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The Rt Hon Lady Paton
Chair
Scottish Law Commission
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26 May 2022

Dear Lady Paton

SCOTTISH LAW COMMISSION REPORT ON MOVEABLE TRANSACTIONS

Further to the Scottish Government's letter of 4 February 2019 addressed to your then Chief Executive, I would like to thank the Scottish Law Commission again for its report on moveable transactions and to update you on our consideration of the recommendations made in that report.

The Scottish Government very much welcomed the thoughtful and detailed report produced by the Commission, particularly in light of the complexities of the subject-matter. As you will be aware, following full and proper consideration, the Programme for Government which was announced on 7 September 2021 included a commitment to introduce a Moveable Transactions Bill. I am pleased to be able to let you know that the Bill was introduced yesterday and is now available on the Scottish Parliament's website.

The Bill will bring much-needed modernisation to this area of the law. It will make various types of commercial transactions more efficient, less expensive and less complicated than they currently are. The benefits to Scottish businesses, and in turn to the Scottish economy, should be considerable.

The Parliamentary Bureau will now determine the committee to which the Bill is allocated. I consider this Bill a suitable candidate for consideration by the Delegated Powers and Law Reform Committee (DPLRC) under Rule 9.17A of the Parliament's Standing Orders and the Presiding Officer's determination under that Rule. I have set out in the annex to this letter more detail on why I consider that the Bill meets these criteria and I am copying this letter to the convener of the DPLRC.

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As you will see from the annex, there is one aspect of the Bill where we have not been able to fully implement the Commission's recommendations. This relates to the Bill's interaction with financial instruments and financial collateral arrangements. It is our view that unfortunately making provision of the type envisaged would be outwith the legislative competence of the Scottish Parliament. However, as you will be able to see from the Bill's Policy Memorandum, the UK Government has been asked to grant an Order under section 104 of the Scotland Act 1998 in order to complete the package of reforms included in the SLC's draft Bill.

I would be grateful if you would pass on my thanks to those still at the Commission who worked on the report. I look forward to working with the Commission, as well as with the former Commissioners responsible for leading on the report (with whom we also continue to consult), during the Bill's parliamentary stages.



TOM ARTHUR

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ASSESSMENT OF THE BILL AGAINST STANDING ORDERS RULE 9.17A AND THE CRITERIA AS DETERMINED BY THE PRESIDING OFFICER FOR QUALIFICATION AS A “SCOTTISH LAW COMMISSION BILL”

(a) The Bill must implement all or part of a report of the Scottish Law Commission

The Bill will implement the overarching recommendations contained in the report entitled *Report on Moveable Transactions (Scot Law Com No 249)*¹ which was published on 19 December 2017. Specifically, the Bill will modernise the law relating to assignments of claims as well as introducing an alternative route to completion of an assignation through registration in the Register of Assignations established by the Bill. It will also modernise the law relating to possessory pledges as well as creating a new concept of a statutory pledge which will allow a pledge to be created through registration in the new Register of Statutory Pledges established by the Bill.

The detailed Scottish Law Commission (“SLC”) recommendations are set out in chapter 40 of volume 2 of the report². The report included a draft Bill which largely forms the basis of the Government’s Bill. However, it should be noted that not all of the recommendations were taken forward in the SLC’s own draft Bill³.

The Bill which the Government intends to introduce includes various clarifications and stylistic changes as well as various relatively minor policy adjustments. Due to the level of detail included in the SLC’s recommendations, a small number of these changes constitute departures from the SLC’s recommendations, but none of these changes are of a level that could be classified as significant.

The most significant difference is the Bill’s treatment of financial instruments and financial collateral arrangements⁴. No bespoke regime is introduced for assignments which constitute financial collateral arrangements and, further, the changes to be made to the law of assignation of claims will not apply to claims which are part of a financial collateral arrangement. In addition, the ability to grant a statutory pledge over financial instruments has been removed. The reason for this departure from the SLC recommendations⁵ is that the Scottish Government has concluded that to make provision to this effect would be outwith the legislative competence of the Scottish Parliament.

The Scottish Government’s view is that these changes are not sufficiently extensive so as to prevent the Bill from being classified as implementing the SLC report. However, even if that view was not to be shared by the Scottish Parliament, the Standing Orders requirement allows for a Bill to implement only part of a report. As such, the Scottish Government considers that this requirement is met.

¹ The report is in three volumes: <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/security-over-corporeal-and-incorporeal-moveable-property/>

² https://www.scotlawcom.gov.uk/index.php/download_file/view/2008/102/

³ For example, recommendation 64 was not the subject of provision as the SLC considered the matter to form part of reserved law.

⁴ As defined in the Financial Collateral Arrangements (No.2) Regulations 2003.

⁵ Specifically, recommendations 70, 95 and 199, though this change also has an impact on recommendations 1 and 12.

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(b) The Bill must comply with such criteria as are determined by the Presiding Officer

The current determination of the Presiding Officer was published in the Scottish Parliament's Business Bulletin on 24 March 2021. The key elements of this are addressed in turn below.

A Bill, the primary purpose of which is to (a) simplify, modernise or improve the law to— (i) ensure it is fit for purpose, (ii) respond to developments, or address deficiencies, in the common law, or (iii) respond to other developments in the law

The primary purpose of the Bill is very clearly to modernise and improve the law relating to transactions concerning moveable property to ensure it is fit for purpose and address deficiencies in the current law. As set out in more detail in the SLC report and in the Policy Memorandum which will be published alongside the Bill, the current law in this area is antiquated (dating from 1862) and is no longer considered fit for purpose. Expensive and elaborate workarounds currently have to be deployed in many cases, usually adopting the law of England and Wales in preference to Scots law.

A Bill, the primary purpose of which is to (b) make provision which is not likely to generate substantial controversy among stakeholders

The provision made by the Bill is not expected to generate substantial controversy among stakeholders.

As set out more fully in the report, the SLC carried out comprehensive consultation in accordance with its established practice in conducting law reform projects. A discussion paper was published in June 2011, to which 40 responses were received. A symposium was also held later that year under the auspices of the Edinburgh Centre for Private Law at the University of Edinburgh, with over 40 attendees. In addition, the SLC met with a number of consultees and stakeholders including Registers of Scotland, Companies House, CBI Scotland, the Federation of Small Businesses, the Asset Based Finance Association (now part of UK Finance), the Finance and Leasing Association and the Consumer Credit Trade Association. An advisory group was also established. All of this informed the SLC's recommendations and report. A further short consultation was then carried out in July 2017 on the SLC's draft Bill.

In addition, evidence was taken on the SLC's draft Bill by the Scottish Parliament's Economy, Energy and Fair Work Committee in the last parliamentary session⁶. In total, 12 responses were received including from the Law Society of Scotland, the Senators of the College of Justice and UK Finance. The summary of evidence produced by the Scottish Parliament Information Centre ("SPICe") noted that "There was almost unanimous agreement that the law in this area needed to be reformed, and that it would make a practical difference to the ability of businesses to access finance if it was."⁷ While SPICe also referred to some concerns held by Citizens Advice Scotland, those are unlikely to be significant enough to prevent the criteria being satisfied given that the rules are concerned with the likelihood of "substantial" controversy. However, in any event, the Scottish Government has engaged with Citizens Advice Scotland and, in light of the further background information provided to them, they advised that they would seek to withdraw

⁶ Full details at <https://archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/113651.aspx>

⁷ <https://www.scotlawcom.gov.uk/files/3415/9661/3679/20200727ConvenertoSGreMoveableTransactions1.pdf>

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their previous comments to the Committee. They also acknowledged the strong support that exists for the reforms.

The Scottish Government has also carried out targeted consultation, including (as well as Citizens Advice Scotland) meetings or discussions with the Federation of Small Businesses, the Law Society of Scotland, various legal firms, UK Finance, the Committee of Scottish Bankers and Association of Business Recovery Professionals (R3) and Scottish Enterprise.

Although certain provisions have been left out of the Bill on legislative competence grounds, it remains the case that the provision which is included in the Bill is not expected to generate substantial controversy.

Wider legislative proposals expected within two years beginning with the date of introduction of the Bill (or by the end of the same session if sooner) which relate closely to the same particular aspect of law

The Scottish Government is not expecting any wider legislative proposals on this topic. While it is the Scottish Government's intention to seek a Section 104 Order under the Scotland Act 1998 in connection with the Bill, such legislation could not of course proceed in the absence of the Bill.

(c) The Bill must not be a Consolidation, Codification, Statute Law Repeals or Statute Law Revision Bill

The Bill is not any of the Bill types listed above.

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