

Moveable Transactions (Scotland) Bill

Business and Regulatory Impact Assessment

May 2022

Final Business and Regulatory Impact Assessment

Moveable Transactions (Scotland) Bill

Purpose and intended effect

- **Background**

The Bill will implement the Scottish Law Commission (SLC) Report on Moveable Transactions (Scot Law Com No. 249)¹ published in December 2017. The SLC made 203 recommendations. The Scottish Government has broadly accepted the vision proposed by the SLC to reform and modernise the law on Moveable Transactions.

Scottish moveable transactions law is widely considered to be out of date, inflexible and inadequate. Competing jurisdictions, in particular England and Wales, have moveable transactions laws which are more commercially friendly than is the case in Scotland. There is significant support for reform and modernisation of Scottish moveable transactions law amongst those who use it. The benefits would be very wide-ranging.

If implemented, Bill would make various types of commercial transactions more efficient, less expensive and less complicated than they currently are. This would lead to greater access to finance for individuals and businesses in Scotland, thus benefitting the general economy.

The Bill would also clarify the existing law, encouraging people and businesses in Scotland to use Scottish law with confidence.

Moveable transactions law is vital to the Scottish economy. It enables both businesses and individuals to use their assets to raise finance by selling debts or by granting security over moveable property.

The main problems with the current Scots law on moveable transactions relate to both assignation of debt and the lack of a “fixed” security over moveable property similar to a mortgage over heritable property (ie land and buildings).

For example, a business may wish to acquire funding by transferring to a financial institution its claims to payment of its customer invoices. This would be done by means of an assignation.

¹Scottish Law Commission (SLC) Report on Moveable Transactions (Scot Law Com No. 249)
<https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/security-over-corporeal-and-incorporeal-moveable-property/>

Alternatively, it may want to retain assets such as vehicles, equipment and intellectual property, but to use these as collateral to obtain loan finance. Individuals might wish to use art work or, perhaps more likely, vehicles to secure finance.

Scots law on moveable transactions is a long way behind international standards which makes some transactions difficult or even impossible to execute here, necessitating the use of cumbersome, complicated and therefore expensive workarounds or the use of English law which takes longer and is more expensive for companies in Scotland.

If the Bill is not progressed, Scotland will fall even further behind international standards and individuals and companies will be unable to avail themselves of the means of accessing finance more easily as proposed in the Bill.

- **Objective**

The policy objective 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.

- **Rationale for Government intervention**

Moveable transactions law is vital to the economy of any country with a developed legal system. It enables both businesses and individuals to use their assets to raise finance by selling debts owed to them or by granting security over moveable property. In these ways, businesses can secure crucial cash flow. If businesses cannot fully exploit their assets (other than heritable property – i.e. land and buildings) to raise finance, they might otherwise have to resort to seeking finance under riskier and more expensive types of lending. These “workarounds”, for example using leaseback arrangements, trusts or licensing, are inevitably more expensive to effect. English law is sometimes used instead which involves Scottish businesses registering in England.

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

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

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

The policy objectives of the Bill will contribute to the realisation of the Scottish Government's purpose by contributing to the following Economic Vision:

We have a strong, dynamic and productive economy which creates wealth and employment across Scotland. Our economy is competitive and we have good international trade, investment and export networks. We are considered an attractive place to do business.

Consultation

- **Within Government**

The policy proposals for the Bill were discussed extensively with the Registers of Scotland by the Scottish Law Commission during their consideration of their recommendations for reform of the law. The Scottish Government has liaised closely with RoS during its consideration of the draft Bill.

- **Public Consultation**

The SLC published a Discussion Paper on Moveable Transactions (Discussion Paper 151)² in June 2011, followed by a three month consultation period. Over 40 responses were received and the project received support from stakeholders including the Asset Based Finance Association, the Finance and Leasing Association, CBI Scotland, the Committee of Scottish Clearing Bankers (as they were then known) and the Federation of Small Businesses. A small advisory group of expert practitioners and academics was formed to assist and this was later enlarged to 19 people. A symposium was held at Edinburgh University and numerous meetings were held with respondents to the Discussion Paper and various other stakeholders. The SLC also engaged with a number of businesses through various

² SLC Discussion Paper on Moveable Transactions (Discussion Paper 151)
<https://www.scotlawcom.gov.uk/files/6113/1057/2523/dp151.pdf>

representative bodies. A full account of the SLC engagement with interested parties is set out in its Business and Regulatory Impact Assessment for the Bill³.

A draft Moveable Transactions (Scotland) Bill was published on the SLC website for comment in July 2017. Responses were received from various stakeholders including the Law Society of Scotland, the Faculty of Advocates and the Institute of Chartered Accountants of Scotland.

In November 2019, Professor (as he now is) Andrew Steven and Emeritus Professor George Gretton, the Commissioners responsible for the SLC Report on Moveable Transactions, gave evidence to the Economy, Energy and Fair Work Committee of the Scottish Parliament along with members of the SLC's advisory group. Bruce Wood CVO, a member of the SLC advisory group and a consultant at Morton Fraser, Solicitors, indicated that:

“We [the SLC and its advisory group] think that we have done all the consultation that can be done... We have spoken to UK Finance, the Federation of Small Businesses, the Law Society of Scotland, the Consumer Credit Trade Association, the Finance and Leasing Association and the banks. They are the people who have the principal interest in the matter. We have also spoken to the chartered accountants and we have consulted widely. We have reported on the consultation that we have done. We think that we have done all the consultation that is actually required.”⁴

- **Business**

The Government's Programme for Government published in September 2019 indicated that officials would conduct a focussed consultation on the SLC proposals for legislation. Officials met with the Federation of Small Businesses in Scotland, Scottish Enterprise, the Law Society of Scotland (and, separately, several firms of solicitors who work in these areas of law), R3 (the Association of Business Recovery Professionals which is an organisation for insolvency, restructuring and turnaround specialists in the UK) and the Committee of Scottish Bankers. Views were also sought from UK Finance (which now incorporates the Asset Based Finance Association) and Citizens Advice Scotland.

Stakeholders contacted by officials were almost universally supportive of the Bill. It was conceded that there may be issues of technical detail on which some individuals have different views, but the broad thrust of the SLC proposals enjoys strong support in view of the potential benefits to business and the wider economy.

³ SLC Business and Regulatory Impact Assessment for the Moveable Transactions (Scotland) Bill: detail of their engagement with interested parties.
https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf

⁴ Oral evidence from the Commissioners responsible for the SLC Report on Moveable Transactions, to the Economy, Energy and Fair Work Committee of the Scottish Parliament.
[Official Report - Parliamentary Business : Scottish Parliament](#)

Options

Option 1 - Do nothing

This option means that the situation will remain as at present. The law in relation to moveable transactions would remain outdated, uncertain and inadequate. As a result businesses and consumers in Scotland would continue to be restricted in using their moveable assets and debts to raise finance in contrast to those in many other countries.

Option 2 – Implement the proposals in the Moveable Transactions (Scotland) Bill

A new modern statutory regime for moveable transactions would provide legal certainty, increased simplicity and greater access to finance for individuals and businesses in Scotland.

The Bill would make various types of commercial transactions more efficient, less expensive and less complicated than they currently are. This would lead to greater access to finance for businesses in Scotland.

Sectors and groups affected

Both options have impacts for the following sectors and groups:

- Businesses of all sizes;
- Solicitors; and
- Individuals.

Benefits and costs of the options

Option 1 – do nothing

Benefits

There are no benefits to maintaining the existing law on moveable transactions.

Costs

If the law on moveable transactions (both assignation of debt and security over corporeal and incorporeal moveable property) is not reformed, then individuals and businesses will continue to operate at a disadvantage to other countries where modern systems governing these matters have been put in place.

The law in relation to moveable transactions would remain outdated, inadequate and uncertain. As a result businesses and individuals in Scotland would continue to be restricted in using their moveable assets and debts to raise finance. This may result in less business growth, and poorer economic performance.

Assignment

The Federation of Small Businesses has indicated that 3500 small businesses in Scotland fold each year because their invoices remain unpaid. Reform of the law relating to assignment of debt in Scotland will permit businesses to more easily transfer to a bank or other financial institution its unpaid customer invoices (claims to payment) by means of an assignment and thus obtain immediate finance.

If no action is taken, assignment of debt in Scotland will remain governed by legislation dating from 1862 which makes the process cumbersome and expensive and which makes it impossible to assign future debt. This places Scottish businesses at a commercial disadvantage to the rest of the world.

It would remain the case that if a business wishes to assign its unpaid invoices to a financial institution in order to raise finance, there has to be written intimation (notification) of the assignment to every invoiced customer (i.e. the debtors). This is cumbersome, expensive and often impractical since there may be numerous debtors. In addition, it cannot be done in respect of future claims, such as invoices due by existing customers in the future, where the debtor cannot yet be identified.

The effect is that some Scottish businesses elect to enter into contracts governed by English law in order to avoid the need for intimation. Invoice financiers can therefore charge more for their services in Scotland than they might in England.

Statutory pledge

The state of the law on security over moveable property makes it difficult for businesses and individuals to use their moveable assets to raise finance.

If no reform is undertaken, Scotland will continue to fall behind modern practice in competing jurisdictions, with an adverse impact on businesses here. Under the proposals in the Bill, corporeal assets, such as equipment and vehicles, or incorporeal assets, such as patents or other intellectual property, will be able to be used to secure a loan, rather like a house being used for mortgage finance.

It is understood that at least one major financial institution will not lend on plant and machinery in Scotland because of the state of the law on moveable transactions. Others will lend, but at higher rates of interest due to the complex workarounds which are necessary to effect the security.

Option 2 – implementation of the Moveable Transactions (Scotland) Bill

Benefits

Assignment of debt

The SLC described the rationale for reforming the law on assignment of debt thus: “Invoice factoring...is becoming an increasingly used means of obtaining finance as an alternative to bank loans: global factoring volume reached an all-time high in 2015, with annual turnover reaching €2,373 billion.”

They went on: “Utilising these finance facilities can be particularly valuable for SMEs. The Scottish Government’s Small Business Survey published in 2017 found that the main reason small firms sought external finance was to secure working capital and cash flow. 41% of SMEs stated their reason for seeking working capital was to cover a short-term gap until funds were received from customers, whilst 15% said they sought working capital to cover unexpected late payments. SMEs rely heavily on steady cash flow, but are often burdened by the late payments of debts owed to them. A House of Commons briefing paper published in 2017 shows that the average late payment SMEs face is around £32,000, a figure which puts many businesses at risk of insolvency. The paper also showed that 12% of the SMEs which experience late payments say it impacts on their ability to pay their own staff on time, while 20% have difficulty paying business bills like energy, rates and rent. Some 29% rely on costly overdrafts to make up for cash flow shortfalls due to being paid late”.

As noted above, the Federation of Small Businesses in Scotland have indicated that 3500 small businesses in Scotland fail each year not because the business is unsustainable, but because the firm cannot get its customers to pay due invoices. The Late Payment of Commercial Debts (Interest) Act 1998 was introduced to give small and medium sized enterprises (SMEs) the right to claim interest on late payments. It is, however, understood that 80% of small businesses do not do so, for fear of jeopardising business relationships with customers who often have greater bargaining power.

Businesses who wish to raise finance on the basis of invoices which are due to be paid to them will assign their debts (in the form of their invoices due) to an invoice factoring company. The invoice factoring company will pay the assignor 80-90% of the money due under the invoices. This obviously provides the business with income much quicker than if it had to wait to be paid by its customers and this income stream will permit it to move forwards. Meanwhile the invoice factoring company will pursue the debt. When they have been paid, they will pay the balance of the sums due under the invoices to the assignor, less the invoice factoring company’s fee, which will include an element of interest on the claims assigned.

At present, if a business wishes to assign its unpaid invoices to a financial institution in order to raise finance, there has to be written intimation (notification) of the assignment to every invoiced customer (ie the debtors). This is cumbersome, expensive and often impractical since there may be numerous debtors. In particular

it cannot be done in respect of future claims, such as invoices due by future customers, where the debtor cannot yet be identified.

Some Scottish businesses write their contracts under English law in an effort to avoid the need for intimation. Because of doubts about the ability to assign claims under future invoices, invoice financiers can charge more for their services in Scotland than in England and Wales.

The Bill will introduce a new Register of Assignations which will provide a modern and efficient alternative to intimation as a means of assigning debt. It will also modernise the law on intimation of assignation.

Security over moveable property

The only way to use incorporeal moveable property for security in Scotland at present (other than by means of a floating charge) is to transfer it into the name of the creditor. For example, intellectual property must be transferred to the lender and complicated licence-back arrangements put in place. Shares in a company similarly have to be transferred to the lender and the lender registered as shareholder. Again, contractual arrangements have to be used to deal with the consequences of transfer, such as entitlement to dividends and voting rights.

In Scotland there is no such thing as a mortgage over moveable, as opposed to heritable, property. Effectively the only “fixed” security (rather than a floating charge) over corporeal moveables is pledge. In a consumer context this is known as “pawn”. It requires delivery of the encumbered property to the creditor. This is commercially impractical, as businesses require possession of their assets to trade.

Floating charges are only available to corporate debtors. Sole traders and partnerships cannot grant them. They also give a relatively low ranking in insolvency and lenders charge more than they would if they could take a “fixed” security.

Secured lending is a huge commercial benefit. Individuals or businesses can grant a lender security against an item of property (collateral) in exchange for a loan or credit arrangement. If the debt is unpaid, the lender can enforce the security by realising (ie selling) the encumbered property, with any surplus returning to the debtor. Secured lending is therefore essentially a means by which creditors can mitigate risk, which in turn lowers the cost of borrowing.

The generally accepted advantages of secured, rather than unsecured, lending are:

- **“Fixed” securities give comfort to lenders because they mean that the loan is “fixed” on the encumbered property, which the lender can possess and sell if they want if the borrower defaults on the loan (like a mortgage provider if the homeowner defaults on mortgage payments).**
- the cost of borrowing in terms of interest rates is usually lower;
- borrowing limits are higher for secured loans;

- secured borrowing usually means lower monthly repayments over a longer term.

The instrument by which finance will be raised on assets owned or which are being purchased will be called a **statutory pledge**. It would be the moveable property equivalent of a standard security over land and would be registered in a new Register of Statutory Pledges.

Being a “fixed” security it will be more attractive to lenders than the floating charge as it will have a higher ranking in the event of the lender’s insolvency.

By way of example, the Scotch Whisky industry is the third biggest industry in Scotland, behind only energy and financial services. It is therefore of vital significance. It contributes £5 billion to UK GDP, supports 40,000 UK jobs and accounts for almost a quarter of UK food and drink exports. At any given time, some 20 million casks lie maturing in warehouses across Scotland. Under the current law, the only way whisky producers can grant security over this valuable, yet “idle”, commodity is with a floating charge. If the Bill is implemented, the new statutory pledge could be used, completed with a straightforward online registration.

Improving the lending environment for the whisky industry in this way would facilitate business growth in this vital pillar of the Scottish economy.

We also understand that at least one major financial institution will not lend on plant and machinery in Scotland because of the state of the law on moveable transactions. Others will lend, but at higher rates of interest due to the complex workarounds.

In addition, it is commercially impracticable at present to raise finance over vehicles already owned by the borrower. The only true security available (possessory pledge) requires the borrower to be dispossessed of the property, whilst a sale and leaseback arrangement requires ownership to be transferred, as well as initial physical delivery to the lender. This is impossible where vehicles are used in day to day business operations.

With the statutory pledge, a business could grant security over its fleet of vehicles in order to raise finance. This would be completed by simple registration and would allow the business to retain both ownership and possession of the property.

The statutory pledge could also be used in the acquisition finance context, providing an alternative alongside other staged payment arrangements such as hire-purchase.

The SLC also pointed out that difficulties also arise in relation to intellectual property, another form of incorporeal moveable property of significant importance to Scottish businesses and the Scottish economy. Scotland is home to many IP-rich sectors such as food and drink, oil and gas and renewable technologies, IT, life sciences and the creative industries. The UK Intellectual Property Office “Fast Facts 2017” publication indicates that the global trade in IP licences was worth over £220 billion and rising. **The Scottish Enterprise Intellectual Assets Service estimates that IP**

assets form around 80% of a Scottish business's value, and it is predicted that the value of IP to business will continue to increase in the future. Indeed, UK investment in incorporeal assets protected by intellectual property rights has risen from £23.8 billion in 1990 to £63.5 billion in 2011; a 167% increase."

The SLC commented that: **"it is therefore crucial that businesses in Scotland are able to fully exploit their IP assets.** Granting security over these is one way they can do this, but again, deficiencies in the law require recourse to expensive functional security arrangements which limit the benefits of using IP as security."

Under the proposals in the Bill therefore, corporeal assets, such as equipment, livestock and vehicles, or incorporeal assets, such as patents or other intellectual property, will be able to be used to secure a fixed security loan, rather like a house being used for mortgage finance.

Savings

The Bill is expected to lead to a number of savings for those individuals and businesses who choose to make use of the new registers.

In relation to invoice factoring, it is understood from informal discussions with a practitioner in the field that the necessary workarounds used at present can lead to legal costs of up to £30,000, but that the changes proposed in the Bill will mean that the legal costs could be as little as £2,000 (plus the fee for registration in the Register of Assignations).

In relation to financial arrangements based on using an individual's or business's assets as collateral for a loan, it is understood that the workarounds which currently have to be used in Scotland due to the unsatisfactory state of the law can lead to legal costs ranging from £2,000 to £10,000, depending on the risk and size of the transaction. Once financial institutions have products which use the new statutory pledge, legal fees will be dramatically reduced and the only other cost will be the fee for registration in the Register of Statutory Pledges.

Nature and extent of impact

There is no requirement for individuals or businesses to register assignments of claims in the Register of Assignations. Parties may wish to continue to assign by means of intimation to the debtor and will be able to do so under the law on intimation as updated by the Bill.

There is also no obligation on parties to register a statutory pledge in the Register of Statutory Pledges as a means of using their moveable property as collateral to raise finance. However, as it is very difficult to do this under the existing law, it is expected that registrations in the new register will grow, particularly as financial institutions develop new financial products involving the statutory pledge.

There will similarly be no obligation to search the registers and indeed in some places the Bill makes it clear that it is not necessary for, say, a purchaser in good faith to do so when buying from a seller who is acting in the ordinary course of their business. There will, however, be other instances where it is in the best interests of a purchaser to search the register (for example, a non-individual purchaser who is buying from someone who is selling the item other than in the ordinary course of their business), but search fees are expected to be modest.

The good faith rules in the Bill mean that innocent parties are protected and so there should be no costs to them if they do something in good faith but in ignorance of an assignation of a claim or the existence of a statutory pledge. They will still get credit for making payment to the wrong person where they are unaware that a claim has been assigned or, as the case may be, will receive what they paid for unencumbered of a statutory pledge of which they were unaware. In the latter case, this means that encumbered property becomes unencumbered, but that does not necessarily mean that the secured creditor will not recover the money owed to them: they will become an unsecured creditor but can still sue their debtor for outstanding sums. The risk of being unable to recover sums as an unsecured creditor will presumably be costed in to the loan rates that are offered, so it is not expected to be a real “cost” on creditors.

Costs

Establishment costs

The reclassification of RoS as central government and not a separate public corporation (on the recommendation of the Office for National Statistics in accordance with international standards) meant that the Keeper’s financial reserves were returned to the Scottish Consolidated Fund at the end of March 2020 and therefore the cost of establishing the two new registers will be met from that Fund.

RoS anticipate that the total costs of establishing the two new registers will be £8.4 million (£8.2m capital/£0.2m resource). This is anticipated to be required over four financial years, broken down as follows—

<u>Year</u>	<u>Capital</u>	<u>Resource</u>	<u>Total</u>
2021-22	£0.9 m	£0 m	£0.9 m
2022-23	£3.1 m	£0 m	£3.1 m
2023-24	£3.4 m	£0.1 m	£3.5 m
2024-25	£0.8 m	£0.1 m	£0.9 m
Total	£8.2 m	£0.2 m	£8.4 m

These figures are based on best estimates of the likely costs to RoS. The development costs have been established on the basis of discussions with the project team and comparison with the development costs of a recent relevant new

register (the Register of Controlling Interests in Land). In line with good practice, a small cost contingency (5%) has been applied to the development costs, mainly to reflect the uncertainty in future pay rates for contractors. Finally, the estimate reflects the impact of up to a three-month delay to the secondary legislation containing the rules of procedure for the two new registers being approved. If they were to be delayed further, the costs would require revision, but as the secondary legislation is to be developed during the Bill's passage through Parliament, it is not expected that any further delay will arise.

The development/set-up costs include staff costs, cloud hosting, testing, assurance work, licence costs, costs for professional services for UX (User Experience) and Disability Assessment Centre, and communications and marketing costs.

It was planned that separate development teams would work on the two registers, but similarities between them has meant that the work can be done by one team. As the two registers are being developed in tandem, it is not therefore meaningful or practical to separate out the costs of each.

Routine running costs

RoS estimate that the running costs for the new registers will be between circa £600,000 and £700,000 per annum and these figures are upper estimates in part to account for inflation. It is anticipated that costs will remain at broadly the same level on an ongoing basis with increases to take account of inflation as time passes. Due to the largely automated nature of the registers, changes in the volume of applications should not have an impact on ongoing running costs.

Ongoing running costs will include IT, staff costs for ongoing development and customer support roles, cloud hosting costs and costs of government services (notifications/payments).

It is expected that the ongoing running costs of the two registers will be funded by registration and search fees paid by users of the registers, with any income shortfall requiring support from the Scottish Consolidated Fund. Fees will be set in secondary legislation after the Bill is passed, and the existing power in section 110 of the Land Registration etc. (Scotland) Act 2012 will allow for this. Fees will be set after soundings are taken from stakeholders on the likely usage of the registers.

The Law Society of Scotland have indicated that, while they cannot put a figure on a likely number of registrations, they believe that every commercial transaction in Scotland which involves funding will mean the use of at least one of the new registers. This appears to suggest significant usage of the new registers.

One member of the SLC's advisory group said in discussions that he thought that £7 billion of Scottish invoice financing would be registered per annum. This would mean a very high volume of registrations and it has been suggested that banks and invoice factoring companies will be early and frequent users of the Register of Assignations. The SLC have previously estimated that the annual number of

registrations across both the Register of Assignations and the Register of Statutory Pledges will be in the region of 5,000 to 15,000.⁵

It is expected that the new registers will be online and automatic, with little need for input from RoS staff. Once operational, registration and search fees are expected to cover ongoing costs; however, this is dependent on the volume of registrations.

Costs of interacting with the registers

For those who choose to engage with the new registers, fees are chargeable under the Bill for:

- initial registration of an assignment document or a statutory pledge,
- registration of an amendment to a statutory pledge,
- a correction of the register⁶,
- searches of the register,
- extracts of the register.

Many parties will see the advantages of registration. The SLC estimated in their Business and Regulatory Impact Assessment (BRIA)⁷ that the registration fees required to cover operating costs for the estimated number of registrations would be in the range of £10 to £60. These costs were based on parallel fees for the Land Register of Scotland, which have since been increased to a £20 to £80 range for registration to cover cost increases since 2017. The figures in the SLC BRIA were based on 2017 costs and relied on volumes being sufficiently high to generate income to cover ongoing running costs of the registers. Accordingly, figures may require to be revised upwards if this proves not to be the case. As above, this will be done by Ministers in regulations, following appropriate consultation. However, this range of estimates compares with £15 to register a Scottish floating charge electronically or a mortgage or charge created by a UK company at Companies House and £80 to register a standard security in the Land Register.

It is expected that any fee for corrections will likely mirror the fee for registration in the register which is the subject of the correction application. The SLC believed that searching fees would be £4 or less. Fees for extracts are expected to be reasonably

⁵ SLC Business and Regulatory Impact Assessment for the Moveable Transactions (Scotland) Bill: estimated number of registrations across both the Register of Assignations and the Register of Statutory Pledges.
https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf page 45

⁶ There is only a formal correction application process for the Register of Statutory Pledges. However, although likely to be less relevant due to the “snapshot” nature of the Register of Assignations, there is a power to introduce such a process in respect of it too and, if so, to charge a fee.

⁷ SLC Business and Regulatory Impact Assessment for the Moveable Transactions (Scotland) Bill: estimated registrations fees
https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf

modest (the fee for an extract from the Land Register is £35 + VAT). The Bill also expressly provides for printed and electronic search results to be admissible in evidence, in the expectation that these will be easier to obtain than extracts and likely slightly cheaper.

The Scottish Government believes that the cost of registration will be modest for applicants to the Register, particularly by comparison with the value of the debt to which the applications are likely to relate, and will be more than counter-balanced by the advantages to be derived from the modernisation of the law. In particular, applicants will no longer be obliged to use the expensive workarounds mentioned above or to use English law as a means to avoid the complexities caused by the unsatisfactory state of existing Scots law (which again implies extra costs).

Although it will not be compulsory to register an assignation, and the option of assignation by intimation will still exist, it is expected that the banking and invoice factoring sector will invariably register their assignations to avoid the need to intimate to possibly large numbers of debtors and because that is the only means by which it will be possible to assign invoices relating to future claims on as yet unknown debtors. This should lead to lowering of costs for those bodies.

The SLC have commented that: “Easy access to information at relatively low cost is the “primary element” through which to establish a transparent and harmonised market for secured credit. In the secured lending context, lenders will conduct investigations into a prospective borrower’s financial position in order to limit exposure to insolvency. Such investigations usually require gathering information on the extent to which assets are already subject to pre-existing security, as the risk of hidden and unquantifiable pre-existing securities can be a significant deterrent for lenders. These investigations cause the cost of credit to rise. With a publicly accessible register, financiers can discover the true picture without resorting to in-depth investigation, thus potentially lowering the cost of borrowing.”⁸

Scottish Firms Impact Test

It is worth reiterating that the Bill does not prevent firms from doing anything which they can currently do at present. The Bill provides firms with new mechanisms that they can adopt to raise finance if they choose. As such, any impact would largely be indirect, unless a firm opts to take advantage of the new regime. Law and accountancy firms would have to provide training to their employees as regards changes to the law.

The SLC consulted closely with business representative bodies. That consultation resulted in positive responses to reform proposals from those bodies. It is anticipated that Scottish firms would benefit from increased access to finance and reduced legal expense, owing to greater clarity in the law. Those engaged in acquisition finance transactions would also have an alternative to current

⁸ SLC Business and Regulatory Impact Assessment for the Moveable Transactions (Scotland) Bill: benefits of the Registers.

https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf pages 33 and 34

arrangements, which would allow the purchaser to have title to the property throughout the repayment period.

The Government's Programme for Government published in September 2019 indicated that officials would conduct a focussed consultation on the SLC proposals for legislation. Officials met with:

- the Federation of Small Businesses in Scotland,
- Scottish Enterprise,
- the Law Society of Scotland (and, separately, several firms of solicitors who work in these areas of law),
- R3 (the Association of Business Recovery Professionals, which is an organisation for insolvency, restructuring and turnaround specialists in the UK) and
- the Committee of Scottish Bankers.

Views were also sought from UK Finance (which now incorporates the Asset Based Finance Association) and Citizens Advice Scotland.

Stakeholders contacted by officials were almost universally supportive of the Bill. It was conceded that there may be issues of technical detail on which some individuals have different views, but the broad thrust of the SLC proposals enjoys strong support in view of the potential benefits to business and the wider economy.

Competition Assessment

The Bill will not have an impact on competition within Scotland.

The proposals within the Bill do not create a competitive advantage for any particular sector or individual, rather they offer benefits in terms of efficiencies and cheaper access to finance which can be reaped by businesses and individuals alike.

The proposals will not directly or indirectly limit the number or range of suppliers. Indeed, the proposals will encourage asset and invoice financiers to operate in Scotland and will encourage lending institutions to provide secured lending in Scotland.

The proposals will not limit the ability of suppliers to compete. As above, the ability of suppliers of finance based on assets to business and individuals will be enhanced. The proposals will not limit suppliers' incentives to compete vigorously as there will be more incentive for them to do so due to the modernisation of the law. Nor will they limit the choices and information available to consumers. The Bill will provide more choices to consumers by offering other means to raise finance, though there are consumer protections in the Bill.

Consumer Assessment

Citizens Advice Scotland (CAS) raised concerns relating to some lenders charging high interest rates and being able to assign debt to more unscrupulous debt collectors. CAS initially therefore expressed a preference for the Bill to apply to businesses only, excluding individual consumers.⁹

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

In addition, there are numerous protections for individuals under the Bill. For example, limits are placed upon the items which an individual can make subject to a statutory pledge. In addition, the rules about enforcement of a pledge are more stringent where an individual is the provider. For example, a court order will usually be required in a way it would not otherwise and the enforcement mechanism of appropriation is not available.

Moreover, although it will be rare for the pledged property to be anyone's home (given that the Bill is concerned with moveable rather than heritable property), it is recognised that a caravan might on occasion be someone's home. As such, protections are put in place to cover this eventuality. The Bill makes adjustment to legislation governing matrimonial homes to afford comparable protection for relevant statutory pledges. The Bill's enforcement provisions also afford protections to those who have the pledged property as their home even if they are not the person who granted the pledge.

There are also special protections for individuals who are interacting with the statutory pledge regime as a third party.

⁹ Citizens Advice Scotland (CAS) written evidence to the Economy, Energy and Fair Work Committee in the last Parliament [EEFW-S5-20-MT-12-CAS.pdf \(parliament.scot\)](#)

The Law Society of Scotland¹⁰ and the judges of the Court of Session¹¹ both indicated, in written evidence to the Economy, Energy and Fair Work Committee in the last Parliament, that they thought that the consumer protections in the Bill were adequate.

In addition, academics at the University of Aberdeen posed the question: “Why should a consumer not be able to grant a non-possessory security over their moveable assets? They can grant non-possessory security over land subject to various protections, and the same should apply to security over moveable property. The SLC protections appear adequate to justify allowing consumers to grant statutory pledges. The statutory pledge may be usefully created by consumers to enable them to access finance (on better terms) than is currently the case. This will enable them to continue to use and enjoy the property in a way that is not possible under the current law.”¹²

CAS have now indicated (in an email to the Scottish Government) that “Our conclusion is that while the issues we raised in general are valid based on experience and knowledge of how the consumer credit market works in practice. We do not currently have a strong enough evidence base to effectively advance our position. We also note the strong support and corporate business case for the reforms. We note the comments by The Senators of the College of Justice and will monitor the effects of the proposals on our clients once passed in law. The current development of the consumer duty applicable to creditors by the Financial Conduct Authority should ameliorate many of our concerns at the product design stage. We will address any consumer harms engendered by reference to appropriate legislative and regulatory channels as occasion demands.”

The Bill will not affect the quality, availability or price of any goods or services in a market. The Bill does not affect the essential services market, such as energy or water, nor will it involve the storage or increased use of consumer data. It does not increase opportunities for unscrupulous suppliers to target consumers, nor does it impact on the information available to consumers on either goods or services, or their rights in relation to these. Finally, the Bill does not affect routes for consumers to seek advice or raise complaints on consumer issues.

¹⁰ Law Society of Scotland written evidence to the Economy, Energy and Fair Work Committee in the last Parliament

[EEFW-S5-20-MT-09-LawSocietyScotland.pdf \(parliament.scot\)](#)

¹¹ The judges of the Court of Session, written evidence to the Economy, Energy and Fair Work Committee in the last Parliament

[EEFW-S5-20-MT-08-SenatorsCollegeJustice.pdf \(parliament.scot\)](#)

¹² Academics at the University of Aberdeen written evidence to the Economy, Energy and Fair Work Committee in the last Parliament.

[EEFW-S5-20-MT-03-CentreScotsLaw-UniversityAberdeen.pdf \(parliament.scot\)](#)

Test run of business forms

The Bill does not introduce any forms but empowers Scottish Ministers to do so, though this would be the subject of consultation with interested stakeholders.

Digital Impact Test

The principal means by which the reforms envisaged in the Bill will be effected will be by the establishment of two new registers, the Register of Assignations and the Register of Statutory Pledges. It is intended that applications to the registers will be online and automatic, as is the case in other jurisdictions, in order to assist commercial efficiency and to make registration as easy as possible for applicants.

The two new registers will be developed, maintained and operated by the Registers of Scotland who have recent experience of establishing new online, automatic registers, including the Register of Landlords and the Register of Controlling Interests in Land. The broad framework for the two registers is set out in the Bill but they will be maintained in such form as the Keeper of the Registers of Scotland thinks fit.

The detailed rules of procedure for the operation of the two new registers will be set out in secondary legislation made by Scottish Ministers and at that stage consideration will be given to whether offline applications will be permitted.

As the registration procedures envisaged in the Bill represent new and innovative ways to assign debt or to raise finance on the basis of using an asset as collateral, they represent new ways for existing businesses and individuals to use their moveable property, but there is no compulsion to do so.

The Technology Assurance Framework, administered by the Digital Assurance Office (DAO), provides reviews of major IT/digital projects during the project lifecycle.

The project to develop the two new registers under the Bill falls within the definition of a major project and will be reviewed at the key stages: business justification, pre-procurement, delivery and “go-live”. At each stage, the project’s ability to deliver its aims and objectives within the timescales, budget and to quality will be assessed against the criteria set out in the framework and recommendations are made as to whether the project can continue or whether remedial action is required before delivery progresses.

RoS design and develop new digital services in line with the Scottish Government Digital Scotland Service Standard which is also managed by the DAO. At the end of each delivery phase of Discovery, Alpha and Beta, the project is being, and will be, assessed against the standard to ensure services meet user needs, use the right technology and are always improving.

Legal Aid Impact Test

The effects of the Bill are unlikely to impact on legal aid, since the proposals are primarily concerned with business.

One issue which the SLC thought could involve legal aid is where consumers in vehicle finance might wish to use the proposed new security as an alternative option to hire-purchase.

Another area where legal advice might be sought is in relation to the provisions of the Bill which provide for compensation to parties if they have suffered loss as a result of inaccuracies in the registers due to the actions of the Keeper of the Registers or certain other persons.

It is considered that in both cases, however, the likelihood of legal action being taken will be very rare and it is therefore thought that in both cases the impact on the legal aid fund will be negligible.

Enforcement, sanctions and monitoring

The Bill does not require public enforcement and imposes no sanctions. It provides consumers and businesses with a new and more efficient way to raise finance using moveable property as collateral for the loan which will be secured by the new statutory pledge. It will also provide an optional registration mechanism to complete the assignation of claims, normally to debt.

The Scottish Government and RoS will monitor the numbers of registrations and searches in the new registers in order to, among other things, inform policy on levels of registration and search fees. RoS will also monitor the efficiency and effectiveness of the new registers both for applicants for registration and for searchers of the two new registers.

Implementation and delivery plan

As noted in the SLC BRIA, under section 3(1) of Law Commissions Act 1965, the SLC has a duty to “keep under review” the laws with which it is concerned and will monitor the Bill’s reception by the legal profession and the wider business community.

The Bill is expected to proceed through Parliament and, if passed, Royal Assent would be obtained around the Spring of 2023. RoS is already working on developing an implementation timetable for the two new registers which are proposed in the Bill.

The detailed rules and procedures for the new registers will be set out in secondary legislation made by Scottish Ministers after liaison with the Keeper of the Registers under powers in the Bill and these need to be in place before the new registers can become operational. It is anticipated that the registers will go live in the summer of 2024.

Post-implementation review

The operation of the new registers and the effectiveness of the reforms will be continually reviewed in the light of the experience of their operation. No set date has been set for a review of the legislation, but this will be done within 10 years.

In the light of the overwhelming support which has been expressed for the reforms by stakeholders, it is hoped that the operation of the new law would be uncontroversial.

Summary and recommendation

Option 2 is recommended.

Summary costs and benefits

Option 1 - Do Nothing

Total benefit per annum: -economic, environmental, social

No benefit

Total cost per annum: - economic, environmental, social – policy and administrative

It is difficult to estimate the economic damage done by the existing system of moveable transactions in Scotland but one witness to the Economy Committee in the last Parliament thought that £7 billion of debt might be assigned in Scotland if the law was updated, thus providing cashflow to the businesses and individuals to whom the money is owed. This benefit will not accrue if the current system is retained.

It is also difficult to estimate the cost of the current lack of a fixed security over moveable property in Scotland, but the fact that one financial institution will not lend on plant and machinery in Scotland due to the unsatisfactory state of the law here is indicative of the difficulties which businesses in Scotland face compared to other parts of the UK and other jurisdictions.

In relation to assignation of debt, the workarounds used at present can lead to legal costs of up to £30,000. The changes proposed will mean that the legal costs could be as little as £2,000 (plus the fee for registration in the Register of Assignations).

In relation to financial arrangements based on using an individual's or business's assets as collateral for a loan, the workarounds which currently have to be used in Scotland due to the unsatisfactory state of the law can lead to legal costs ranging from £2,000 to £10,000, depending on the risk and size of the transaction. Once financial institutions have products which use the new statutory pledge, legal fees will be dramatically reduced and the only other cost will be the fee for registration in the Register of Statutory Pledges.

Option 2 - Implement Scottish Law Commission Report on Moveable Transactions by enacting Moveable Transactions (Scotland) Bill

Total benefit per annum: -economic, environmental, social

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

Total cost per annum: - economic, environmental, social – policy and administrative

RoS anticipate that the total costs of establishing the two new registers will be £8.4 million. This is anticipated to be required over four financial years 2021-22 to 2024-25.

RoS estimate that the running costs for the new registers will be between circa £600,000 and £700,000 per annum, but this will be recouped from registration and search fees, which are expected to be modest, though this will depend on the levels of usage of the new registers.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:



Date: 23 May 2022

**Tom Arthur
Minister for Public Finance, Planning and Community Wealth**

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