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Delegated Powers and Law Reform Committee

Stage 1 Report on the Moveable Transactions (Scotland) Bill



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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. The Moveable Transactions (Scotland) Bill ("the Bill") was introduced in the Scottish Parliament on 25 May 2022 by the Cabinet Secretary for Justice, Keith Brown MSP.
2. The Scottish Government's **Policy Memorandum** notes that the purpose of the Bill is to modernise the law of Scotland in relation to transactions concerning moveable property (referred to as the law of moveable transactions). This encompasses the law relating to:
 - the assignation of a claim to the right to the performance of an obligation (typically the right to be paid money);
 - security over corporeal moveable property (such as vehicles, equipment, whisky or livestock); and
 - security over a certain kind of incorporeal moveable property, specifically intellectual property (IP) which includes copyright, trademarks, design rights and patents.
3. The Bill is based on the Scottish Law Commission's ("SLC") report on Moveable Transactions, published in 2017. The Report is in 3 volumes ([Volume 1](#), [Volume 2](#) and [Volume 3](#)), which includes a draft Bill in Volume 3. A summary of all of the SLC's work on its moveable transactions project [can be found on its website](#).
4. The Bill was determined as a 'Scottish Law Commission Bill' under Rule 9.17A of the Scottish Parliament's Standing Orders. The Delegated Powers and Law Reform Committee was subsequently designated as lead committee for Stage 1 consideration of the Bill.
5. In addition to carrying out the role of lead committee, under Rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill that confer power to make subordinate legislation. The Committee considered the delegated powers in the Bill at its meetings on 20 September and 15 October 2022. The Committee's report on the delegated powers in the Bill is covered later in this report.
6. The Finance and Public Administration Committee considered the Financial Memorandum to the Bill. Following a call for views, it received four responses and agreed to pass on the submissions to the Delegated Powers and Law Reform Committee to take into account in its evidence sessions and also in its Stage 1 report. The financial aspects of the Bill, specifically in relation to the fees that may be charged to access the registers, are covered later in this report.
7. As with all primary legislation, the Scottish Parliament Information Centre has published a full [briefing on the Bill](#).
8. The Committee issued a wide call for views and received [45 responses](#).
9. The Committee held oral evidence sessions on 24 September, 4 and 25 October and 1 November. It heard from the Scottish Law Commission, academics, the legal profession, consumer and money advice stakeholders, financial and business

representatives, Registers of Scotland and the Minister for Public Finance, Planning and Community Wealth, Tom Arthur MSP. Full details of the Committee's meetings and those who gave oral evidence are listed at Annexes A and B.

10. The Committee is grateful to all those who helped inform its consideration of the Bill.

Background to moveable transactions and the Bill's proposals

What is a moveable transaction?

11. Moveable transactions law enables businesses and individuals to use their moveable property (i.e. property other than land and buildings) to access finance.

What does the Bill seek to do?

12. The Scottish Government's [Policy Memorandum](#) states that the purpose of the Bill is to modernise the law of Scotland in relation to transactions concerning moveable property (referred to as the law of moveable transactions). The Bill seeks to make it easier for businesses and individuals to raise finance using their moveable property.
13. There are three principal barriers to doing this at the moment in Scotland:
 - assignation of a claim (typically the right to be paid money) requires intimation to the debtor;
 - corporeal moveable property (such as vehicles, equipment, whisky or livestock) used to secure a loan must be in the possession of the creditor; and
 - it is not possible to create a security right over incorporeal moveable property except by transferring ownership.

How does the Bill seek to change this?

14. In its 2017 report, the SLC proposed a new system which would adapt existing Scottish legal principles. The key proposal being the creation of two new official registers:
 - Assignations of claims could be registered in the **Register of Assignations** as an alternative to intimation to the debtor.
 - The **Register of Statutory Pledges** would provide details of corporeal moveable goods which had been used as security to raise finance. It would also be available for some incorporeal moveable property – specifically intellectual property and financial instruments.

What is an assignation?

15. An assignation is the process by which ownership of incorporeal moveable property is transferred in Scotland. The Bill deals with one specific type of assignation, that of transferring ownership of a legal claim.
16. “Assignation” of claims is the transfer of ownership of a claim from one person to another. A claim is most commonly the right to payment of a debt. The operation of the law in this area is key to how businesses can access invoice financing (where invoices are sold to access finance options which improve cashflow).

For example, if someone has a right to be paid for goods or services, they can

transfer that right to payment to another person.

17. Under the current law, an assignation of a claim can only be completed by letting the person who owes the debt know about the assignation (“intimation”). Under the proposed changes, this would no longer be required, and the transfer could instead be recorded in a central register.
18. The SLC's report considered that the Register of Assignations would remove the need for intimation to the debtor when their obligation is transferred to someone else. It would also facilitate the assignation of future claims. However, it would remain possible to use intimation to the debtor instead. Debtors would also be protected if they continued to pay the original creditor by mistake.

What is a statutory pledge?

19. A pledge is a type of security (usually for a loan) which is taken over moveable property, in a similar way to how a mortgage is taken out on a house. 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 a statutory pledge. This would be registered in a public register rather than delivered to the creditor. This would make using their corporeal moveable property as security for finance a much more practical option for businesses.

For example, with a mortgage on a house, a lender grants a loan, but the lender can sell the house if the loan is not repaid.

With a pledge, someone grants a loan and the lender can sell a piece of moveable property if the loan is not repaid.

20. The purpose of the Register of Statutory Pledges would be to serve as a proxy for actual delivery of the goods to the creditor. Anyone intending to deal with corporeal moveable property could check the register to see if a creditor had a prior interest. Although those who unknowingly bought pledged assets would have their right of ownership protected in certain contexts. However, it would also remain possible to create securities over corporeal moveable property by giving possession to the creditor.
21. This register would also be available for some incorporeal moveable property – specifically intellectual property.

Does the Bill differ from the SLC's proposals?

22. The primary change in the Bill to that proposed by the SLC is the removal of provisions to provide for the assignation of claims over financial instruments (such as shares and bonds). In the [Policy Memorandum](#), the Scottish Government considered that such arrangements were beyond the legislative competence of the Scottish Parliament. Instead, the Scottish Government proposed to ask the UK Government to grant an Order under section 104 of the Scotland Act 1998. It considered that the Order "would have the same effect as if the provisions had been included in the Bill and would therefore complete the full extent of the reforms recommended by the SLC."
23. This change from the SLC's recommendations in 2017 is covered in more detail

later in this report.

The role of the Scottish Law Commission

24. The SLC 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.
25. It is up to the Scottish or UK governments to decide whether to take proposals made by the SLC forward. They may carry out further consultation before deciding what to do.
26. The SLC 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. As noted above, it published its final Report on Moveable Transactions in 2017.
27. The Scottish Government announced its intention to bring forward a Bill on moveable transactions in its Programme for Government 2021-22. As noted above, the Bill which is before the Scottish Parliament is broadly the same as the Bill developed by the SLC.

Consultation on the Bill: Scottish Law Commission

28. Bills introduced by the Scottish Government as SLC Bills are preceded by a consultation exercise carried out by the SLC. One of the requirements for a Bill to be designated as an SLC Bill is that the primary purpose of it is to make provision which is not likely to generate substantial controversy among stakeholders.
29. During the course of the Committee's evidence taking, there was extensive discussion about the impact of the Bill on individual consumers and, in relation to that, the extent to which consumer organisations had been involved and consulted on during the development of the SLC's proposals and draft Bill.
30. Professor Andrew Steven, one of the original Commissioners leading this work on behalf of the SLC, told the Committee that the SLC regarded the consumer element as a very sensitive one and one on which it was important to get evidence. He indicated that they had been influenced by how reforms had been done in other countries and that "it was unusual to leave consumers out".¹ It was explained that in other jurisdictions consumers were allowed to grant non-possessory security but that it was subject to special protections.
31. Nonetheless, Professor Steven added that the Commission was acutely aware that no consumer organisations had responded to the SLC's formal consultation. The project team had subsequently met with Consumer Focus Scotland in 2012 or 2013. Professor Steven indicated that Consumer Focus Scotland had been content that consumers were included, but indicated that it was keen to keep in touch to receive further detail.² In subsequent correspondence, Lady Paton, Chair of the SLC, advised that the policy to include consumers was carefully considered by the Scottish Law Commissioners in early 2013 and that further stakeholder involvement was sought and received at that point.³
32. Lady Paton advised that the SLC regularly engages in projects which concern the rights of consumers and is keen to engage with consumer groups wherever their interests are relevant to a project. Her letter noted, however, that "consumer groups are often operating with highly limited resources in the face of significant demand, which undoubtedly acts as a barrier to their engagement with bodies such as the Commission." She indicated that the SLC would be grateful for any recommendations the Committee may have as to "how the participation of consumer groups in SLC consultations might be facilitated whilst minimising the burden it places on them".⁴
33. **In Session 5, this Committee's predecessor committee scrutinised the Prescription (Scotland) Act 2018. The Committee's report at Stage 1 commented on the SLC's consultation on its proposals, noting that the Committee's Stage 1 scrutiny process had reached a different audience to that of the SLC consultation, particularly in relation to the welfare rights sector. Accordingly, the Committee recommended that the SLC review its**

consultation processes with a view to giving policy considerations a greater level of attention when deliberating on law reforms. ⁵

34. For this Bill, it appears that significant concerns from consumer and money advice organisations have only been identified at the stage of parliamentary scrutiny. The Committee also notes that the SLC consultation on its proposals for a Bill to reform the law of moveable transactions was principally carried out in 2012-13, nearly 10 years ago.

35. The Committee notes that one of the requirements for a Bill to be designated as an SLC Bill is that the primary purpose of it is to make provision which is not likely to generate substantial controversy among stakeholders.

36. Given this criterion, the Committee considers that where the Scottish Government is considering introducing a Bill to give effect to an SLC report and significant time has passed since the SLC's original consultation on its proposals, further consultation should be undertaken. That consultation should be sufficiently wide in its reach to ascertain whether the Bill is likely to generate substantial controversy not only from within the legal community but also in terms of its broader policy impact. It will be a matter for the SLC and the Scottish Government to decide which of the two organisations should carry out that consultation and how it should be undertaken.

General

Impact of the reforms proposed in the Bill

General support

37. There was almost universal support from respondents and witnesses for the reforms proposed in the Bill as they apply to businesses. Dr Hamish Patrick from Shepherd and Wedderburn said that the “legal infrastructure that we have at the moment is from the 19th century and is completely useless for practical commerce.”⁶ He went on to say that there was “absolutely no doubt that the bill will be of immense benefit to businesses”. Similarly, Dr Jonathan Hardman from the Law Society of Scotland indicated that reform in this area was “needed drastically and as soon as possible”⁷ and that therefore it supported the reforms. Academics noted that Scots law was behind the law in many other countries in this area.⁸ Respondents commented that the reforms would bring Scots law up-to-date, making Scotland a better place to do business.
38. The Committee heard that there were examples of lenders who avoided Scotland, or who did not lend on certain classes of assets based in Scotland. The Law Society of Scotland indicated that some lenders would not let their business borrowers incorporate Scottish subsidiaries into their business structures because of the difficulties around taking securities over shares in Scotland; companies based in Scotland chose to incorporate under English law and using English bank accounts because it was easier to raise finance that way; and raising finance using intellectual property (IP) was unduly complex, making Scotland an unattractive place for IP-rich businesses to be based.⁹
39. Burness Paull noted that the effect of a preference for English law had the result of taking advisory work (such as by lawyers, accountants and insolvency professionals) out of Scotland.¹⁰
40. It was suggested that the overall effect was to put Scottish businesses – and those providing services to Scottish businesses – at a disadvantage in comparison to businesses in other countries.
41. UK Finance said that, if implemented effectively, the legislation would “provide significant benefit to the Scottish economy, allowing more finance to be provided to more Scottish businesses through a wider range of finance options.”¹¹ Mirka Skrzypczak from NatWest agreed that the proposed changes to the law on assignments and to the law on pledges would definitely increase access to finance and create the ability to do that at a lower cost. She indicated that, if the Bill was passed and its provisions rolled out, NatWest would consider having, even for a short time, a favourable set of lending conditions and financial conditions for people and organisations in Scotland to assist with the roll-out.¹²
42. Several respondents to the call for evidence suggested that the proposals in the Bill, in particular the use of electronic registers, would put Scotland ahead of some of its competitors.

The role of the floating charge

43. In commenting on the benefit of the reforms, respondents also referred to the role of floating charges (a form of security over the general assets of a company), noting the issues that arise in relying on this form of security. Floating charges are only available to certain corporate bodies, primarily companies. They are not available to partnerships or sole traders. The Federation of Small Businesses in Scotland (FSB) noted that this means 29% of registered small businesses (and all 166,000 unregistered businesses) in Scotland do not have access to them as a finance option.¹³
44. UK Finance raised a further issue with the use of floating charges. The law has recently changed to give preference to the payment of certain tax debts in insolvency. These will be paid before floating charge holders (but after those with fixed securities, available in the rest of the UK). It noted that Scottish businesses are likely to be more reliant on floating charges than businesses in the rest of the UK, so the change is likely to have a greater impact on their access to finance.¹⁴
45. Academics from the University of Aberdeen suggested that it may not be possible to grant a floating charge over trust property. Since trusts are used in a variety of financing options, it would be useful to have a non-possessory form of security which was not a floating charge.¹⁵

Sector-wide benefits

46. Stakeholders discussed the impact of the reforms on different business sectors. Dr Patrick from Shepherd and Wedderburn suggested that all sectors of business would benefit because it was a broad, technical structural reform, but that some would benefit earlier than others. Dr Patrick considered that there would be a gradual realisation of the opportunities that the reforms present to sectors, in order for that to be developed.¹⁶
47. Dr Hardman from the Law Society of Scotland agreed on these points. He said that intellectual property for technology start-ups would be especially important. He noted that another big area would be those that rely on having large valuable assets, such as whisky. He said “being able to pledge whisky barrels to a funder means that whisky distilleries will be able to obtain finance on their whisky while keeping it in their warehouse, which is not currently possible.”¹⁷ The Scotch Whisky Association similarly welcomed the reforms in the Bill.¹⁸
48. The written evidence from UK Finance suggested that the impact would depend on the particular circumstances of the business. Their view was that, at the moment, small and medium sized enterprises would generally experience increased costs or reduced availability in terms of accessing finance, in comparison to other countries. It gave the specific example of invoice financing (where businesses sell claims in the form of invoices due, to help with cashflow). UK Finance noted the reforms would remove the problems lenders faced extending this type of finance to sole traders and partnerships in Scotland.¹⁹
49. Colin Borland from the FSB agreed that the Bill would bring benefits. He said that the most common forms of finance that have been acquired by small businesses in recent years were overdraft facilities, credit cards and asset finance. He went on to

say that “That strongly suggests to me that in the market as a whole, flexibility in financing is the most important thing for small business borrowers. That means that the bill which could be seen as quite dry and technical, will potentially be quite significant if it succeeds in its aims of broadening access to that type of financial solution.”²⁰

Consumer concerns

50. A number of advice agencies were also clear that they supported the reforms in relation to business. However, they were united in their view that the proposals should not apply to individual consumers. Money Advice Scotland noted that it had consulted extensively with the money advice sector before coming to this view.²¹
51. In particular, they were concerned about the potential for the proposed statutory pledge to open up a new high-cost credit market in Scotland, to the detriment of consumers. Mike Dailly from Govan Law Centre told the Committee that the Bill would “lead to a bonanza for predatory lenders looking to exploit vulnerable consumers.”²² Money Advice Scotland said that businesses were likely to borrow for investment, but that consumers often borrowed out of need.²³ Advice Direct Scotland argued that consumers were likely to use essential assets as security, which may then be lost.²⁴ These concerns are examined in more detail below.

52. The Committee welcome the reforms in relation to businesses and agrees that they are likely to have a beneficial impact on access to credit and finance. Given practical barriers to the use of floating charges, the Committee is satisfied that reform of this type of security is a less attractive option.

53. However, the Committee is sympathetic to concerns raised by stakeholders about the impact of the reforms on individual consumers and these concerns are considered in more detail later in this report.

Assignment

Background to assignments

54. As noted above, assignment is the way in which ownership of incorporeal moveable property is transferred in Scotland. Assignment 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. The provisions in the Bill are 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. Invoice financing can involve invoice factoring (where invoices due are sold to the factor, which collects the money and passes a proportion back to the business) and invoice discounting (where the sale of future invoices is used as security for access to ongoing credit).
55. The current rules for assignment 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 assignment is called an **assignment document**. The current law requires that, for assignment 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**.
56. Section 3(2) of the Bill provides that an assignment may be effected by registering the assignment document in the Register of Assignations as an alternative to intimation. It is expected that this would become the most common way of making an assignment.
57. The Register of Assignations would be maintained by [Registers of Scotland](#). It would 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.
58. The Scottish Ministers would have regulation-making powers to require that some types of assignment can only be carried out by registration (section 3(8) of the Bill).
59. The Scottish Government has concluded, however, that it cannot include the provisions which were included in the SLC Bill in relation to the assignment of claims which are financial collateral arrangements under the Financial Collateral Arrangements (No.2) Regulations 2003 due to legislative competence concerns. Instead, it has asked the UK Government to grant an order under section 104 of the Scotland Act 1998.²⁵
60. **The Committee requests that the Scottish Government set out in further detail in its response to this report why it has concluded that provision about the assignment of claims which are financial collateral arrangements under the Financial Collateral Arrangements (No.2) Regulations 2003 are outwith the competence of the Scottish Parliament.**

The Register of Assignations

61. Stakeholders recognised the benefits of the introduction of registration to facilitate invoice financing, which is important to businesses as a way of improving cashflow.
62. The FSB quoted the maxim that it is not a lack of profitability that kills businesses but a lack of cash. It stated:
- ” “More recently, it is true to say that the issue is becoming more acute. FSB’s Small Business Confidence Index (SBI) shows that a third of Scottish business owners say that late payments increased in the last three months of 2021. Over one in ten Scottish firms (12%) say late payment is now threatening the viability of their business.”²⁶
63. In his subsequent evidence to the Committee, Colin Borland from the FSB indicated that its latest small business confidence index showed that over half of all small businesses in Scotland continue to be beset by late payments, and that a third have seen an increase in late payments over the past few years.²⁷
64. Stakeholders referred to the current requirements for intimation which could be cumbersome and costly for invoice factoring. Burness Paull noted, for example, that they have clients spending thousands of pounds sending intimation by courier when, in other legal systems, they could do it by email.²⁸
65. Businesses and lenders can use complex trust arrangements to get round the current requirements. The Scottish Law Agents’ Society explained that this involved the borrower business holding sums received from the business’s customers in trust for their lender.²⁹ Mirka Skrzypczak from NatWest told the Committee:
- ” “We have an expensive workaround in which we create a trust mechanism and use trust language with our customers. That is a problem because it is costly: third-party lawyers must be involved in drafting agreements and in helping our customers to really understand what the trust mechanism means to them. Also, from a lender’s perspective, that presents huge challenges because the mechanism has never been tested.”³⁰
66. The requirement to intimate creates a particular barrier for invoice financing because it is not possible to intimate to future debtors. The effectiveness of using a trust mechanism to get around the requirement to intimate to debtors has not been tested in the courts. UK Finance noted that the risks associated with untested trust arrangements for invoice discounting would add to the costs of accessing this type of finance.³¹
67. Shepherd and Wedderburn indicated that Scottish trade debts are considered by some international funders to be ineligible for their finance arrangements because of the inadequacies of Scots law.³² Mirka Skrzypczak similarly said that, in some instances, businesses deliberately take a decision to have a facility under English law, as opposed to one under Scots law, in order to access finance.³³
68. In his evidence to the Committee, the Minister emphasised that these provisions in the Bill could be positive in a number of ways. He said:

” “The Scottish Government’s small business survey in 2015 showed that only 2 per cent of the businesses that were surveyed applied for an invoice discounting or factoring facility, with most—34 per cent—applying for bank overdrafts and 32 per cent applying for loans. If Scottish businesses utilised invoice factoring to the same extent as UK businesses as a whole do, they might assign invoices worth nearly £18 billion. The figure for invoice factoring in 2018 and 2019 was still only 4 per cent. Those figures demonstrate that there is significant room for growth in that sector and for access to finance to be opened up for business.”³⁴

Dual system of assignation

69. The Scottish Government explained in the [Policy Memorandum](#) that enabling assignation of claims by both registration and intimation gave flexibility to those who might prefer intimation for reasons of confidentiality. However, it meant that the Register of Assignations would not be comprehensive, so that a search could not be relied upon to disclose whether a claim had been assigned. (This issue is discussed in more detail at paragraphs 44 to 56 of the Policy Memorandum).
70. Stakeholders were broadly supportive of the dual approach. UK Finance stated, for example, that its members were not concerned about the dual system which would mean that if businesses wished to preserve commercial confidentiality by avoiding public registration of their financial arrangements, they could do. UK Finance noted that a dual system also avoided change-over costs and the disruption caused by a big bang approach.³⁵
71. Other business respondents, academics and legal respondents were, in the main, unconcerned about the dual system for assignation. Flexibility was considered to be of greater value than a comprehensive register.
72. Dr Patrick from Shepherd and Wedderburn similarly supported the dual system. He indicated that there were some situations where giving notice was “absolutely fine”; for example, in relation to a large project financing for building a harbour or hospital in which lots of high-value limited contracts are assigned and everyone is in the room. He noted that, in such cases, all can sign the contract and notice is very easy.³⁶
73. Academics from the University of Aberdeen suggested that there could be a registration-only approach for bulk transfers. They noted that this would reduce costs and enable potential assignees to verify their right in a claim without contacting every debtor. In general, there was an expectation that registration would be the default method for assigning bulk claims (such as with invoice factoring) and future claims (as with invoice discounting) as the law does not support effective assignation at the moment.³⁷
74. Dr Patrick also considered that the practice of everyone registering was likely “to develop in certain fields.” He suggested that there might come a point when registration will be the only way for particular types of claim. He noted that the Bill provides for that eventuality, because Scottish Ministers have a regulation-making

power to require registration for the assignment of certain categories of claim.³⁸ Shepherd and Wedderburn welcomed the regulation-making power in allowing for a nuanced approach. However, they stressed the importance of consultation to identify all the interests which might be affected by such a change.³⁹

75. There were, however, some concerns about a system of dual assignment. The Faculty of Advocates questioned the practical effect of a rule which enabled the transfer of ownership on the happening of an uncertain event, which may be unknown to the debtor.⁴⁰ Professor Louise Gullifer also commented on this issue. In particular, she noted that the priority of a claim (who gets the strongest right where there are competing interests) was not dependent only on order of registration, but on the order of fulfilment of either of the requirements in section 3(2)(b) of the Bill.⁴¹ Professor Hugh Beale suggested that priority could be decided on the basis of registration alone, but with exceptions for those cases where it is not hard to contact the individual debtor or registration seems unnecessary for other reasons.⁴²
76. The academics from the University of Aberdeen noted separately that it was important that users understood that the Register of Assignations would not be comprehensive given that assignment could still take place via intimation.⁴³
77. Shepherd and Wedderburn appeared to take a slightly different view. They suggested that making the Register of Assignations comprehensive was an unachievable aim. This was because the title (the ownership right) in the underlying claim was not registered and therefore not verifiable. Their view was that attempts at comprehensiveness would make registration inefficient and expensive, which would undermine the overall policy intention.⁴⁴

Assignment of debts owed by individual consumers

78. However, there were also concerns about these reforms from a consumer perspective.
79. Consumer and money advice stakeholders were concerned that the Bill would remove the requirement for intimation when an individual consumer's debt was assigned. Govan Law Centre highlighted that not receiving intimation of an assignment could cause consumers to lose track of who they needed to pay and struggle to keep on top of their finances as a result.⁴⁵ Myles Fitt from Citizens Advice Scotland (CAS) further suggested that it was a "recipe for confusion".⁴⁶ North Lanarkshire Council's Social Inclusion and Wealth Team spoke of the stress and confusion for clients.⁴⁷
80. In particular, Myles Fitt pointed out that the lack of notification makes it difficult when clients come to the CAS service. When a debt has been assigned, advisers can spend significant time trying to identify who clients owe money in order to be able to negotiate repayments with them.⁴⁸ Money advisers also indicated that they would struggle to trace creditors and send timely notifications in relation to statutory debt

solutions.

81. Similarly, Alan McIntosh from Advice Talks Ltd suggested that, in relation to the Debt Arrangement Scheme, money advisers need to know who the actual creditor is. This is because they need to notify creditors of the intention to use the scheme, give them offers and confirm the balances that are owed to them.⁴⁹
82. Govan Law Centre suggested that the Bill would create a two-tier system – where consumer credit debts were intimated but other types of debts owed by consumers were not.⁵⁰ Money Advice Scotland noted that this would create inconsistency and confusion for clients and advisers.⁵¹ Mike Dailly from Govan Law Centre said:
- ” “The bill operates within existing UK law, so under the Financial Services and Markets Act 2000, the Financial Conduct Authority is empowered to make rules and it has made the consumer credit rule book, which requires that consumer credit agreements be intimated to the consumer on assignment. If the bill were to be passed as drafted, we would have the absurd position in which consumers would be protected in certain circumstances but not in others, which is not logical.”⁵²
83. As a consequence, respondents from the advice community called for intimation to remain a requirement for debts owed by individual consumers. They suggested that it should not be possible to register these types of claims unless the assignee could demonstrate that intimation had occurred.
84. In subsequent written evidence to the Committee, Professor Steven indicated that the Bill would make registration an alternative to intimation but would not alter the requirement for notification under Financial Conduct Authority (FCA) rules. In practice, assignees would still have to notify consumers if they wished payment to go to them rather than the assignor.⁵³

85. Given the broad support from stakeholders, the Committee supports the approach taken by the Scottish Government in making provision for a dual system of assignment.

86. Nonetheless, the Committee recommends that the Scottish Government consult further on the likely use of the Register of Assignations for the assignment of consumer credit debts and the impact on individual consumers. The Scottish Government should report back to the Committee in its response to this report, or at the very latest, in advance of the deadline for Stage 2 amendments.

87. The Committee recognises that to require intimation in all cases involving individuals would undermine the reforms in relation to access to invoice financing. Nonetheless, the Committee remains concerned about the impact the removal of intimation may have on debtors and asks the Scottish Government to consider and report back on this issue within the

same timeframe.

Waiver of defence clauses

88. The Bill would provide (section 13(1)) that where a claim is assigned, the debtor can exercise any defence against the assignee that they could against the assignor. This means that, if the debtor has a legitimate reason for not paying the assignor (for example, goods were faulty, or a debt was wrongly calculated), they would not have to pay the assignee. The Bill would also provide that a debtor and assignor could agree that this protection would not apply. This is known as a “waiver of defence” clause.
89. In its response to the Committee’s call for views, the Faculty of Advocates stated:
- ” “the Faculty was not in favour of permitting waiver-of-defence clauses. The Faculty’s concern is that if they are to be permitted, they would doubtless become pro forma terms in all institutional lending transactions resulting in the diminution of the rights of third parties. The Faculty notes that consumers will be protected, but this protection would not apply to protect small businesses. Ultimately however this is a question of policy: protection of small businesses as against the marketability of claims.”⁵⁴
90. Shepherd and Wedderburn criticised the drafting of section 13 and the extent to which it restates existing law.⁵⁵ In terms of the substance of the provision, Dr Hardman of the Law Society of Scotland acknowledged that “such clauses are pretty common in practice, especially in the business-to-business context.” However, he noted that there were legitimate questions about the bargaining disparities and the freedom that people should have to contract out of the default rules for set-off.⁵⁶
91. The Scottish Government argued that the Bill simply codifies the current law, which allows contracting parties to waive defences if they chose, while the SLC argued that provisions in the Consumer Rights Act 2015 could be used to provide protection to consumers.
92. In his evidence to the Committee, the Minister commented on waiver of defence clauses, stating that:
- ” “It is important to note that the bill changes nothing in relation to waiver of defence clauses. It simply puts the existing common law into statute. I stress that the existing common-law position is that the ability of parties to agree to have a waiver of defence clause is subject to any legislation that restricts or prevents that, including any and all consumer protection legislation.”⁵⁷
93. Nonetheless, the Minister went on to note that he appreciated that concerns had been raised with the Committee about the drafting of the relevant section and was happy to consider that at Stage 2.⁵⁸

94. **The Committee has considered whether the option to waive defence clauses should be removed for all. However, it is mindful of the potential impact of this on business freedom and on small businesses, who may wish to retain this possibility. The Committee is, however, particularly concerned around the position of sole traders and the extent to which they are adequately protected. It invites the Scottish Government to reflect on this point and, on the basis of evidence it has received, or subsequently gathers, consider whether the Bill should be amended to remove this option for sole traders.**

95. **The Committee recommends that the Scottish Government bring forward an amendment at Stage 2 removing the option to sign waiver of defence clauses for individuals not acting in a business context.**

Statutory pledge

Background to statutory pledge

96. The second main purpose of the Bill is to reform the law of pledge. Pledge is a form of security over corporeal moveable property. In a consumer context, one form of pledge is known as pawn and regulated by the Consumer Credit Act 1974. Outside the context of pawn, the current law requires that pledged items are in the possession of the creditor.
97. 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.
98. The Scottish Government [Policy Memorandum](#) to the Bill describes a statutory pledge as:
- ” ...the moveable property equivalent of a standard security over land and will be registered in a new Register of Statutory Pledges.
99. As a “fixed” security, the [Policy Memorandum](#) states that the statutory pledge is designed to be more attractive to lenders than the floating charge as it permits more certainty as to the strength of the security, for example in the event of the borrower’s insolvency.
100. The [Policy Memorandum](#) goes on to say that registration in the Register of Statutory Pledges will also remove the requirement to deliver the asset to the creditor. The SLC, in its 2017 report, said that the existing requirement to deliver the moveable property to the creditor is commercially impractical, as businesses require possession of their assets to trade. This can make this form of security unattractive to businesses. Businesses in England (and many other countries) can use corporeal moveable property as security for a loan while retaining possession of it. This, considered the SLC, puts Scottish businesses at a disadvantage.
101. The Bill's statutory pledge provisions would also extend to IP rights which is a form of incorporeal moveable property. Under the Bill, Scottish Ministers would be given regulation-making powers to enable statutory pledges to be created over other types of incorporeal moveable property.
102. However, one element of the SLC’s recommendations that is not in the Bill covers a separate form of incorporeal moveable property, known as financial instruments (such as shares and bonds). The [Policy Memorandum](#) notes that the Scottish Government also intends that it will be possible to grant a statutory pledge over financial instruments. Nevertheless, the Scottish Government concluded that legislating on financial instruments is reserved to the UK Government.
103. The Scottish Government has asked the UK Government to make an order under section 104 of the Scotland Act 1998 to deal with the issue.

104. **The Committee requests that the Scottish Government set out in further**

detail in its response to this report why it has concluded that making provision for financial instruments in this Bill would be outwith the competence of the Scottish Parliament.

Current issues

105. As noted above, it is currently not possible to take security over moveable property in Scotland without taking possession of that property. Sale and leaseback has been used as one workaround for this. However, this can be legally challenged, and the Scottish Law Agents' Society noted that the courts have been reluctant to accept these as genuine transactions.⁵⁹
106. Shepherd and Wedderburn highlighted that mechanisms like hire purchase can work reasonably well to provide funding backed by assets such as vehicles. However, it works less well for things like livestock, manufacturing stock or commodities (eg. grain or oil).⁶⁰ UK Finance noted that even large businesses looking to borrow on the basis of their valuable stock are only able to do so using a floating charge.⁶¹
107. Even for possessory pledge, there are problems with the law in Scotland. The Law Society of Scotland noted that the current law requires actual delivery not constructive delivery (like giving a creditor the keys to a warehouse). This can be an issue for small spirits producers with stock in third-party warehouses.⁶²
108. Academics from the University of Aberdeen discussed the requirement to transfer ownership of incorporeal moveable property in order to use it as security. Because ownership cannot be split, it is not possible to create multiple security rights over the same property, so that the finance-raising potential of an asset may not be fully realised.⁶³
109. UK Finance highlighted that the Bill's reforms in relation to intellectual property are likely to be useful to Scotland's video gaming and pharmaceuticals sectors. The reforms in relation to incorporeal moveable property (if they are extended to financial instruments) are also likely to be useful for complex structural finance arrangements.⁶⁴

Protections in the Bill for individual consumers

110. 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. As they are not individuals, other types of small business are also excluded from the protections.
111. The following additional protections would apply to individuals not acting in a

business context in relation to statutory pledge:

Section 48

112. Property which is the subject of a statutory pledge must be identified separately. It would not be possible to create a statutory pledge over "all my household goods". Paragraph 155 of the [Policy Memorandum](#) states that this is intended to make it clear to a consumer what is at stake if they do not fulfil their obligations.
113. Property which is the subject of a statutory pledge must be owned by the consumer. 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.
114. Each item of corporeal moveable property used as security in a statutory pledge must be worth more than £1,000. Paragraph 157 of the [Policy Memorandum](#) also states that this would prevent individuals using low value domestic items like clothing and furniture as statutory pledges.
115. 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.

Sections 64 and 65

116. A court order will be needed to take possession of property which is the subject of a pledge or to enforce a pledge. Although the provider can agree - after the pledge has become enforceable - that a court order is not necessary.
117. 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.

Section 71

118. A secured creditor will not be able to appropriate encumbered property as an enforcement option.
119. 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.

Enabling a high-cost credit market

120. However, while there was support for the introduction of registration of a statutory pledge among the business community, there were concerns about the impact of the reforms on individual consumers.
121. Consumer and money advice stakeholders expressed significant concerns that the

statutory pledge proposals could enable a new form of high-cost credit in Scotland. Myles Fitt from CAS described the Bill as “a shot in the arm for the high-cost credit industry, which is always waiting for the next opportunity”.⁶⁵

122. He said that CAS believed that the Bill ran a great risk of creating an unintended consumer harm, noting that, even if mainstream lenders did enter this market, that would not preclude high-cost lenders from doing so too. Myles Fitt told the Committee that: “Members should not underestimate the effectiveness of marketing by those high-cost lenders, which will be much better at marketing than any mainstream, lower-cost lender.”⁶⁶
123. Some stakeholders suggested that statutory pledge could operate in a similar way to logbook loans in England. Logbook loans utilise the English law process of bills of sale to use cars as security for credit. The Money Advice Trust highlighted that similar products in England have high interest rates and are given to consumers who are struggling financially. They expected a similar lending landscape to emerge in Scotland.⁶⁷
124. Advice sector respondents also highlighted the particular risks if a lending product using a personal car as security emerged in Scotland. Loss of the car could impact on people’s ability to work, or to transport children or disabled family members. It was suggested that logbook loan providers use the fact that their customers need their cars as leverage to get payment of their loan before the debtor’s other financial commitments. CAS made the wider point that this creates a market for lending based on the utility of the asset as much as its actual value.⁶⁸
125. The cost-of-living crisis was raised as another factor. Witnesses emphasised that the definition of “vulnerable consumer” has widened, not narrowed. People were struggling and may be desperate to access credit to cover essential expenditure. This increased the risk that such individuals would take on unsustainable borrowing. CAS noted that it was their experience that people often turn to high-cost credit just before they hit crisis point.⁶⁹ Mr Alan McIntosh from Advice Talks Ltd similarly described it as “a last resort”, after “the credit cards, the loans and everything else”.⁷⁰
126. CAS said that the ability to borrow on and keep using items that consumers need “is a potent consumer behaviour cocktail for hasty and unnecessary borrowing decisions – even if there were no risk of high-cost lenders and no cost living pressures.”⁷¹
127. In subsequent correspondence, CAS claimed that there was no demonstrated consumer need or demand for the Bill. It said:

” “There have been no calls or demands from consumers or consumer groups to have the ability to borrow based on a moveable asset. We do not believe lenders have been making noises about policy reform in relation to consumers. Rather, the inclusion of consumers has sprung from legal experts correctly and insightfully advocating a policy change for businesses but who have little expertise or insight into the impact of involving consumers.”⁷²
128. Govan Law Centre was among the respondents who also questioned the need for

this type of security for consumers. They noted that the market currently offers hire purchase and conditional sale (with significant additional protections from the Consumer Credit Act 1974), as well as bank loans, credit union loans and other affordable credit sources.⁷³

129. On the other hand, academics responding to the Bill were of the view that enabling consumers to access lending secured on moveable assets would reduce the risk to lenders and therefore the cost of credit. They noted that, in other countries which had reformed their laws, consumers had generally been included.⁷⁴ Mr Bruce Wood suggested that direct comparisons could be made with Australia and New Zealand in terms of the impact on consumers. Australia in particular had a similar consumer protection regime to that provided by the FCA. Mr Wood reported no problems with secured lending to consumers there.⁷⁵
130. Some also commented that, since consumers could grant mortgages (standard securities in Scotland), use pawnbrokers and other types of quasi-secured lending, it was difficult to see why they shouldn't be able to use statutory pledge.
131. Mr Wood did accept that proposals in the Bill would open up the possibility of logbook-type loans in Scotland. However, he noted that the model already exists, with the workaround that the customer transfers ownership of the car to the lender, which then leases it back to them via a hire purchase arrangement. Mr Wood discussed the current hire purchase market. Businesses offering hire purchase must separately fund the acquisition of the assets they then offer to consumers. The business model must include the interest rate the business pays to acquire the asset as well as the rate charged to consumers to cover the risks involved and create a profit. This double margin or finance cost puts the cost of credit up. In statutory pledge, the debtor would own the asset, so it should follow that the risks and costs reduce.⁷⁶
132. However, Govan Law Centre, along with other respondents, challenged the assumption that statutory pledge would result in lower interest rates for consumers. They indicated that no evidence had been presented to demonstrate this.⁷⁷

Regulation by the Financial Conduct Authority

133. Stakeholders discussed the protections for consumers that currently existed.
134. Some legal and academic stakeholders argued that existing protections via the FCA and the Consumer Credit Act 1974 were sufficient. It was highlighted that the FCA was in the process of introducing a new consumer duty, which was expected to provide stronger protection to consumers. UK Finance noted that the new consumer duty would likely be in full force by the time the Bill was implemented.⁷⁸
135. The duty would require financial firms to assess what their customers need, making it easier to identify products that don't meet these needs before harm is entrenched. Morton Fraser suggested this "will fundamentally change how firms serve customers", requiring them to act in good faith and avoid causing foreseeable harm.⁷⁹

136. However, some advice organisations were less enthusiastic. They noted that harm has occurred in relation to consumer credit products – for example payday lending – despite FCA regulation. CAS noted that FCA regulation doesn't currently cover credit unions, factor fees or buy now, pay later credit products (such as Klarna).⁸⁰ Advice organisations further noted that existing models of high-cost credit were also currently the focus of greater FCA regulation, meaning that operators were looking for new markets and products. CAS suggested that high-cost lenders might deliberately try to design products in this sphere which fell outside FCA regulation.⁸¹ Myles Fitt suggested that would lead to years of vulnerable groups getting into financial difficulty until the FCA catches up with the product.⁸²
137. In its written evidence, CAS concluded:
- ” “The debt advice sector has had extensive experience in dealing with the fallout of high-cost, sub-prime lenders moving from opportunity to opportunity whilst regulators such as the FCA and Financial Ombudsman Service has played catch up.”⁸³
138. It was also noted that if high-cost credit providers designed a product which was not covered by FCA regulation, the Scottish Government would have to rely on the UK Government to extend the FCA's powers.
139. Money advice providers raised concerns about the statutory pledge existing outwith the current regulatory framework. Alan McIntosh suggested that the type of product that these securities would be taken out over did not have as many protections as those that are currently available in Scotland, which are hire-purchase and conditional sale. He noted that a lot more consumer protections are built into those.⁸⁴
140. In subsequent written evidence to the Committee, Professor Andrew Steven challenged the suggestion that the new statutory pledge would not be subject to regulation by the FCA. He argued that the statutory pledge would be a “security” within the meaning of section 189 of the Consumer Credit Act 1974 and that therefore it would “automatically be regulated by the FCA and be subject to the 14-day default notice provisions in section 87-89 of the 1974 Act.”⁸⁵

Excluding consumers from the Bill's proposals

141. Advice organisations were united in their call for consumers to be excluded from the reforms in the Bill, as the best way to protect their interests. Mike Dailly from Govan Law Centre said in evidence that:
- ” “I would go as far as to say that if the bill as passed included consumers in the way that is proposed, there would not only be legal problems but a question about morality that would have to be asked.”⁸⁶
142. Dr Hardman reported that the Law Society of Scotland's Banking, Company & Insolvency Law, and Consumer Law sub-committees were of the view that the Bill already includes a number of protections for consumers, and therefore was of the opinion that consumers should be included in the Bill. It was considered that most, if

not all of the consumer lending in relation to statutory pledges, is likely to be regulated by the FCA, which could intervene if consumer hardship emerged in the vehicle finance sector. However, the Law Society supported further protections for consumers in the Bill, including raising the threshold (as discussed below).⁸⁷

143. A theme among academic respondents was that the Bill dealt with reforming property law, whereas the appropriate place for consumer protections was in consumer protection legislation. Professor Gullifer commented that it was satisfactory for secured transactions law (such as the Bill) to provide rules which are similar for all borrowers, with additional protections for consumers dealt with elsewhere. She noted that this approach was taken in many countries and appeared to work. However, this did not negate the need to take great care in formulating consumer protections.⁸⁸
144. In subsequent written correspondence, Professor Steven argued that excluding all consumers from granting a statutory pledge would leave Scotland out of line with modern international standards as set out by the United Nations, the World Bank and in legislation by “just about every other country which has reformed moveable transactions law in recent times.”⁸⁹
145. Other respondents, such as Mr Wood, argued that preventing the reform of property law on consumer protection grounds would prejudice those consumers who could be expected to benefit.⁹⁰
146. Academics from the University of Aberdeen also sounded a note of caution. They suggested that, if consumers were unable to grant a statutory pledge, lenders might be wary of lending to individuals more generally, including sole traders. This was because it may not be clear whether the asset in question was used wholly or mainly for business purposes.⁹¹
147. Dr Patrick noted that the reforms would bring about big benefits for sole traders and that therefore it was important to get the boundary right and not to preclude availability of something that would be useful for them.⁹² Colin Borland from the FSB commented that it would have a “strong concern” if it looked as if the Bill would limit access to business finance for small firms.⁹³
148. In subsequent correspondence, the FSB indicated that, in general terms, it did not take a position on whether or not statutory pledge should be available as an option to individual consumers. However, it said that:

” “The only note of caution we sound is that, were it to be decided that individual consumers should not be able to grant a statutory pledge over their property, it would be essential that, in doing so, we did not inadvertently exclude sole traders - especially unregistered enterprise or very early stage start-ups.”⁹⁴
149. The FSB went on to note that given that a sole trader’s business cannot, by definition, be separated from them as an individual, it would be a challenge to establish whether a particular individual was seeking to grant a pledge in a business context or a domestic one. It was also easy to see how difficulty could arise in trying to define whether an asset is, for example, used wholly or mainly for the purposes of a business (e.g a family car).⁹⁵

150. In his evidence to the Committee, the Minister emphasised that it was important to recognise that, if the Scottish Government did seek to effect that aspirational removal of individuals or “consumers” from the Bill, there would have to be careful consideration of how that could be done in the drafting. He said:

” “I am conscious that, as we seek to prevent potential risks, we must not generate unintended consequences that would limit the impact and policy objective of the bill, which is about opening up financing opportunities to businesses of all sizes, particularly those that want to grow but that do not have any heritable property and that would rely on using moveable property as collateral.”⁹⁶

151. The Committee received conflicting evidence on the risks to consumers of the proposed reforms and the extent to which protections in the Bill were adequate. There were also conflicting views on the extent to which individual consumers granting a statutory pledge would be protected by the Consumer Credit Act 1974 and current FCA regulation.

152. The Committee recognises the real concerns of money advisers and CAS about the potential for the Bill to open up a further high-cost credit market.

153. The Committee notes the potential difficulties in amending the Bill to exclude individuals from the provisions relating to statutory pledge given the difficulties in distinguishing sole traders and early start-ups from individual consumers.

154. The Committee recommends that individuals not acting in a business context should be excluded from this part of the Bill. Careful consideration should be given as to how to do this in a manner which would not exclude sole traders and early start-ups from the benefits of the reforms. The Committee notes that it may be possible to introduce a system where sole traders or early start-ups can self-declare their status as a business, but recognises that that is a matter for the Scottish Government to consider.

155. In addition, the Committee recommends that the Scottish Government gives consideration to creating more protections in the Bill for sole traders - who will in many cases be in a similar position to individual consumers.

156. In the event that the statutory pledge part of the Bill is not amended to exclude individual consumers, the Committee recommends that additional protections are put in place for this group. Some options are discussed further on in this report.

157. The Committee also recommends that the Bill is amended to require the Scottish Government to carry out a review of the operation of the Bill after a 3 to 5 year period and report to Parliament. The review should, in particular, consider the experiences of small businesses and individual consumers.

158. **The Scottish Government is also invited to consider its strategy to address the matters arising out of the review (and report), including how existing regulation making powers may be exercised in so far as these may be able to amend provisions in this regard where possible, so as to avoid the need to make primary legislation.**

£1,000 value threshold for individual consumers

159. Respondents and witnesses commented on the existing protections within the Bill for individuals and the extent to which they were adequate. One of the protections for consumers in the Bill is to prevent them from using individual assets with a value of £1,000 or less for a statutory pledge. There was general agreement – including from the two former SLC commissioners who responded – that the threshold should be increased. In his evidence, Professor Gretton explained that the figure of £1000 had been included in the Bill “as a drafting issue” as it was thought that an initial figure should be provided.⁹⁷
160. It is further noted that the figure of £1000 was suggested by the SLC in 2017. Using the Retail Prices Index (RPI) measure of inflation, £1,000 in September 2017 would be £1,294 if uprated in line with inflation.
161. Witnesses suggested various alternative figures, with most coalescing around £3,000 or £5,000. Myles Fitt from CAS indicated that the sum could be £3,000 or £5,000, noting that the higher the figure the more likely household items are protected. However, he also noted that, the value of cars “will be upwards of £4,000 or £5,000”. If the figure was as high as £12,000, he suggested that “you might as well as remove consumers from the bill because it will take out so much that there will be no point”.⁹⁸
162. Alan McIntosh pointed out that the figure of £3,000 related to existing protections in the Home Owner and Debtor Protection (Scotland) Act 2010, making it an obvious option.⁹⁹ In subsequent correspondence, the Law Society of Scotland indicated that it was supportive of a limit of £5,000 rather than the £1,000 limit that is currently in the Bill.¹⁰⁰
163. A number of respondents from the advice sector raised concerns that the current provisions in the Bill would defeat the protections in the Debt Arrangement and Attachment (Scotland) Act 2002. The 2002 Act contains a list of assets which cannot be seized by creditors as part of court-sanctioned debt enforcement action. These are generally described as essential household items, but could, for example include a sofa or computer worth more than £1,000 where these were the only sofa or computer the household had access to.
164. As part of this discussion, witnesses also commented on the potential to exclude household items as a general category from the Bill’s provisions. In his oral evidence, Professor Gretton indicated that the Bill enables the Scottish Ministers to provide specific categories of moveable property that cannot be subject to a statutory pledge. Therefore, he noted that the Scottish Ministers could provide that

household goods are excluded.¹⁰¹

165. Dr Hardman from the Law Society of Scotland summarised the risks associated with different approaches to addressing consumer concerns: He said:

“Whichever one of the three metrics that you go with, you will end up slightly overprotecting in some places and you will risk underprotecting in others. If you carve out consumers from the bill, you overprotect the wealthy consumer who might want to use their assets. If you go down your suggested route with household items, you will not protect every consumer but you might overprotect in certain areas.”¹⁰²

166. In his evidence to the Committee, the Minister responded to the concerns raised by consumer organisations. He said:

“However, last week, I met Citizens Advice Scotland and some of the debt advice agencies and listened carefully to what they had to say about the application of the bill to consumers. I am certainly well disposed to strengthening the consumer protections in the bill and, in particular, I believe that the monetary threshold under which it will not be possible to grant a statutory pledge should be raised from £1,000.

I am also in no doubt that the policy of the Government should be that it should not be possible to grant a statutory pledge over ordinary household goods. We can look to see how the bill might be amended at stage 2 to ensure that that is not possible.”¹⁰³

167. However, the Minister indicated that he was still contemplating the exact approach for creating consumer protections. He told the Committee:

“I have not reached a settled view, but my reflections are consistent with those of everyone else who has engaged with this argument. Is there a point where, particularly given the provisions on the statutory pledge for individuals, there has to be a list of specific items rather than a category of goods? Is there a situation that arises where we increase the threshold to such an extent that the statutory pledge is no longer a realistic option for any individual who would be seeking to use it? I am also conscious that there is a particular focus on motor vehicles being a potentially high-value good that individuals own.”¹⁰⁴

168. In terms of the threshold level, the Minister indicated that he had “not settled on a particular amount”. He was aware of the £3,000 figure in the regulations and the Debt Arrangement and Attachment (Scotland) Act 2002, but wanted to give the matter further consideration.¹⁰⁵

169. The Minister suggested that there were several approaches to uprating the threshold figure: either to develop an automatic mechanism or to have periodic uprating effected by statutory instrument. He noted that, in relation to an automatic instrument, there would be a wider range of considerations on matters such as its design and its reference to other statistics—for example, the RPI.

170. The Minister indicated that he would be happy to consider the matter in general and to come back to the committee in his response to its Stage 1 report.¹⁰⁶

171. The Committee has recommended above that the Scottish Government give consideration to excluding individuals not acting in a business context from Part 2 of the Bill, while noting the need to do so in a manner which would not exclude sole traders and early start-ups from the benefits of the reforms.

172. In the event that this recommendation is not taken forward by the Scottish Government, the Committee wishes to see further protections put in place to protect consumers.

173. The Committee recommends that the threshold is increased. A range of figures were put forward by stakeholders; in particular, the figures of £3,000 and £5,000 were proposed. The Committee recognises that there are risks associated with either of these figures. There is a risk some essential household items may have a value above £3,000, while the figure of £5,000 would likely to cover all essential household goods other than some cars, so would significantly reduce the opportunity to use statutory pledge to acquire household goods.

174. The Committee notes that the Minister is giving further consideration to the appropriate threshold to be included in the Bill and recommends that the Scottish Government come forward with a revised figure at Stage 2. Given the evidence that the Committee has received, it considers that the threshold should not be lower than £3,000.

175. The Committee recommends that any figure is automatically updated annually on an agreed date by reference to the Retail Prices Index.

176. The Committee supports the retention of the current delegated power that would allow the Scottish Government to increase the threshold if that proved necessary.

177. Alongside the increase in threshold, the Committee recommends that the Bill is amended to specify that “essential household goods” are excluded. In making this recommendation, the Committee is mindful of concerns that this phrase is open to interpretation, and that there is a risk of excluding some assets belonging to sole traders or early start-ups. The Committee recognises that the Scottish Government will wish to consider carefully how the term is defined in the Bill.

178. **The Committee finally recommends that the Scottish Government review the operation of the exclusion of household items after 3 to 5 years and report to Parliament.**

Enforcement

Court procedure for individuals not acting in a business context

179. Section 64 of the Bill requires a court order before a pledge can be enforced where the provider of the pledge is an individual or where the property is in respect of the sole or main residence of an individual (with exceptions).
180. A key concern in commentary about the Bill in the media has been in relation to enforcement, with the powers being compared to warrant sales. Warrant sales were a form of debt enforcement involving court officers collecting and auctioning non-essential items from a debtor's house to raise money to pay their debt. They were abolished by the Scottish Parliament.
181. Academics from the University of Aberdeen argued that comparisons to warrant sales were misconceived. In particular, they indicated that the creditor would only be able to take enforcement action against the item pledged. There would not be a general right to enforce against a debtor's non-essential household property. They also noted that unsecured creditors could take court action and get a right to enforce against a debtor's moveable property more generally.¹⁰⁷ Professor Gretton noted that hire purchase and conditional sale could involve repossession of the asset securing the loan.¹⁰⁸
182. The Bill would require creditors to "conform to reasonable standards of commercial practice" when enforcing a pledge (section 63(4)). However, it is less clear how this provision would interact with the court procedure provided for in the Bill. The Scottish Law Agents' Society noted that this requirement related only to enforcement activity, not to the general terms and conditions of the arrangement.¹⁰⁹ Burness Paull argued that the standard is uncertain, and indicated that further clarification or guidance would be welcome.¹¹⁰
183. The Scottish Law Agents' Society noted that while the Bill contains the requirement for a court order, there are no powers or criteria specified in the Bill which judges could use to protect debtors. There are protections in the Consumer Credit Act 1974 and the Debtors (Scotland) Act 1987 which may be relevant.¹¹¹
184. Govan Law Centre noted that other forms of debt enforcement which target a debtor's general household goods are subject to significant additional protections. They noted that exceptional attachment orders are only granted in exceptional circumstances and therefore rarely used. Govan Law Centre argued that the means of enforcing statutory pledge in the Bill is a retrograde step. They stated:

” “Those with financial difficulties that we assist often have concerns about people coming into their homes to remove goods when they are having financial difficulties, usually having their fears elevated by television shows that show bailiffs entering properties for non payment of debts; which is fairly common place in England. There is a visible reassurance when their rights are explained to them that this only happens in exceptional circumstances in Scotland by way of an exceptional attachment order and a substantive number of household items are exempt from attachment.” ¹¹²

185. **The Committee recommends that the Bill is amended to create additional criteria which must be satisfied before a statutory pledge can be enforced against an individual not acting in a business context. In particular, creditors should be required to: provide clear information about the terms of the security; the specific defaults and what the debtor must do to remedy these; make reasonable efforts to contact the debtor to agree steps to remedy the default; accept reasonable payment offers; and signpost individuals to sources of advice.**

186. **The Committee invites the Scottish Government to consider what further provision could be introduced to protect against situations where items within a home are the subject of enforcement action.**

Enforcement against small businesses would be possible without a court order

187. Concerns were also expressed by respondents about the risks to small businesses given that the Bill does not require a court order in cases where a pledge is being enforced against a business. It was noted that small businesses might suffer from the same disadvantages as individual consumers. Nonetheless, it was also noted that an increase in protections may increase costs of borrowing and availability of certain products.

188. The Minister acknowledged these risks in his evidence to the Committee. He said:

” “I am happy to reflect on that [safeguard in the legal system at least to allow for pleas to be made about the circumstances before a lender is allowed to arrest property that could be critical to business]. I will also take away the questions of definitions and to which particular category of business the protection would apply. Of course, businesses of all sizes can get into financial distress. We see examples of larger businesses that have declined and failed, and of smaller businesses that have been very resilient, nimble and fleet of foot. However, I acknowledge the general point about the particular risk and exposure that are faced by small businesses when they are still just saplings on the forest floor.”

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189. While noting that the costs of borrowing may increase, or that products may not be available, the Committee recommends that the Scottish Government consider in consultation with representatives from small businesses whether the Bill should be amended to increase protections for small businesses in relation to the enforcement of a pledge.

190. The Committee also recommends that the Scottish Government report on the impact of the enforcement provision in the Bill on small businesses within 3 to 5 years of these provisions coming into force and consider whether, as a result of its review, further protections should be put in place.

Registers

Background to the registers

191. As noted above, 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.
192. The Bill places a range of new duties on the Keeper of the Registers of Scotland (the official in overall charge of Registers of Scotland). It is expected that registration and searches will be competed electronically, which is intended to reduce costs and speed up processes.
193. 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.

The detail of how the registers operate

194. The detail of how the registers will operate will be contained in future regulations.
195. A number of stakeholders commented on the content of the registers. UK Finance highlighted that there was a risk in asking for too much information from those seeking to register documents pointing out that the more information which was required, the greater the risk of a mismatch (eg. between information in the pledge document and information in the record), which might invalidate the security. UK Finance therefore suggested that a pragmatic approach should be taken to information requirements, with limited mandatory fields. They did note that there must be enough information to make the security uniquely identifiable.¹¹⁴
196. The Law Society of Scotland suggested that assignees and secured creditors will only provide information which is mandatory (to minimise the risk of a mismatch). The Law Society highlighted the following suggestions for further improvements to the registers:
 - providing a tick box for asset class in relation to statutory pledge rather than having to describe specific assets, which would be easier for larger lenders and facilitate pledges of future assets;
 - a text box for comments about the end date of the pledge;
 - a tick box to indicate if a lender is acting as a trustee for a syndicate of lenders (which is a common arrangement) rather than directly for themselves.¹¹⁵
197. Respondents also commented on the search functionality of the registers. Shepherd and Wedderburn noted provision in the Bill for searching against unique

identification numbers of pledged assets. They suggested that this power be used sparingly as it increased the risk of mismatch invalidating the pledge, as well as making it more difficult to pledge future assets. ¹¹⁶

198. In Shepherd and Wedderburn's view, the only search criterion which was important was the identity of the assignor or pledge provider (a view shared by the Law Society of Scotland). They noted that this would allow those with an interest to use the information request powers in the Bill to seek any further information they needed. They said that full text searching of the underlying documentation (assignment documents and constitutive documents for statutory pledges) would be useful as it could speed up the checking process.
199. The Law Society of Scotland suggested that it would not be possible to create definitive searches on property – especially given the intention to cover future assets and classes of assets. This was partly because registration would not confirm ownership, but also because the rights may have changed and the registers would not be comprehensive. They therefore emphasised that any ability to search on property would have to be heavily caveated to avoid confusing the public.
200. In his evidence to the Committee, Dr Hardman from the Law Society of Scotland said that, in comparable jurisdictions, it is emphasised that searches on such registers are only one part of a diligence exercise. As a consequence, Dr Hardman stressed the importance of having clear guidance on the registers once they were up and running, noting that at the moment there is a risk that people will expect things that might not be achievable. ¹¹⁷
201. Advice Direct Scotland raised further concerns about whether the information in the registers would make taking debt enforcement action easier; and whether credit reference agencies might use information in a way which has a negative impact on individuals. ¹¹⁸
202. In his evidence to the Committee, Professor Steven confirmed that the register would be a public register like the land register, but that the way in which the register would be searched would be limited. He noted that the standard approach would be to allow only a search against the grantor of the statutory pledge or the assignor. He pointed out that there was a commercial reason for that, which is that if it were possible to search against the assignee or the creditor, it would be possible to obtain a customer list. ¹¹⁹

Links with Companies House

203. Some respondents (including Brodies) ¹²⁰ highlighted the potential to link the registers with information about companies held at Companies House. When a company grants a security, that information must be registered with Companies House. There will therefore be some duplication with the information held in the registers proposed in the Bill.
204. Academics from the University of Aberdeen highlighted powers under section 893 of the Companies Act 2006, which could be used to enable information to be transmitted from one register to the other. However, they noted that this would be a

- matter for the UK Government to take forward.¹²¹
205. In their evidence to the Committee, Registers of Scotland officials indicated that they were looking to build application programming interfaces into their service, which would allow the two software systems to talk to each other. Technically it was possible, but they had not scoped out that work yet because it was not part of the Bill as it currently stands.¹²²
206. The Minister informed the Committee that the Scottish Government had contacted the UK Government about how to progress this issue.¹²³
207. The Committee subsequently wrote to the Secretary of State for Scotland seeking an indication of the stage that discussions between the two Governments had reached; whether steps might be taken to address this issue and, if possible, potential timescales.¹²⁴
208. In its response, the Parliamentary Under Secretary advised that officials within the Department for Business, Energy and Industrial Strategy would be best placed to take forward discussions with the Scottish Government on this topic and that he would facilitate the necessary conversations in this regard.¹²⁵

209. The Committee recognises the benefits of aligning the new registers with information held at Companies House. The Committee urges the Scottish Government to take this forward with the UK Government as a priority.

Voluntary updates to the Register of Statutory Pledges

210. There will be no requirement under the Bill for secured creditors to update the Register in relation to changes to a statutory pledge, or in relation to assignation or discharge of a pledge. The intended approach is that creditors will do this voluntarily.
211. However, NatWest suggested that creditors in England were often slow to update discharged securities. In her evidence to the Committee, Mirka Skrzypczak said that under English law, it is a statutory requirement to remove pledges when the loan has been repaid, but that banks are notoriously slow to remove those security interests. She suggested that financial institutions should have their own code of conduct on this issue and should promptly remove security interests from facilities that have been repaid. Mirka Skrzypczak indicated that such a requirement could be made statutory, but that that would not necessarily work.¹²⁶
212. Under section 93 of the Bill, the Scottish Ministers have a regulation-making power to set a time limit after which statutory pledges would expire or have to be re-registered. The Faculty of Advocates raised concerns about this provision. They highlighted that this proposal could leave short-term securities on the register longer than needed, while also creating an inconvenient administrative burden for longer-

term securities. An alternative would be to enable pledges to remain on the register for the period stated by the parties involved. The Faculty of Advocates suggested that creditors themselves should set the time limit when registering a pledge. ¹²⁷

213. The Keeper noted that the legislation, as currently drafted, means that the removal of a pledge is voluntary – either the lender would remove it or the person who has given the pledge would ask for it to be taken off because they would not want it to continue to be recorded. ¹²⁸ Jon Hodge from the Registers of Scotland said that:

” “we have no views on what the position should be. We intend to monitor how the register matures over time and whether the number of entries starts to affect the searchability and usability of the register. We would feed that back. Ultimately, it will be for ministers to make that decision on that, based on balance between the utility of the registers and the ease of doing business.” ¹²⁹

214. The Keeper noted that there was provision in the Bill for Ministers to make secondary legislation that could introduce changes to how updates on statutory pledges must be made. She indicated that Registers of Scotland could supply data about how the register is being used and how many pledges are on it that might be expected to have expired so that Ministers could decide whether they want to introduce a compulsory element a later stage. ¹³⁰

215. Responding to a query about creating set timescales for the expiry of statutory pledges, Hamish Goodall, Bill Team leader from the Scottish Government, stated that:

” “I do not know whether the timescales are practical, because you could register a statutory pledge and say that it will expire in 25 years, but a person who searched the register would not know whether it had expired—they would not know whether the money had been paid. Therefore, the best approach would be to discharge the pledge.” ¹³¹

216. The Minister responded that:

” “The register will be a new one, and we want time for it to bed in and to see how it operates in practice. However, the committee will appreciate that there are provisions in the bill to enable ministers to make regulations to address the points of concern that have been raised. At this point in time, my view is that we would want to see how the registers operate in practice and what sort of behaviour there is, but there is the option of addressing any clogging-up issues that have been highlighted through delegated powers.” ¹³²

217. Advice Direct Scotland highlighted the risk that the registers could contain out of date information, to the detriment of individual consumers. They called for clear and effective processes to correct errors and settle disputes. ¹³³

218. Sections 96 and 97 of the Bill provide for corrections to made to the Register of Statutory Pledges. However, if the creditor disagrees, the dispute must go to court. There is no process set out in the Bill for making corrections to the Register of Assignations.

219. The Keeper confirmed to the Committee that, in relation to the Register of Statutory

Pledges, people could apply to her to have the record corrected. However, the Keeper emphasised that she did not have a judicial role. In a dispute between two parties, it was not for her to determine the accuracy of the record.¹³⁴

220. Finally, as public registers, it is inevitable that the registers created by the Bill would make some personal information more widely available and concerns were expressed about the implications of this for individuals.
221. In her evidence to the Committee, the Keeper said that they were building the registers in a way which would protect people’s information in the sense that people would only be able to access the register in the prescribed manner; they would only be able to search against the things that are prescribed and they would only get returns on the information that matched their search criteria. The Keeper indicated that someone will not be able to go into the register, scroll through the entire thing and see everything in it. From a cybersecurity point of view, she said Registers of Scotland was building in “excellent protections to ensure that information is held securely”.¹³⁵
222. The Keeper also pointed out that one of the elements of having a fee was that it “discourages people from spending days in looking up the names of the neighbours in their street for example to find out their financial affairs.”¹³⁶
223. Meanwhile, Jon Hodge from Registers of Scotland said that while applicants had to provide a data of birth, that could not be searched for in isolation. It could only be searched for in conjunction with a name and even then, only the month and the year, which would “prevents parties from potentially scraping the register for information”. In addition, the assignee or the secured creditor could not be searched for, preventing people from scraping the register for example to build up customers lists of lending institutions.¹³⁷
224. The Registers of Scotland is currently investigating how individual users of the register would be verified and how they could safely, and in an authenticated way, make changes to the registers. Cat Haig from Registers of Scotland said that they did not want to get into a situation in which “anybody can access information and make changes.”¹³⁸

225. The Committee accepts the views of some stakeholders that the voluntary approach to updating the registers minimises the burden on creditors. It notes that, in relation to the Register of Statutory Pledges, routes exist in the Bill for a provider to force a correction.

226. The Committee recommends that the Bill is amended to require certain updates to be made to the Registers timeously or within a specific timeframe, such as assignation, restriction – or in particular – discharge of a pledge.

227. The Committee further recommends that the Scottish Government consider

whether the Bill should be amended so that secured creditors are able to set a time limit when registering a statutory pledge.

228. The Committee invites the Scottish Government to consider the potential for harm to individual debtors from inaccurate information and report back to the Committee on whether there is a need for more user-friendly corrections and disputes processes in its response to this report, or at the very latest, in advance of the deadline for Stage 2 amendments

229. The Committee recommends that the Bill is amended to put in place a straightforward accessible mechanism for the initial consideration of corrections and disputes.

230. It was apparent that much of the detail of the registers will be left to regulations. The Committee emphasised the importance of early sight of the regulation during the evidence session with the Minister. The Minister responded that:

” “I will not be in a position to provide early sight of the regulations. We must recognise that it is a live bill and it will be for Parliament to determine its final shape, should Parliament be content to pass it. However, we will, of course, consult on the rule making for both of the registers and, given that it would be an exercise of delegated powers, I am happy to keep the committee informed as the consultation and engagement process develops.” ¹³⁹

231. The Committee understands that much of the detail about the operation of the registers will be set in regulations. Stakeholders raised a number of concerns about how the registers will operate in practice, including who will have access, privacy protections and long-term accuracy of the database. It is not possible to make considered recommendations on these issues without access to those regulations.

232. The Committee reiterates its request for early sight of the draft regulations.

Fees

233. The Bill allows for fees to be charged to access the registers. Respondents to the call for views emphasised that fees needed to be kept low to encourage use of the registers. The Financial Memorandum suggests that they will be in the region of £10 to £80 (with a proposed £4 search fee).

234. Separately consumer and money advice stakeholders have called for searches – for money advisers and/or for individual consumers – to be free. Citizens Advice

Scotland argued that those who are already in difficult financial circumstances should not have to incur a fee to find out who their creditor is.¹⁴⁰ Mr Alan McIntosh of Advice Talks Ltd also noted that access to the register would help money advisers find out who their clients owe money too and whether the loan was secured.¹⁴¹

235. In her evidence to the Committee, the Keeper said that it was for Ministers and Parliament to decide how to set the fee structure. Registers of Scotland would expect to be able to cover their costs for running the register from the totality of the fees charged and if there were to be a different fee structure in which certain people had free access to search, that would need to be taken into account in the overall funding.¹⁴²

236. When asked about the level of fees to be charged, the Minister confirmed that these would be set out in regulations and added that:

” “The cost of using the register must be seen in the broader context of the savings that can be made and the cost benefit of that new option. Any variation in fees would require careful consideration. Ultimately, we want to be in a position where the fees cover the costs of the operation of the register. Any shortfall would need to be made up from the consolidated fund. Given the challenging fiscal and economic circumstances, we all appreciate that using Government money to intervene to, in effect, subsidise the register would require careful consideration.”¹⁴³

237. Asked whether the registers should be free to money advice operations, the Minister responded that:

” “Yes. That is what I alluded to in my response to Mr Kidd. I recognise that that point has been raised in evidence to the committee. I come back to the point that the option would have to be considered in terms of affordability and cost, but, as I have said, I am happy to consider it and am keen to see the conclusions that the committee draws.”¹⁴⁴

238. The Committee agrees that fees within the current projected spread as proposed by the Scottish Government are likely to encourage use and generate savings in comparison to current ways of working.

239. Nonetheless, the Committee requests more detailed information about proposed fees for specific actions in advance of the deadline for Stage 2 amendments.

240. The Committee recommends that searches for certain groups are free; in particular, searches should be free for not-for-profit money advisers where the latter are not charging individuals for the services that they provide.

Scope of the Bill - Financial instruments

241. As noted above, the Bill does not cover financial instruments in relation to either assignment of claims or statutory pledge. The Scottish Government has concluded that this area is outwith the legislative competence of the Scottish Parliament and has approached the UK Government to use the section 104 procedure in the Scotland Act 1998 to take this forward.
242. It is currently only possible to use shares as security in Scotland if ownership is transferred to the creditor. UK Finance described the problems this creates. For example, the creditor may acquire additional responsibilities to comply with transparency and national security regimes such as persons with significant control. Some finance providers have an outright policy of not taking Scottish shares as security as a result.¹⁴⁵ Ross Anderson also noted that the absence of an effective security right over shares was why lenders often require Scottish businesses to incorporate in England.¹⁴⁶
243. Shepherd and Wedderburn noted that, where ownership was transferred, there was a need for complex ancillary arrangements to transfer voting rights and dividends back to the original shareholder.¹⁴⁷
244. Stakeholders have stressed that applying the reforms to shares is particularly important and that the requirement to take ownership of shares (and the responsibilities that can come with this) is a major barrier to Scottish businesses using them as security. Brodies called for the financial instrument reforms to be “progressed with urgency”.¹⁴⁸
245. Dr Hardman from the Law Society of Scotland also said that it was very important that shares are included. He said the Law Society was agnostic on the method by which that is achieved as long as the measure was implemented at the same time as the new legislation comes in.¹⁴⁹
246. The Minister was asked in evidence to expand on the Scottish Government’s view that these elements were outwith the competence of the Scottish Parliament. He responded that:
- ” Fundamentally, it is because it relates to the reserved matters of financial services and financial markets. I recognise the point that the member raises about the fact that there can be contrasting opinions, but we have sought to take an approach that ensures that the matters that we believe are within competence can be considered as part of the bill, and the one area that we do not believe to be within competence can still be effected, albeit through another process, namely the section 104 orders that are provided for by the Scotland Act 1998.”¹⁵⁰
247. In subsequent correspondence, the Minister indicated that it was hoped that it would be possible to agree in principle with the UK Government a section 104 order. He advised that this issue had been raised by officials with the Scotland Office in January 2022. The Scotland Office had recently indicated that the Office of the Advocate General was still reviewing the policy summary which the Scottish

Government had submitted.¹⁵¹

248. The Committee subsequently wrote to the Secretary of State for Scotland seeking:
- his views on whether provisions relating to financial collateral arrangements fall within the competence of the UK or Scottish Parliament;
 - an indication of the stage which discussions between the UK and Scottish Governments had reached;
 - his views on whether he anticipated that a section 104 order would be granted; and,
 - if so, information on the timescale to which the UK Government was working for bringing forward such an order.¹⁵²

249. In his response to the Committee, the Parliamentary Under Secretary indicated that:

” “In line with the usual process, I understand that discussions between officials in my department, the Office of the Advocate General for Scotland and the Scottish Government on the particulars of the request are ongoing. These discussions include, as they often do, whether the proposed provisions in the order relate to reserved matters. Only after all the necessary conversations have been had, and after ministers in all relevant departments have provided their agreement in principle for an order to be made, would officials start drafting an order.”¹⁵³

250. The Committee notes the strong evidence from stakeholders that the proposed reforms in relation to the law of assignation and pledge should be extended to financial instruments as a matter of urgency. The Committee further notes the conflicting evidence from stakeholders on whether a section 104 order is required or whether such provisions would fall within the competence of the Scottish Parliament. The Committee welcomes that dialogue between the Scottish and UK Governments is taking place and urges both governments to resolve the question of whether a section 104 order is required. If it is concluded by both governments that such an order is required, the Committee recommends that the Scottish Government pursue this with the UK Government as a priority.

Other points

Electronic signature requirements

251. There were some concerns expressed that the Bill would require a more complex form of electronic signature than is necessary. A “simple” electronic signature covers any indication of consent logically associated with a document. But the Bill would require an “advanced” electronic signature – where software is used to identify the parties and prevent tampering. The expense of such software is likely to put it beyond the means of individuals as well as many small businesses. This would mean that they could not conduct business relating to the Bill electronically.

252. Professor Steven highlighted the problem in a letter to the Committee making suggestions for potential improvements to the Bill:

” “Since the Commission’s Report on Moveable Transactions was published in 2017, electronic documents have become more and more common, accelerated of course by the pandemic. Under the Bill electronic signing is tied to the meaning of this given in the Requirements of Writing (Scotland) Act 1995. This requires a high-level electronic signature which is effectively restricted to signing by solicitors.” ¹⁵⁴

253. David Bartos also commented that:

” “Only a few sophisticated law firms will have the software to use advanced electronic signatures. Injustices such as the one described above [in relation to transferring a guarantee as part of a house sale] are likely and not just for consumers. Small businesses are likely to be affected as well.” ¹⁵⁵

254. In subsequent correspondence, the Scottish Government responded that under the Bill a document could be both executed or authenticated. The Minister confirmed that only a qualified electronic signature would be permitted under the Bill noting that this would provide the highest level of security and evidential value. The Minister referred to the power section 116(3) to modify the definition of “authenticated”, but indicated that it would not be “prudent at this early stage to downgrade the level of electronic signature required under the Bill”. ¹⁵⁶

255. Given the barriers advanced signatures can create to conducting business electronically for most users, the Committee recommends that the Bill is amended to require only a simple electronic signature.

Agricultural charges

256. The Bill would abolish agricultural charges – which are a bit like floating charges over a farmer’s stock and produce. Agricultural charges are considered obsolete in Scotland, possibly because they can only be granted by agricultural co-operatives.

In England, where they can be granted by any farmer, they are still in use.

257. One respondent called for the Bill to reform rather than abolish agricultural charges as he believed they would be more useful than a statutory pledge in the context of a security over stock.
258. The Scottish Government responded that agricultural charges were introduced by the Agricultural Credits (Scotland) Act 1929. They can only be granted by agricultural co-operatives in favour of banks. At the time of reporting in 2017, the Scottish Law Commission stated its impression (at paragraph 38.14 of its Report on Moveable Transactions) that agricultural charges were rarely used in practice and this view was confirmed by the Scottish Agricultural Organisation Society Ltd and the Law Society of Scotland. In the absence to any evidence to the contrary, the Scottish Government has no reason to believe that the position has now changed.
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259. In the circumstances, the Scottish Government indicated that it was minded to proceed to abolish agricultural charges in the form prescribed by the 1929 legislation, but to keep under review the need for charges along similar, but reformed, lines if evidence is presented that they are required.

Delegated Powers Memorandum

260. Under Rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill that confer power to make subordinate legislation. The Committee [considered the delegated powers in the Bill](#) at its meetings on 20 September and 15 October 2022.
261. The Bill confers 27 powers to make subordinate legislation on the Scottish Ministers. The Scottish Government has prepared a Delegated Powers Memorandum (DPM) which sets out the reasoning for taking the delegated powers in the Bill and the parliamentary scrutiny procedure that has been chosen.
262. The Committee was content with the delegated powers in the Bill with the exception of the delegated powers in relation to section 53, which is discussed below:
263. Section 53 provides protections to persons who have acquired a motor vehicle in good faith that is encumbered property. Section 53(1) sets out the conditions that require to be met for the acquired motor vehicle not to be encumbered property, including that there is to be a sale agreement, the vehicle is encumbered property under a statutory pledge, it is not purchased for business purposes and the purchaser has acted in good faith.
264. Section 53(8) confers power on Scottish Ministers, by regulations, to specify classes of motor vehicle that subsections (1) - (7) do not apply to. Such regulations would be subject to the negative procedure.
265. The Committee asked the Scottish Government for an explanation as to why the negative procedure is considered appropriate when specifying classes of motor vehicle to which subsections (1) - (7) do not apply as this explanation was absent from the DPM. Further, given this is described as a protection in the DPM, whether affirmative procedure may be more appropriate.
266. While the Committee welcomed the further explanation provided by the Scottish Government as to why the negative procedure is considered appropriate in this instance, it considered that the power will see the withdrawal of protection available to certain purchasers which may have a significant impact on the financial position of those individuals.
267. The Committee considers that the affirmative procedure would ensure that the withdrawal of this protection and the circumstances in which it is intended to be used could be fully considered and scrutinised at the highest level.
- 268. The Committee recommends that the Scottish Government seek to amend the Bill at Stage 2 to make regulations under section 53(8) subject to the affirmative procedure such that there can be enhanced scrutiny of and proposal to specify the classes of motor vehicle that subsections (1) to (7) do not apply to.**

Financial Memorandum

269. As noted earlier in this report, the Finance and Public Administration Committee issued a call for evidence on the Bill and received four responses and agreed to pass on the submissions to the Delegated Powers and Law Reform Committee to take into account in its evidence sessions and also in its Stage 1 report.

[Published responses for Moveable Transactions \(Scotland\) Bill: Financial Memorandum - Scottish Parliament - Citizen Space](#)

270. The Committee notes the responses.

Conclusions on the general principles of the Bill

271. **The Committee recognises the benefits of the reforms proposed in the Bill to businesses and agrees that they are likely to have a beneficial impact on access to credit and finance.**

272. **While this report calls on the Scottish Government to give further consideration to a number of issues ahead of Stage 2, in particular in relation to individual not acting in a business context, the Committee recommends to the Parliament that the general principles of the Bill be agreed to.**

Annexe A: Extracts from minutes

20th Meeting, 2022, Tuesday, June 21, 2022

Moveable Transactions (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1.

23rd Meeting, 2022, Tuesday, September 20, 2022

Moveable Transactions (Scotland) Bill (in private): The Committee considered the delegated powers provisions in this Bill at Stage 1 and agreed to write to the Scottish Government.

24th Meeting, 2022, Tuesday, September 27, 2022

Moveable Transactions (Scotland) Bill: The Committee took evidence from—

Lady Ann Paton, Chair, Scottish Law Commission;

Professor Andrew Steven, Chair of Property Law at the University of Edinburgh and former Scottish Law Commissioner;

Emeritus Professor George Gretton, Lord President Reid Professor of Law at the University of Edinburgh and former Scottish Law Commissioner.

Moveable Transactions (Scotland) Bill (in private): The Committee considered the evidence it heard earlier under agenda item 3 and agreed to write to the Scottish Government.

25th Meeting, 2022, Tuesday, October 4, 2022

Moveable Transactions (Scotland) Bill: The Committee took evidence from—

Mike Dailly, Solicitor Advocate & Principal Solicitor, Govan Law Centre;

Dr Hamish Patrick, Partner and Head of Financial Sector, Shepherd and Wedderburn LLP;

Dr Jonathan Hardman, Convener of the Banking, Company & Insolvency Law sub-committee, Law Society of Scotland;

Myles Fitt, Strategic Lead - Financial Health, Citizens Advice Scotland;

Alan McIntosh, Approved Money Adviser, Advice Talks Ltd.

Moveable Transactions (Scotland) Bill (in private): The Committee considered the evidence it heard earlier.

26th Meeting, 2022, Tuesday, October 25, 2022

Moveable Transactions (Scotland) Bill: The Committee took evidence from—

Mirka Skrzypczak, Head of Working Capital & Trade Products, NatWest;

Colin Borland, Director of Devolved Nations, Federation of Small Businesses Scotland;

Jennifer Henderson, Keeper of the Registers of Scotland, Jon Hodge, Policy Lead for RMT and Cat Haig, Product Lead for RMT, Registers of Scotland.

Moveable Transactions (Scotland) Bill (in private): The Committee considered the evidence it heard earlier.

27th Meeting, 2022, Tuesday, November 1, 2022

Moveable Transactions (Scotland) Bill: The Committee took evidence from—

Tom Arthur, Minister for Public Finance, Planning and Community Wealth, Hamish Goodall, Bill Team Leader, Rob McConnell, Solicitor in Commercial and Competition Law Branch and Vuyi Stutley, Solicitor in Commercial and Competition Law Branch, Scottish Government.

Moveable Transactions (Scotland) Bill (in private): The Committee considered the evidence it heard earlier under agenda item 2 and agreed to write to the UK Government.

28th Meeting, 2022, Tuesday, November 8, 2022

Moveable Transactions (Scotland) Bill (in private): The Committee agreed the themes arising from evidence heard during its scrutiny of the Bill at Stage 1.

30th Meeting, 2022, Tuesday, November 22, 2022

Moveable Transactions (Scotland) Bill (in private): The Committee considered a draft report. Various changes were agreed to, and the Committee agreed to consider a revised draft at its next meeting.

31st Meeting, 2022, Tuesday, November 29, 2022

Moveable Transactions (Scotland) Bill (in private): The Committee considered a revised draft report. Various changes were agreed to. The Committee delegated responsibility to the Convener for finalising the draft report for publication.

Annexe B: Evidence

Oral Evidence

- [Meeting on 27 September 2022](#)
 - Lady Ann Paton, Chair, Scottish Law Commission;
 - Professor Andrew Steven, Chair of Property Law at the University of Edinburgh and former Scottish Law Commissioner;
 - Emeritus Professor George Gretton, Lord President Reid Professor of Law at the University of Edinburgh and former Scottish Law Commissioner.
- [Meeting on 4 October 2022](#)
 - Mike Dailly, Solicitor Advocate & Principal Solicitor, Govan Law Centre;
 - Dr Hamish Patrick, Partner and Head of Financial Sector, Shepherd and Wedderburn LLP;
 - Dr Jonathan Hardman, Convener of the Banking, Company & Insolvency Law sub-committee, Law Society of Scotland;
 - Myles Fitt, Strategic Lead - Financial Health, Citizens Advice Scotland;
 - Alan McIntosh, Approved Money Adviser, Advice Talks Ltd.
- [Meeting on 25 October 2022](#)
 - Mirka Skrzypczak, Head of Working Capital & Trade Products, NatWest;
 - Colin Borland, Director of Devolved Nations, Federation of Small Businesses Scotland;
 - Jennifer Henderson, Keeper of the Registers of Scotland, Jon Hodge, Policy Lead for RMT and Cat Haig, Product Lead for RMT, Registers of Scotland.
- [Meeting on 1 November 2022](#)
 - Tom Arthur, Minister for Public Finance, Planning and Community Wealth, Hamish Goodall, Bill Team Leader, Rob McConnell, Solicitor in Commercial and Competition Law Branch and Vuyi Stutley, Solicitor in Commercial and Competition Law Branch, Scottish Government.

Written Evidence

- Alan McIntosh, Advice Talks Ltd
- Mark Lagan
- Gordon Kinsella
- Cllr Alasdair MacPherson

- James Alexander Philip Milton
- William Logan
- Catriona Scott
- Richard Calnan
- David Bartos
- Meg van Rooyen, Money Advice Trust
- Andrew Swift, The Scotch Whisky Association
- Abbey Fleming, Money Advice Scotland
- Caroline Sophie Rupp
- Ken Swinton, Scottish Law Agents Society
- Hugh Beale
- Andrew Steven
- R3
- James Drummond Young
- Govan Law Centre
- Tim Macdonald
- Dr Alisdair MacPherson, Dr Chike Emedosi, Professor Donna McKenzie Skene and Professor Roddy Paisley, Centre for Scots Law, University of Aberdeen
- John Craft, Advice Direct Scotland
- Hamish Patrick, Shepherd and Wedderburn LLP
- Beverley Wood, Morton Fraser
- Cameron Drummond
- Magda Raczynska
- Law Society of Scotland
- Brodies LLP
- John Maciver, Pinsent Masons LLP
- Sarah-Jayne Dunn, Citizens Advice Scotland
- Professor Louise Gullifer
- Social Inclusion and Wealth Team, North Lanarkshire Council

- G L Gretton
- John MacLeod
- James Wilson, Dentons UK and Middle East LLP
- Ross Anderson
- Matthew Davies, UK Finance
- Kirsty Maciver, Burness Paul LLP
- StepChange Debt Charity Scotland
- Federation of Small Businesses
- Professor Orkun Akseli
- Bruce Wood
- Dr Obiora Ezike
- Faculty of Advocates
- Hamish Patrick

Correspondence

- Minister for Parliamentary Business to the Convener, 8 June 2022
- Clerk to the Delegated Powers and Law Reform Committee to the Scottish Government, 23 September 2022
- Deputy Convener to the Minister for Public Finance, Planning & Community Wealth, 29 September 2022
- Deputy Convener to the Scottish Law Commission, 29 September 2022
- Minister for Public Finance Planning and Community Wealth to the Deputy Convener, 5 October 2022
- Scottish Government to the Clerk of the Delegated Powers and Law Reform Committee, 6 October 2022
- Convener to Lady Ann Paton, 10 October 2022
- Professor George Gretton to the Deputy Convener, 17 October 2022
- Professor Andrew Steven to the Deputy Convener, 17 October 2022
- The Law Society of Scotland to the Convener, 24 October 2022
- Lady Ann Paton to the Convener, 24 October 2022
- Professor Andrew Steven to the Convener, 26 October 2022

- The Federation of Small Businesses to the Convener, 27 October 2022
- Citizens Advice Scotland to the Convener, 28 October 2022
- Convener to the Secretary of State for Scotland, 2 November 2022
- Convener to the Secretary of State for Scotland, 9 November 2022
- Minister for Public Finance, Planning and Community Wealth to the Convener, 14 November 2022
- Parliamentary Under Secretary of State for Scotland to the Convener, 24 November 2022

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- 3 [Correspondence from Lady Ann Paton to Convener](#). 24 October 2022
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- 5 [Prescription \(Scotland\) Bill: Stage 1 Report \(parliament.scot\)](#)
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- 25 Moveable Transactions (Scotland) Bill. [Policy Memorandum](#)
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- 32 [Written evidence](#). Shepherd Wedderburn
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- 41 [Written evidence](#). Professor Louise Gullifer
- 42 [Written evidence](#). Professor Hugh Beale
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- 54 Written submission. [Faculty of Advocates](#)
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- 68 Written submission. [Citizens Advice Scotland](#)
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- 73 Written submission. [Govan Law Centre](#)
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- 108 Written submission. [Professor George Gretton](#)
- 109 Written submission. [The Scottish Law Agents' Society](#)
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- 125 [Letter](#) from the Parliamentary Under Secretary of State for Scotland to the Convener, 24 November 2022
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- 151 [Correspondence](#) from the Minister for Public Finance, Planning and Community Wealth to the Convener, 14 November 2022
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