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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Delegated powers provisions in the Moveable Transactions (Scotland) Bill after Stage 2**



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# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is 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; and

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

(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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# Committee Membership



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Scottish Conservative  
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**Oliver Mundell**  
Scottish Conservative  
and Unionist Party



**Carol Mochan**  
Scottish Labour

# Introduction

1. At its meeting on 25 April 2023<sup>i</sup>, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Moveable Transactions (Scotland) Bill after Stage 2.<sup>ii</sup>
2. The Scottish Government Bill was introduced by the former Cabinet Secretary for Justice and Veterans, Keith Brown MSP, on 25 May 2022. The lead committee is the Delegated Powers and Law Reform Committee.
3. The Committee submits this report to the Parliament under Rule 9.7.9(b) of the Standing Orders.

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<sup>i</sup> Rona Mackay MSP substituted for Stuart McMillan MSP.

<sup>ii</sup> The Bill, as amended at Stage 2, is available [here](#).

# Overview of the Bill

4. The delegated powers in the Bill at Stage 1 were previously considered by the Committee at its meetings on 20 September and 25 October 2022, with its [report](#) on the delegated powers in the Bill at Stage 1 subsequently being published on 27 October 2022.
5. In its capacity as lead committee for the Bill, the Committee considered and completed Stage 2 of the Bill at its meeting on 21 March 2023. The Scottish Government subsequently produced a [Supplementary Delegated Powers Memorandum](#) (“Supplementary DPM”) taking into account the amendments made to the Bill at that meeting. This Supplementary DPM sets out the reasons for taking the Supplementary delegated powers in the Bill and the procedure chosen.

# Supplementary Delegated Powers

## Provisions of the Bill

### Section 31(5) – Searching the assignments record

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Negative**

**Revised or new power: New**

## Provision

6. Searches of the assignment record may incur a fee to be payable. Section 31(4) states that no fee is payable for the search when the search is conducted by a not-for-profit money adviser who is not charging individuals for the services that they provide. Section 31(5) confers a power on the Scottish Ministers, by regulations, to be able to make further provision about the meaning of “not-for-profit money adviser”.
7. Regulations made under section 31(5) are subject to the negative procedure.

## Committee Consideration

8. The same power is conferred in relation to searches of both the assignment and statutory pledges record. Searches of either of these records will incur a fee, unless it is a search carried out by someone meeting the criteria specified above, in which case the fee will not be payable.
9. This is a new power conferred on the Scottish Ministers which the supplementary DPM states is necessary as further clarity on the term may be required in the future by defining the term or listing those who qualify. The Scottish Government considers it would be disproportionate for this to be done by primary legislation; it is a matter of detail; it is limited in how it could be exercised; does not amend primary legislation and is not concerned with the operation of the record as a whole, so is subject to the negative procedure.
10. The power is limited to making further provision in relation to the meaning of a “not-for-profit money adviser” only. Regulations made under this provision cannot remove the exemption from paying the fees and they cannot amend primary legislation, they can only supplement it. There may be a need for further clarification in the future, with the example given by defining the term or listing those who qualify. It would appear appropriate that, should this need arise, it should be done through secondary legislation. For these reasons the negative procedure would provide a proportionate level of Parliamentary scrutiny to be applied.

11. **The Committee accepts the proposed power in principle and is content that the exercise of the power will be subject to the negative procedure.**



**Section 43A(3) – Competence of individual acting as provider of a statutory pledge****Power conferred on: Scottish Ministers****Power exercisable by: Regulations made by Scottish statutory instrument****Parliamentary procedure: Affirmative****Revised or new power: New**

## Provision

12. An individual can only grant a statutory pledge when acting in the course of the individual's business, the activities of a charity, or the activities of an unincorporated association. The encumbered property must also be a permitted asset, which is specified in section 43A(2), which includes the corporeal property value exceeding £3000.
13. Section 43A(3) confers powers on the Scottish Ministers by regulations to modify the specified amount and also to modify this section so as to specify types of property which are or are not permitted assets.
14. Regulations made under this section are subject to the affirmative procedure.

## Committee consideration

15. These are essentially new powers, however, it is considered by the Scottish Government that they are similar to the power previously contained in section 48(5) of the Bill as introduced. The previous powers placed restrictions on individual consumers being able to grant statutory pledges over household goods as a protection. It had a £1000 limit on the value of the household goods under which could not be subject to a statutory pledge which was able to be modified by regulations made by the Scottish Ministers. The Committee was content with the delegated power in section 48(5) as introduced. However, as part of the Committee's lead committee consideration of the Bill, it expressed concerns about the policy detail, finding the original £1000 value to be insufficient, and recommended this be increased. This recommendation has been implemented in the new power.
16. The power in section 43A(3) as amended at stage 2 now applies to individuals who are acting in a business and other capacity over permitted assets. There is a specified value of £3000 in section 43A(2) that provides a protection against low value household goods being subject to a statutory pledge which is to be read as being up-rated annually in line with inflation. The Scottish Ministers can modify the £3000 monetary threshold which corporeal assets must meet, and they can also specify types of property which are or are not permitted assets.
17. The reasons for these powers are stated in the Supplementary DPM as being the same as for the power as introduced. The reasons were to prohibit statutory pledges being made over low-value but essential items, such as clothing, white goods or furniture, and because a monetary threshold may not capture everything that needs to be exempt. It was considered to be unduly inflexible for such changes to be required to be done through primary legislation. Further, the Supplementary DPM states that as this provision will apply to unincorporated businesses it may be

that the threshold value or the permitted assets may require modification in light of experience over time.

18. This section offers a protection to specified individuals granting statutory pledges. As such, the Scottish Government considers that the affirmative procedure is appropriate to provide the highest level of Parliamentary scrutiny. In addition, it will also permit the modification of primary legislation so the affirmative procedure would be the appropriate level of scrutiny to be applied here.

19. **The Committee accepts the proposed power in principle and is content that the exercise of the power will be subject to the affirmative procedure.**

### **Section 53(8) – (power to specify classes of vehicle to which good faith protections do not apply)**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Affirmative**

**Revised or new power: Revised (the power itself has not changed, although the procedure to which it is subject has)**

Provision

20. 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 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.
21. Section 53(8) confers power on Scottish Ministers, by regulations, to specify classes of motor vehicle that subsections (1) - (7) do not apply to. Regulations made under section 53(8) may also amend sections 51 and 52 to provide that either, or both of those sections, do not apply to the specified classes of motor vehicles.

Committee consideration

22. This power, as introduced, was subject to the negative procedure unless it was amending primary legislation. The Scottish Government was asked by the Committee during its consideration of the delegated powers about the level of scrutiny being applied to this power. The Scottish Government provided further explanation as to why the negative procedure was considered appropriate, which was taken into account by the Committee in its considerations.
23. The Committee welcomed the further explanation as to why the negative procedure was considered appropriate from the Scottish Government, however, given the power could see the withdrawal of protection available to certain purchasers which may have a significant impact on the financial position of those individuals, it

considered that the affirmative procedure would be more appropriate. The Committee recommended that the Scottish Government amend the Bill at Stage 2 to make all regulations under section 53(8) subject to the affirmative procedure such that there can be enhanced scrutiny of any proposal to specify the classes of motor vehicle that subsections (1) to (7) do not apply to.

24. The Scottish Government has made this amendment to the power in section 53(8) at stage 2 and, as noted in the Supplementary DPM, the power itself remains the same but is now subject to only the affirmative procedure allowing the highest level of scrutiny to be applied where the power is exercised.

- 25. The Committee welcomes the amendment made to section 53(8) of the Bill by the Scottish Government, accepts the proposed power in principle and is content that the exercise of the power will be subject to the affirmative procedure.**

## **Section 102(5) – Searching the statutory pledges record**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Negative**

**Revised or new power: New**

Provision

26. Searches of the statutory pledges record may incur a fee to be payable. Section 102(4) states that no fee is payable for the search when the search is conducted by a not-for-profit money adviser who is not charging individuals for the services that they provide. Section 102(5) confers a power on the Scottish Ministers, by regulations, to be able to make further provision about the meaning of “not-for-profit money adviser”.
27. Regulations made under section 102(5) are subject to the negative procedure.

Committee consideration

28. The same power is conferred in relation to searches of both the assignation and statutory pledges record. Searches of either of these records will incur a fee, unless it is a search carried out by someone meeting the criteria specified above, in which case the fee will not be payable.
29. This is a new power conferred on the Scottish Ministers which the supplementary DPM states is necessary as further clarity on the term may be required in the future by defining the term or listing those who qualify. The Scottish Government considers that it would be disproportionate for this to be done by primary legislation; it is a matter of detail; it is limited in how it could be exercised; does not amend primary legislation and is not concerned with the operation of the record as a whole, so is subject to the negative procedure.
30. The power is limited to making further provision in relation to the meaning of a “not-

for-profit money adviser” only. Regulations made under this provision cannot remove the exemption from paying the fees and they cannot amend primary legislation, they can only supplement it. There may be a need for further clarification in the future, with the example given by defining the term or listing those who qualify. It would appear appropriate that, should this need arise, it should be done through secondary legislation. For these reasons the negative procedure would provide a proportionate level of Parliamentary scrutiny to be applied.

31. **The Committee accepts the proposed power in principle and is content that the exercise of the power will be subject to the negative procedure.**

## **Section 116(1B) – Interpretation of Act**

### **Power conferred on: Scottish Ministers**

### **Power exercisable by: Regulations made by Scottish statutory instrument**

### **Parliamentary procedure: Affirmative**

### **Revised or new power: Revised**

#### Provision

32. Section 116 is the main interpretation provision in the Bill. Section 116(1A) includes a definition of “authenticated” and “executed”. Section 116(1B) confers power on the Scottish Ministers, by regulations, to modify (either or both) paragraph (a) or paragraph (b) of subsection (1A).

#### Committee consideration

33. Section 116(3), as introduced, conferred power on the Scottish Ministers, by regulations, to modify the definition of “authenticated” and the definition of “executed” in subsection (1). The DPM explained that the power permitted the Scottish Ministers to prescribe a different standard for executing paper documents or authenticating electronic documents than those provided for in the 1995 Act. This was to allow flexibility to change the definitions to be able to future-proof the Bill to take account of technological developments in the future.
34. The Supplementary DPM states at paragraph 26 that the provision was changed to remove the requirement for electronic documents to be authenticated using advanced or qualified electronic signature so a simple electronic signature can be used. The use of an advanced or qualified electronic signatures is, however, still available. The Supplementary DPM further states that the power is simply an updated version of the previous power found in section 116(3) and the reason for taking the power remains as described above.
35. The Committee was content with the power to modify the specified interpretive provisions in the Bill when considered at stage 1.
36. The power as revised is wider in its extent from that included in section 116(3) at the introduction of this Bill. The previous power was restricted to making regulations that could modify the definition of “authenticated” and “execution” as they appeared

in section 116(1). Those definitions have been expanded and are now included in new section 116(1A). The revised power in section 116(1B) delegates the power to modify section 116(1A). Although the definitions are wider than before, the effect remains similar.

37. The provision is one which permits the modification of primary legislation so it is appropriate that the highest level of scrutiny be applied.

- 38. The Committee accepts the proposed power in principle and is content that the exercise of the power will be subject to the affirmative procedure.**

