

RESPONSE FORM

DISCUSSION PAPER ON HERITABLE SECURITIES: DEFAULT AND POST DEFAULT

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk). Comments not on the response form may be submitted via said email address or by using the [general comments form](http://www.scotlawcom.gov.uk/contact-us#sendcomments) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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| **Name:**  «InsertTextHere» |
| **Organisation:**  «InsertTextHere» |
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**Summary of Proposals**

1. What information or data do consultees have on:

(a) the economic impact of the current legislation on heritable securities, or

(b) the potential economic impact of any option for reform proposed in this Discussion Paper?

(Paragraph 1.22)

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| **Comments on Proposal 1**  «InsertTextHere» |

2. When exercising a standard security, should a security holder be subject to a duty to conform with reasonable standards of commercial practice?

(Paragraph 2.29)

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| **Comments on Proposal 2**  «InsertTextHere» |

3. Do consultees have any comments on our approach to redemption post-default as outlined above?

(Paragraph 2.38)

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| **Comments on Proposal 3**  «InsertTextHere» |

4. (a) Do consultees consider that any new legislation should make provision regarding the enforcement of *ex facie* absolutedispositions?

(b) If so, what should the effect of any such provision be?

(Paragraph 2.44)

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| **Comments on Proposal 4**  «InsertTextHere» |

5. Should new legislation restate the principle *prior tempore, potior jure* as it applies to security over heritable property?

(Paragraph 3.24)

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| **Comments on Proposal 5**  «InsertTextHere» |

6. (a) Should a subsequent standard security holder be able to restrict the priority of an earlier standard security by giving notice?

(b) If so, should post-notice voluntary advances by the prior security holder be unsecured, or treated in some other way?

(Paragraph 3.32)

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| **Comments on Proposal 6**  «InsertTextHere» |

7. Do consultees agree that:

(a) The parties to a standard security and any other right in security should be free to enter into a ranking agreement intended to vary the terms of the security?

(b) Such agreements must be set out in writing?

(c) Registration of the agreement in the Land Register is required to vary the terms of the standard securities concerned?

(Paragraph 3.36)

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| **Comments on Proposal 7**  «InsertTextHere» |

8. A security holder may exercise remedies under a standard security where:

(a) there is a failure to perform the secured obligation; or

(b) in such other circumstances, if any, as are agreed between the debtor, the owner or registered tenant of the security property, and the security holder.

Do consultees agree?

(Paragraph 4.47)

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| **Comments on Proposal 8**  «InsertTextHere» |

9. (a) Should new legislation specify circumstances in which a security holder may exercise remedies under a standard security beyond those listed in question 8 above?

(b) If so, which circumstances should be specified in the legislation?

(c) Should the specified circumstances be subject to variation by the parties to the security?

(Paragraph 4.50)

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| **Comments on Proposal 9**  «InsertTextHere» |

10. Do consultees agree with the proposal that:

(a) Prior to exercising remedies under a standard security, the security holder will be required to serve a notice known as a default notice?

(b) The security holder will not be entitled to exercise remedies unless and until the default notice expires?

(Paragraph 5.11)

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| **Comments on Proposal 10**  «InsertTextHere» |

11. Do consultees agree that the form of the default notice should be prescribed by legislation?

(Paragraph 5.15)

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| **Comments on Proposal 11**  «InsertTextHere» |

12. (a) Should the form of the default notice be prescribed in primary or secondary legislation?

(b) What comments do consultees have on the suggested list of key information to be included in the default notice?

(c) What further key information, if any, should be included?

(Paragraph 5.18)

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| **Comments on Proposal 12**  «InsertTextHere» |

13. Do consultees agree with the proposal that a default notice may be served by the security holder or its agent?

(Paragraph 5.20)

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| **Comments on Proposal 13**  «InsertTextHere» |

14. Do consultees agree with the following provisional proposals?

(a) A default notice must be served on the debtor, the owner or registered tenant of the security property, and any other person against whom the security holder wishes to preserve a right of recourse in respect of the secured obligation.

(b) Where a natural person on whom service should be made is deceased, service must instead be made on any person appearing from the title to have succeeded to the security property, or on the confirmed executor of the deceased estate. If no successor appears on the title and no executor has been confirmed, service must be made on the Lord Advocate.

(c) Where a natural person on whom service must be made has been sequestrated, service must also be made on the trustee in sequestration (unless discharged).

(d) Where service is to be made on a body of trustees, it is sufficient for service to be made on the majority of trustees.

(e) Where a company on which service should be made has been removed from the Register of Companies, service should be made on the Lord Advocate.

(f) Where the address of the person upon whom service should be made is unknown, or it is unknown whether the person is alive, or the notice is returned with intimation that delivery was unsuccessful, service is to be made on the Extractor of the Court of Session.

(Paragraph 5.29)

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| **Comments on Proposal 14**  «InsertTextHere» |

15. Where a security holder has been made aware that a guardian or attorney is acting on behalf of an intended recipient of a default notice who is an adult with incapacity, should service be made solely on the guardian or attorney on that adult’s behalf?

(Paragraph 5.31)

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| **Comments on Proposal 15**  «InsertTextHere» |

16. Should it be competent to serve a default notice by:

(a) Sheriff officer, using the methods specified in the Ordinary Cause Rules 1993, rule 5 (namely delivery into the hands of a recipient who is a natural person; leaving the notice in the hands of a resident at the recipient’s dwelling or in the hands of an employee at the recipient’s place of business; letterbox delivery following diligent enquiry; or leaving the notice at the recipient’s dwelling place or place of business in such a way that it is likely to come to their attention following diligent enquiry)?

(b) Sending it to the intended recipient by a postal service which provides for delivery of the notice to be recorded?

(c) Electronic transmission where the electronic form of the notice and the electronic address for service has been agreed in writing by all relevant parties in advance?

(Paragraph 5.40)

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| **Comments on Proposal 16**  «InsertTextHere» |

17. Which, if any, other methods of service should be competent for default notices?

(Paragraph 5.41)

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| **Comments on Proposal 17**  «InsertTextHere» |

18. Should relevant parties be permitted to agree in writing, prior to service of a default notice, that it must be served:

(a) By one (or more than one) of the methods specified in the statute?

(b) At a specified address?

(Paragraph 5.43)

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| **Comments on Proposal 18**  «InsertTextHere» |

19. Should the time limit for compliance with a default notice be:

(a) 14 days after service?

(b) One month after service?

(c) Two months after service?

(d) Some other period, and if so, what?

(Paragraph 5.46)

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| **Comments on Proposal 19**  «InsertTextHere» |

20. Do consultees agree that the time limit for compliance with a default notice may be varied or dispensed with following service of the notice where consent is given in writing by all the following parties:

(a) the debtor;

(b) the owner or registered tenant;

(c) holders of any prior or *pari passu* securities;

(d) the spouse of the debtor, owner or registered tenant where the security property is a “matrimonial home” in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 22;

(e) the civil partner of the debtor, owner or registered tenant where the security property is a “family home” in terms of the Civil Partnership Act 2004 s 135(1);

(e) any “entitled resident” of the security property as defined in the enhanced debtor protection provisions of any new standard securities legislation?

(Paragraph 5.48)

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| **Comments on Proposal 20**  «InsertTextHere» |

21. Should section 21 of the Interpretation and Legislative Reform (Scotland) Act 2010 be excluded from application to any new standard securities legislation, and if so, why?

(Paragraph 5.54)

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| **Comments on Proposal 21**  «InsertTextHere» |

22. Should a bespoke route of challenge to a default notice (similar to that found in section 22 of the 1970 Act) be provided for in any new legislation?

(Paragraph 5.59)

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| **Comments on Proposal 22**  «InsertTextHere» |

23. (a) After what period of time should the rights of a security holder to exercise remedies on the basis of an expired default notice be extinguished by prescription?

(b) Why?

(Paragraph 5.64)

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| **Comments on Proposal 23**  «InsertTextHere» |

24. Should an expired default notice continue to provide a valid basis for the exercise of remedies where the default giving rise to the notice is subsequently purged? Why or Why not?

(Paragraph 5.68)

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| **Comments on Proposal 24**  «InsertTextHere» |

25. Do consultees agree that a court order should not be required to exercise a remedy under a standard security, except where legislation specifically so provides?

(Paragraph 6.20)

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| **Comments on Proposal 25**  «InsertTextHere» |

26. Should a security holder be able to apply to the court for relevant orders in relation to the exercise of remedies even where such an order is not required by legislation?

(Paragraph 6.21)

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| **Comments on Proposal 26**  «InsertTextHere» |

27. Should court proceedings in respect of the exercise of standard securities be raised by way of ordinary cause procedure, except in cases to which the enhanced debtor protection measures apply?

(Paragraph 6.23)

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| **Comments on Proposal 27**  «InsertTextHere» |

28. (a) Should the obligation to obtemper a decree of court obtained under legislation on standard securities continue to be subject to the long 20-year prescription?

(b) If not, why not?

(Paragraph 6.27)

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| **Comments on Proposal 28**  «InsertTextHere» |

29. Should the person criterion for application of the enhanced debtor protection measures be satisfied where both the debtor and the owner of the security property are natural persons (including where the debtor and owner are the same person)? If not, what difficulties do you identify with this proposal?

(Paragraph 7.55)

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| **Comments on Proposal 29**  «InsertTextHere» |

30. Where the debtor is a natural person and the owner of the security property is a juristic person, should any of the enhanced debtor protection measures be disapplied or otherwise modified? If so, which measures should be disapplied, or which modifications should be made?

(Paragraph 7.55)

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| **Comments on Proposal 30**  «InsertTextHere» |

31. Where the debtor is a juristic person and the owner of the security property is a natural person, should any of the enhanced debtor protection measures be disapplied or otherwise modified? If so, which measures should be disapplied, or which modifications should be made?

(Paragraph 7.55)

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| **Comments on Proposal 31**  «InsertTextHere» |

32. (a) Should the property criterion for application of the enhanced debtor protection measures be satisfied where the security property comprises or includes a dwellinghouse?

(b) If not, what difficulties do you identify with this proposal, and what would you propose as an alternative?

(Paragraph 7.62)

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| **Comments on Proposal 32**  «InsertTextHere» |

33. Should the term “dwellinghouse” be defined in new legislation, if the property criterion is that the security property “comprises or includes a dwellinghouse” as suggested above?

(Paragraph 7.62)

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| **Comments on Proposal 33**  «InsertTextHere» |

34. (a) Should buy-to-let properties be excluded from the application of the enhanced debtor protection measures?

(b) Should the legislation provide for any other exceptions, and if so, what?

(Paragraph 7.62)

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| **Comments on Proposal 34**  «InsertTextHere» |

35. Where a default notice is served in relation to a security property which meetsthe property criterion for application of the enhanced debtor protection measures, the security holder must give notification of the same to the occupier(s) of that property and to the local authority in which the property is located.

Do consultees agree?

(Paragraph 7.67)

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| **Comments on Proposal 35**  «InsertTextHere» |

36. Are any amendments, additions or deletions to the PARs required? If so, what?

(Paragraph 8.6)

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| **Comments on Proposal 36**  «InsertTextHere» |

37. Should the “headline” requirements of the PARs continue to be provided for in primary legislation, with further detail in secondary legislation and guidance, as at present?

(Paragraph 8.7)

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| **Comments on Proposal 37**  «InsertTextHere» |

38. Other than those outlined in this Discussion Paper, what difficulties exist with the procedure for application for warrant under the 1970 Act, section 24(1B)?

(Paragraph 8.10)

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| **Comments on Proposal 38**  «InsertTextHere» |

39. (a) Should new legislation continue to provide a non-exhaustive list of factors to be taken into account by the court when determining an application for warrant to exercise remedies where the debtor appears or is represented, modelled on the current section 24(7)?

(b) Should the final factor listed in section 24(7) be amended in new legislation to restrict the court’s consideration to the ability of the debtor, the owner, any entitled resident and any child of the foregoing parties residing with them to find reasonable alternative accommodation?

(c) Are any other amendments, additions or deletions to the section 24(7) factors required? If so, what?

(Paragraph 8.14)

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| **Comments on Proposal 39**  «InsertTextHere» |

40. Should new legislation provide the court with guidance on how to balance the interests of the debtor, owner and entitled residents in considering factors equivalent to those currently listed at section 24(7)? If so, what guidance should be given?

(Paragraph 8.15)

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| **Comments on Proposal 40**  «InsertTextHere» |

41. Are any amendments, additions or deletions required to the definition of entitled resident set out in section 24C? If so, what?

(Paragraph 8.18)

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| **Comments on Proposal 41**  «InsertTextHere» |

42. (a) Following expiry of a default notice, should the requirement for warrant of the court under the enhanced debtor protection regime be waived where the debtor, the owner and any entitled residents confirm in writing that:

(i) they are not in occupation of the security property;

(ii) they consent to the exercise of remedies under the security;

(iii) their consent was given freely and without coercion of any kind?

(b) Should the debtor, the owner and any entitled resident also be required to confirm that the security property is unoccupied?

(Paragraph 8.22)

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| **Comments on Proposal 42**  «InsertTextHere» |

43. (a) Should new legislation on standard securities make available the same remedies as current legislation?

(b) Should new legislation include any remedy not currently provided for, and if so, which remedy?

(Paragraph 9.5)

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| **Comments on Proposal 43**  «InsertTextHere» |

44. Should receivership be available as a remedy under any new legislation on standard securities? If so, what powers should be available to the receiver?

(Paragraph 9.12)

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| **Comments on Proposal 44**  «InsertTextHere» |

45. Should any restriction be placed on the security holder’s choice between the remedies of sale and management of the security property? If so, what form of restriction is appropriate?

(Paragraph 9.17)

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| **Comments on Proposal 45**  «InsertTextHere» |

46. Do consultees agree that it should not be possible to vary the statutory provisions on exercise of remedies under a standard security?

(Paragraph 9.23)

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| **Comments on Proposal 46**  «InsertTextHere» |

47. Do consultees agree that remedies under a standard security should continue to be exercisable by or on behalf of the security holder?

(Paragraph 9.24)

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| **Comments on Proposal 47**  «InsertTextHere» |

48. What comments do consultees have as to the powers of postponed (or *pari passu*) security holders to exercise remedies without the consent of prior (or *pari passu*) security holders?

(Paragraph 9.28)

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| **Comments on Proposal 48**  «InsertTextHere» |

49. (a) Should provision equivalent to section 27 of the 1970 Act on application of the proceeds of sale be made in any new legislation?

(b) Should this provision be extended to cover the proceeds of any remedy exercised under a security?

(Paragraph 9.31)

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| **Comments on Proposal 49**  «InsertTextHere» |

50. Should new legislation on standard securities provide that a security holder may seek decree of ejection against any person in natural possession of the land or buildings in which the security is held where that person has no legal basis to occupy?

(Paragraph 10.11)

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| **Comments on Proposal 50**  «InsertTextHere» |

51. Do consultees agree that the only basis for ejection under a standard security should be the relevant statutory provision?

(Paragraph 10.13)

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| **Comments on Proposal 51**  «InsertTextHere» |

52. When seeking to remove an assured or private residential tenant from the security property, should a security holder be required to obtain an order for possession under the relevant tenancy legislation?

(Paragraph 10.21)

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| **Comments on Proposal 52**  «InsertTextHere» |

53. (a) Should new legislation on standard securities provide guidance on how the security holder’s duty of care in relation to moveables left in the security property may be discharged?

(b) If so, what guidance would be appropriate?

(Paragraph 10.26)

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| **Comments on Proposal 53**  «InsertTextHere» |

54. (a) In future legislation, should “taking possession” be defined to mean taking action to physically secure the land or buildings in which the security is held, including taking possession through a third party such as a tenant? If not, why not?

(b) Should the legislation include a non-exhaustive list of actions which meet the definition of possession? If so, which actions should be included?

(Paragraph 11.36)

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| **Comments on Proposal 54**  «InsertTextHere» |

55. On entry into possession, should a security holder be able to exercise the rights of the owner or registered tenant in relation to the management and maintenance of the security property where:

(a) Management of the security property includes exercise of any rights required in connection with the aim of enforcing performance of the secured obligation;

(b) Maintenance of the security property includes any reconstruction, alteration or improvement reasonably required for the purpose of maintaining its market value?

(Paragraph 11.41)

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| **Comments on Proposal 55**  «InsertTextHere» |

56. On entry into possession:

(a) Should a security holder assume the obligations of the owner or registered tenant in relation to the management and maintenance of the security property?

(b) Should this include responsibility for outstanding costs previously incurred by the owner or registered tenant in relation to the management and maintenance of the security property?

(Paragraph 11.46)

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| **Comments on Proposal 56**  «InsertTextHere» |

57. Do consultees agree that the security holder’s right to collect rents and grant and administer leases under any new legislation should follow from entry into possession of the security property?

(Paragraph 12.3)

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| **Comments on Proposal 57**  «InsertTextHere» |

58. Should the security holder’s remedy of collection of rents cover:

(a) Rents which fall due on or after the security holder’s entitlement to rents arises?

(b) Rents which fell due prior to the security holder’s entitlement arising, but have yet to be paid?

(Paragraph 12.7)

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| **Comments on Proposal 58**  «InsertTextHere» |

59. In any new legislation, should the power to grant a lease be available under a standard security only where the security property is ownership of land or buildings?

(Paragraph 12.9)

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| **Comments on Proposal 59**  «InsertTextHere» |

60. In relation to the grant of (sub-)leases by the security holder:

(a) What comments do consultees have on the current use of this remedy in practice?

(b) What duration of lease should the security holder be entitled to grant without warrant of the court?

(c) Would the extension of the seven-year limit in relation to leases give rise to any debtor protection concerns? If so, what measures should be taken to address these concerns?

(d) What limits, if any, should be placed on the power of a security holder to grant a private residential tenancy?

(Paragraph 12.15)

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| **Comments on Proposal 60**  «InsertTextHere» |

61. We provisionally propose that, on entering into possession of the security property:

(a) A security holder should be entitled to exercise the rights of the owner or registered tenant relating to (sub-)leases or other rights of occupancy in respect of the security property; and

(b) A security holder should assume the obligations of the owner or registered tenant relating to (sub-)leases or other rights of occupancy in respect of the security property.

Do consultees agree?

(Paragraph 12.18)

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| **Comments on Proposal 61**  «InsertTextHere» |

62. Should a court order be required for the security holder to exercise the power of sale?

(Paragraph 13.28)

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| **Comments on Proposal 62**  «InsertTextHere» |

63. Should the selling security holder continue to have the choice to sell by private bargain or by public auction? If not, what reform would you propose here?

(Paragraph 13.35)

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| **Comments on Proposal 63**  «InsertTextHere» |

64. (a) Should the selling security holder be placed under a duty to take all reasonable steps to obtain (i) the best price reasonably obtainable, (ii) the market value of the security property or (iii) some other objective?

(b) Should the legislation include a non-exhaustive list of factors (capable of amendment by secondary legislation) to be considered by the court in determining whether this duty has been discharged? If so, which factors should be included, and why?

(Paragraph 13.39)

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| **Comments on Proposal 64**  «InsertTextHere» |

65. Where a purchaser acquires property from the security holder exercising its power of sale under the security, should legislation provide that:

(a) The transfer is valid notwithstanding the lack of capacity of the debtor, the owner, or any other party entitled to receipt of notice of enforcement proceedings under the security; and

(b) The title acquired is protected against any challenge arising from extinction of the secured obligation or from defects in the process by which the security holder’s power of sale is established, so long as certain conditions are fulfilled?

(Paragraph 13.47)

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| **Comments on Proposal 65**  «InsertTextHere» |

66. Do consultees agree that the conditions referred to in part (b) above should be as follows:

(a) The purchaser paid value for the security property;

(b) The purchaser was in good faith prior to the conclusion of missives, with the following factors taken into account in determining whether this requirement has been met:

(i) The purchaser’s actual or constructive knowledge that the secured obligation had been extinguished;

(ii) The purchaser’s actual or constructive knowledge of defects in the process by which the security holder’s power of sale was established;

(iii) Attempts made by the purchaser to satisfy themselves that the purchaser has discharged its best price duty;

(iv) Whether the purchaser is a close associate of the security holder?

(Paragraph 13.47)

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| **Comments on Proposal 66**  «InsertTextHere» |

67. Do consultees agree that any new legislation should provide that:

(a) The security holder’s remedy of sale of the security property includes the power to grant a disposition transferring ownership of that property.

(b) Registration of a disposition granted under this power has the effect of disburdening the property sold of the standard security, and of any *pari passu* and postponed securities.

(Paragraph 13.49)

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| **Comments on Proposal 67**  «InsertTextHere» |

68. Is any reform required to the foreclosure process? If so, which reforms would be appropriate?

(Paragraph 14.22)

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| **Comments on Proposal 68**  «InsertTextHere» |

69. (a) Should the debtor be liable to the security holder for expenses reasonably incurred in exercising the security?

(b) Should the expenses of litigation be “reasonably incurred” only to the extent of any award by the court or agreement between the parties?

(c) Is there an alternative approach to the debtor’s liability for expenses that you would consider more appropriate, and if so, why?

(Paragraph 15.13)

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| **Comments on Proposal 69**  «InsertTextHere» |

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| **General Comments**  «InsertTextHere» |

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.