 amendments

| Purpose of amendment | Result |
| --- | --- |
| **Amendment 47**, in the name of Carol Mochan MSP, would prevent the use of waiver of defence clauses in all contexts (so covering businesses and individuals). | Withdrawn, following assurances from the Minister that he had not received any representations on this issue |
| **Amendment 49**, in the name of Carol Mochan MSP, is an alternative to amendment 47. It would prevent the use of waiver of defence clauses in agreements with individual consumers | Not moved, following assurances from the Minister that he had not received any representations on this issue |
| **Amendment 50**, in the name of Carol Mochan MSP, is an alternative to amendment 47. It would prevent the use of waiver of defence clauses in agreements with sole traders and individuals consumers. | Not moved, following assurances from the Minister that he had not received any representations on this issue |
| **Amendment 51**, in the name of Carol Mochan MSP, would create a duty on Scottish Ministers to report on the impact of waiver of defence clauses within three years of the section coming into force. | Agreed to by division |

# Statutory pledge - protections for consumers

**There was significant concern that the statutory pledge provisions in the Bill, as applied to individual consumers, could enable predatory lending. In the Stage 1 debate, the Minister announced the Scottish Government's intention to remove individual consumers from the ambit of this part of the Bill.**

Money advice and consumer organisations raised concerns that allowing individual consumers to access statutory pledge could result in a new market for high-cost lending secured on household goods. Their view was that protections in the Bill covering individuals not acting in a business context were not sufficient to prevent this.

### Stage 1 consideration

The recommended that individuals not acting in a business context were excluded from Part 2 of the Bill, dealing with statutory pledge. It highlighted the need to do this carefully so that sole traders and start-up businesses were still able to benefit from the provisions.

### Stage 2 amendments

| Purpose of amendment | Result |
|---|---|
| Scottish Government **amendment 16** would prevent individuals not acting in a business context from granting a statutory pledge. However, the option would be preserved for:<br>• individuals acting in a business context using assets wholly or mainly used for business purposes<br>• charity trustees using charity assets<br>• members of associations using association assets.<br>In addition, corporeal moveable assets would have to have a value of more than £3,000. | Agreed to |
| **Amendment 16A**, in the name of Carol Mochan MSP, would prevent the pledge of goods which were essential for heating, cooking or laundry purposes. | Not moved, following assurances from the Minister that it was not needed as individual consumers would no longer be able to grant statutory pledges |
| **Amendment 16B**, in the name of Carol Mochan MSP, would require the £3,000 value threshold to be read as uprated every year in line with the Retail Prices Index. | Agreed to by division |
| Scottish Government **amendment 17** would remove section 48 of the Bill containing additional protections for individuals as individual consumers would no longer be able to use statutory pledge. | Agreed to |

# Statutory pledge - protections for sole traders

**Sole traders may sometimes have similar vulnerabilities to individual consumers. However, it was recognised that, in order to facilitate access to credit, there was a need to balance additional protections against increased costs and risks for lenders.**

The Bill as introduced would allow enforcement of a statutory pledge obligation against a sole trader (usually involving the sale of the encumbered property) to take place without a court order.

### Stage 1 consideration

The Committee recommended that the Scottish Government consult with small business representatives on whether protections in relation to enforcement should be increased.

It also recommended that the Scottish Government report on the impact of enforcement provisions on small businesses, within three to five years.

### Stage 2 amendments

The Minister reported that the Federation of Small Businesses had indicated that requiring a court order for enforcement action would be a useful protection. However, it was their view that no further protections were needed.

Note, though, that sole traders would be protected by the £3,000 minimum threshold for the value of assets used in a statutory pledge, and the requirement for pledged assets to be wholly or mainly used for business purposes. These are discussed in the section dealing with protections for consumers.

| Purpose of amendment | Result |
|---|---|
| Scottish Government **amendment 20** would introduce the requirement for a court order before a pledge could be enforced against a sole trader. | Agreed to |

# The registers - accuracy and data protection

**The Bill would create two new registers - the Register of Assignations and the Register of Statutory Pledges. It was unclear exactly how these registers would operate and what impact that would have on accuracy and in relation to data held on individual debtors.**

Both registers would be electronic.

The Register of Assignations would be searchable primarily by assignor. It would not be possible to search by the names of individual debtors, but details of individual debtors might appear in assignation documents. There would be no requirement to update the register, e.g. when a condition relating to an assignation was satisfied.

The Register of Statutory Pledges would be searchable primarily by provider and by any identifying criteria for encumbered property (e.g. reference numbers for motor vehicles). There would be a requirement to update the register where a statutory pledge had been enforced. The Scottish Government hoped that secured creditors would make other changes voluntarily - in particular, where a statutory pledge had been discharged.

Much of the detail of how the registers would operate in practice would be contained in regulations. Without sight of these regulations, the Committee found it difficult to made considered recommendations.

### Stage 1 consideration

The Committee recommended that the Bill was amended to require some changes to the Register of Statutory Pledges to be made timeously or within a specific timeframe. It also recommended that consideration was given to allowing secured creditors to specify a time limit to the entry when registering a statutory pledge.

The Committee asked the Scottish Government to further consider the potential for harm to individuals from inaccurate information. It recommended that the Bill was amended to put in place a simple mechanism for initial consideration of corrections and disputes.

### Stage 2 amendments

There were no Stage 2 amendments in this area.

# The registers - fee exemption for money advisers

**Amendments would exempt not-for-profit money advisers from being charged fees to search the registers set up in the Bill.**

The Financial Memorandum to the Bill (paragraph 62) states that fee for searching the registers is expected to be in the region of £4. Stakeholders expressed concerns about the burden of paying the fee falling on money advice services which were searching on behalf of clients.

It is not clear to what extent the Register of Assignations would provide useful information about specific debts as searches on the names of individual debtors would not be possible.

The Register of Statutory Pledges would be searchable by the name of the provider of the pledged assets. Previous amendments have excluded the possibility of individual consumers granting statutory pledges. However, details of obligations owed by other individuals who may seek money advice - in particular, sole traders - may appear in the Register.

### Stage 1 consideration

The Committee's Stage 1 report recommended that consideration should be given to making searches free for some groups. It highlighted in particular not-for-profit money advisers.

### Stage 2 amendments

| Purpose of amendment | Result |
|---|---|
| **Amendment 64**, in the name of Jeremy Balfour MSP, would require searches of the **Register of Assignations** by not-for-profit money advisers to be free. | Agreed to by division |
| **Amendment 81**, in the name of Jeremy Balfour MSP, would require searches of the **Register of Statutory Pledges** by not-for-profit money advisers to be free. | Agreed to by division |

## Electronic signatures

**The Bill as introduced would require the use of advanced or qualified electronic signatures (which provide additional security through encryption and authentication). However, there were concerns that the cost of software necessary to use these would create barriers for small businesses.**

Advanced electronic signatures uses software to uniquely identify the signatory and ensure that the signature has not been tampered with. Qualified electronic signature provides additional levels of identification and security.

By contrast, a simple electronic signature covers any indication of consent logically associated with an electronic document, e.g. a name at the bottom of an email.

The Registers of Scotland can currently only accept electronic documents which are validated using a qualified electronic signature. This would affect the registers created in the Bill. In addition, the minimum requirement for electronic assignation documents would be advanced electronic signature.

### Stage 1 consideration

The Committee recommended that the Bill was amended to require only simple electronic signatures to authenticate electronic documentation.

### Stage 2 amendments

| Purpose of amendment | Result |
| --- | --- |
| Scottish Government **amendment 36** would remove the requirement for a qualified electronic signature in relation to the registers created by the Bill. | Agreed to |
| Scottish Government amendment 42 would remove the definition of authentication which required an advanced electronic signature. | Agreed to |
| Scottish Government amendment 43 would create a definition of electronic signature requiring only a simple electronic signature. | Agreed to |
| Scottish Government amendment 45 would create new definitions of authentication (electronic documents) and execution (hard copy documents) to simplify both processes. | Agreed to |

# Reviewing the legislation

**Amendments were brought forward to require a review of the operation of the legislation generally.**

There was some uncertainty about how the provisions in the Bill would operate in practice. This related in particular to the competing priorities of protecting consumers and small businesses and improving their access to credit. As noted in the section on information requirements for the registers, there was also uncertainty about how the registers would operate in practice.

### Stage 1 consideration

The Committee recommended that the Scottish Government carries out a review of the statutory pledge provisions after three to five years, giving particular consideration to the experiences of individual consumers and small businesses.

### Stage 2 amendments

| Purpose of amendment | Result |
| --- | --- |
| Amendment 53, in the name of Carol Mochan, would require the Scottish Government to report on the operation of the Bill three years after Royal Assent. The report should give particular consideration to the impact of statutory pledge on sole traders and small businesses. | Agreed to by division |
| Amendment 85, in the name of Jeremy Balfour, would require the Scottish Government to report on the operation of the Bill three years after Royal Assent. | Not moved, as it was very similar in content to amendment 53, which had been agreed by the Committee |

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