

## CONSULTATION DRAFT

### EXPLANATORY NOTES

#### INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Law Commission (“the Commission”) in order to assist the reader of the Bill, and to help inform debate on the recommendations made by the Commission in their Report on Moveable Transactions. They do not form part of the Bill and have not been endorsed by the Scottish Government or the Scottish Parliament.

2. The Notes should be read in conjunction with the Report. The Notes are not, and are not meant to be, a comprehensive description of the Bill. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

#### THE BILL – OVERVIEW

3. The Bill makes important reforms to the law of moveable transactions, by reforming and extending the laws on the assignation of claims and on securities over moveable property.

##### Discussion Paper

4. The law has been subject to substantive review by the Commission, which published a Discussion Paper on Moveable Transactions in June 2011 (DP 151). This has been followed up by the Report on Moveable Transactions [*publication pending*] which makes the recommendations given effect by the Bill.

##### Draft Common Frame of Reference

5. The Commission has had regard in framing those recommendations to the Draft Common Frame of Reference (“the DCFR”). An online version of the DCFR can be read here: [http://ec.europa.eu/justice/policies/civil/docs/dcfr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf).

6. In full, the DCFR is the Draft Common Frame of Reference (Principles, Definitions and Model Rules of European Private Law). As the title suggests, the DCFR contains principles which underpin the model rules; definitions of terms used in the model rules; and model rules on a number of areas of private law.

7. The European Parliament and Commission were concerned that divergent national contract laws within the member states were having a detrimental impact on cross-border trade in the internal market, given high transaction costs for traders wishing to sell in another member state, and a lack of consumer confidence in purchasing products from another member state.

8. Furthermore, the development of European contract law had been piecemeal. Specific issues, mainly relating to consumer protection, had been looked at individually. This had resulted in inconsistencies, gaps and overlaps in the resultant EU legislation.

9. The Commission therefore sought a common frame of reference which could be used in trying to resolve these issues both in contract law and in certain other areas of private law, notably moveable property law. The result was the DCFR. The DCFR is an

academic text, which can be used as a basis by the European institutions to produce a common frame of reference in future. It therefore has persuasive force only.

### Uniform Commercial Code/Personal Property Security Acts

10. The Commission has also had regard to the Uniform Commercial Code (“UCC”) of the United States of America. The UCC is another model law, although it has been adopted in most of the States of the Union.

11. The UCC is divided into Chapters, and Chapter 9 (“UCC-9”) deals with security interests in moveables.

12. The UCC has strongly influenced developments in security regimes in other jurisdictions including Canada, Australia and New Zealand. In those jurisdictions the enabling legislation is usually described as Personal Property Security Act (“PPSA”), where “personal” connotes moveable property.

13. The full text of the UCC is available at: <http://www.law.cornell.edu/ucc.table.html>.

### Part 1 Assignment

14. The Bill will modernise and clarify some technical aspects of the law relating to the assignment of claims, and will address a number of anomalies within the current legislative framework so that the law in this area is fairer, clearer and more consistent.

15. “Claim” is defined in subsection (2) of section 42. It is the right to the performance of an obligation, subject to two exceptions.

16. The first exception is in respect of performance of a non-monetary right relating to land (also called “heritable property”). It is therefore only a claim to a monetary right relating to land that is a claim for the purposes of the Bill, such as a claim relating to an assignment of rents. The existing law will apply to non-monetary claims.

17. The second exception is in respect of negotiable instruments, such as cheques and bills of exchange. Again, the existing law will apply to such instruments.

18. Typically, therefore, a ‘claim’ for the purposes of the Bill will be the right to be paid money. The reforms are particularly relevant to debt factoring, invoice discounting and taking security in relation to rents by assignment.

19. An assignment may be intended to be a permanent transfer of the claim, or it may be intended as a transfer for the limited purpose of giving security for a loan to the assignor or some other person. In either case, the assignment will effect an outright transfer of the claim to the assignee. If the assignment is in security then the claim will be transferred back to the assignor when the obligation is discharged (typically on repayment of a loan), and the deed giving effect to that transfer is usually described as a “retrocession”. It is however an assignment in its own right and falls to be treated as such by the Bill.

20. Part 1 of the Bill has 42 sections which cover the following key areas:

- A claim must be assigned by an assignment document,
- An assigned claim is transferred to the assignee by intimation or by registration,

- Warranties apply, by default, to the transfer of a claim,
- An assignation may be made subject to a condition which must be satisfied before transfer,
- A claim that is yet to come into being can be assigned,
- Reduced formal requirements apply, in respect of the assignation of a claim that qualifies as a security financial collateral arrangement, or a title transfer financial collateral arrangement,
- Protection for debtors who do not know of the assignation and therefore perform to the assignor rather than the assignee,
- A bar on the assignation by an individual of a claim for wages or salary due to the individual,
- A new Register of Assignations to be kept by the Keeper of the Registers of Scotland,
- Applications for registration,
- Correcting errors in the Register, and applications for correction,
- The liability of the Keeper and of other persons for errors in the Register,
- Searching the Register,
- The right to request further information from the assignee in a registered assignation,
- The making by the Scottish Ministers of such further rules as seem proper to them in respect of the operation etc. of the Register, and
- The repeal of the Transmission of Moveable Property (Scotland) Act 1862 (which is superseded by the Bill).

## Part 2 Security over moveable property

21. A pledge is under the common law a type of security in which the person granting the pledge continues to own the property subject to the pledge, and the person in whose favour the pledge is granted acquires a separate real right of security in the property.

22. The only pledge under the current law is a possessory pledge over corporeal moveable property. The security can only be created by actual delivery of the property to be pledged to the creditor, for example by pawning jewellery as security for a loan from a pawnbroker.

23. It is not currently lawful to grant a non-possessory pledge over corporeal moveable property such as a motor vehicle, or a pledge of any kind over incorporeal moveable property such as intellectual property.

24. The Bill therefore:

(a) reforms the law of possessory (common law) pledge over corporeal moveable property, and

(b) introduces a new statutory pledge over both corporeal and incorporeal moveable property.

25. The new statutory pledge will be created by registration in a Register of Statutory Pledges to be held by the Keeper of the Registers of Scotland ("the Keeper").

26. So far as possible there is to be the same enforcement procedure for both common law and statutory pledges. The rationale for this is that the security rights although over different types of property otherwise largely differ only as to creation, namely delivery of the property in the case of a common law possessory pledge, and registration in the case of the statutory pledge.

27. Part 2 of the Bill has 75 sections which cover the following key areas:

- The codification of the delivery rules for possessory pledge,
- A new statutory form of non-possessory pledge, created by registration, over corporeal and incorporeal moveable property,
- The exclusion of certain types of property from being made subject to a statutory pledge, including a restriction on pledge on incorporeal moveable property other than intellectual property and financial instruments,
- Restrictions on the freedom of the person granting a statutory pledge to deal with the property subject to a statutory pledge,
- Protections for persons who in good faith acquire property subject to a statutory pledge,
- The assignation, amendment, restriction, and extinction of a statutory pledge,
- The ranking of pledges, both common law and statutory,
- The enforcement of pledges, both common law and statutory,
- The Register of Statutory Pledges,
- Applications for registration etc. of statutory pledges,
- The nature of an effective registration,
- The duration of a statutory pledge,
- Correcting errors in the Register, and applications for correction,
- The liability of the Keeper and of other persons for inaccuracies in the Register,
- Searching the Register, and copies and extracts of information in the Register,

- The right to request further information from the creditor in whose favour a statutory pledge is granted,
- The making by the Scottish Ministers of such further rules as seem proper to them in respect of the operation etc. of the Register, and
- It ceasing to be competent to create an agricultural charge.

### Part 3 Interpretation, Miscellaneous and General

28. This is the final part of the Bill which deals with various self-explanatory matters.

## **THE BILL - COMMENTARY ON SECTIONS**

### **PART 1 ASSIGNATION**

#### **Chapter 1 – Assignment of claims, protection of debtors and related matters**

##### **Section 1 Assignment of claims: general**

29. Subsection (1) provides that a claim can only be assigned by means of a document (“assignment document”), and that subject to one exception in subsection (6) the rule is that the assignment document must be signed by or on behalf of the person assigning the claim either in ink if a hard copy (“executed”) or with an electronic signature if an e-document (“authenticated”).

30. Section 42(1) of the Bill provides for the meaning of “claim”, and section 118(1) of the Bill provides for the meaning of “authenticated”.

31. The exception to the rule is for security financial collateral arrangements and title transfer financial collateral arrangements, where the requirement for the document to be executed or authenticated does not apply. See section 4(2)(a) of the Bill in that respect.

32. Subsection (2) defines the terms “assignor”, “assignee” and “debtor” for the purposes of Part 1 of the Bill. The assignor is the person assigning the claim (the person to whom an obligation must be performed is also described in the Bill as the “holder” of the claim). That claim is an obligation enforceable against the debtor. The assignee is the person to whom the claim is assigned.

33. Subsection (3) requires the claim to be described, but subsection (4) makes it clear that claims do not need to be individually described in the assignment document provided that they fall within a class that is described. Thus, for example, it would be possible for a business to assign all invoices raised against a particular customer, or all invoices rendered in a specified period.

34. Subsection (5) confirms that a claim that is not held by the assignor at the date of the assignment, including a claim that has not yet come into being, can be assigned. Under the existing law, the requirement of intimation to the debtor makes it difficult to assign such ‘future’ claims. For example, a plumbing business may wish to assign to a factor the invoices for work not yet instructed by a customer. It is not possible to complete the

assignment by intimating such a claim until the work had been done, and the debtor can be identified. The alternative method of registration in the Register of Assignations (“RoA”) as set up under section 19 of the Bill will however enable the assignment of future claims.

## **Section 2      Assignment of a claim subject to a condition**

35. This section makes it clear that an assignment can be made subject to a condition which must be satisfied before the claim is transferred, often referred to as a “suspensive condition”. Under the existing law there is a lack of authority on the competence of such conditions.

36. Subsection (2) requires the condition to be set out in the assignment document. This is so that a third party can discover from the document whether there is such a condition or not (and in the case of registered assignments a copy of the document will be included in the assignments record). There is an exception to this rule for security financial collateral arrangements and title transfer financial collateral arrangements, where the formalities of constitution require to be relaxed in order to comply with European Union rules.

37. Subsection (3) allows the condition to be set out by reference to another document, for example a loan contract.

38. Subsection (4) clarifies the generality of the position as set out in subsection (1) by setting out in more detail the nature of a condition for the purposes of this section.

## **Section 3      Transfer of claims**

39. This section sets out, with one class of exceptions, when an assigned claim is transferred.

40. There are two options to effect transfer, namely (a) intimation (notification) to the debtor, or (b) registration of the assignment in the RoA. These are set out in subsection (1)(a)(i) and (ii). But the claim will only transfer on intimation or registration if it is identifiable at that moment in time. If it is not so identifiable at that moment, transfer is postponed under subsection (1)(b) until the claim does become identifiable.

Example 1: Arthur grants an assignment document in favour of Barbara in respect of a £1,000 debt owed by Zoe. Barbara registers the assignment in the RoA. The claim in respect of the £1,000 debt transfers on registration because the debt is clearly identifiable.

Example 2: Debra grants an assignment document in favour of Excellent Factors Ltd in respect of the customer invoices set out in schedules to be sent from time to time by her to Excellent Factors Ltd. Excellent Factors Ltd registers the assignment in the RoA before any such schedule is sent. At this moment nothing is transferred because the claims are not yet identifiable. But, on the subsequent sending of a schedule listing invoices the claims in respect of those invoices become identifiable and are transferred.

41. Subsection (2) provides that for assignments which are subject to a condition, transfer cannot take place until the condition is satisfied. It is based in part on paragraph 5.106 of Chapter 5 of Book III (obligations and corresponding rights) of the DCFR.

42. Subsection (3) provides that in the case of a future claim, transfer cannot take place until the claim becomes held by the assignor.

Example. A plumbing business assigns its invoices for the next month to a factor. Two days later Mrs Smith calls the business because her shower is broken. A plumber repairs the shower that same day. The bill is £100. The business's claim to be paid the £100 by Mrs Smith immediately transfers to the factor because (a) the claim has come into being and (b) the claim is identifiable as a claim to which the assignation document relates.

43. Subsection (4) disapplies the doctrine of accretion in relation to the assignation of future claims. Accretion operates where a person with no title has purported to grant a right to a third party, and that person subsequently obtains title, so that the defect in the right of the third party is cured. However the parameters of this doctrine in relation to future claims are unclear, as is its interaction with insolvency. (For heritable estate – interests in land - only there is express provision under the Bankruptcy (Scotland) Act 2016 s 78(7)). The intention is that the new express rules on assignation of future claims will displace any conflicting common law rule.

44. Subsection (5) sets out three qualifications in relation to the rules on when claims transfer under subsection (1).

The first qualification relates to security financial collateral arrangements and title transfer financial collateral arrangements, mentioned above and dealt with in section 4(2)(a).

The second qualification relates to subsection (6) which enables the Scottish Ministers to prescribe certain categories of claim which require registration for transfer.

The third qualification concerns registration so that a claim is only transferred where the registration is an effective registration for the purposes of section 26 (and see also the commentary on that section below).

45. Subsection (6) enables the Scottish Ministers to prescribe certain categories of claim which can *only* be transferred by registration in the RoA. In England and Wales there is support for the view that an assignment of trade receivables should require registration to have third party effect. If for example registration was to become compulsory in respect of trade claims in England and Wales, then there may be support for this to be the position in Scotland too.

#### **Section 4 Security financial collateral arrangements and title transfer financial collateral arrangements**

46. This section deals with the special case of an assignation of a claim for the purpose of a security financial collateral arrangement (SFCA) or a title transfer financial collateral arrangements (TTFCA). EU law requires that arrangements of that kind can be effected with minimum formality: see Directive 2002/47/EC on Financial Collateral Arrangements, as transposed for the UK by the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003/3226).

47. EU law does not, however, require parties to treat arrangements of that kind as a special case. The parties can therefore still choose to intimate or register an assignment under section 3 of the Bill.

48. Subsection (2)(a) provides that if the assignment document evidences a SFCA or TTFCFA then the steps of intimation or registration are not required to transfer the relevant claims. Instead, the claim may transfer when the financial collateral in question comes into the possession of, or under the control of, the collateral-taker within the meaning of the Regulations. In that event there is no requirement for the assignment document to be signed or for any suspensive condition to be specified within the document.

49. Subsection (2)(b) makes it clear that transfer is also possible under section 3.

50. Subsection (3) adopts several of the definitions in the 2003 Regulations.

51. Subsection (4) reflects the terms of the 2003 Regulations by providing that the assignment document may be created as certain forms of transcribed writing or recorded sounds. But the transcription or recording must be in a durable medium, such as paper or a hard drive.

## **Section 5      Assignment of claims: insolvency**

52. This section regulates the effect of the assignor's insolvency on the assignment of future claims.

53. Subsection (1) identifies the effective date of insolvency in the five principal types of insolvency process, namely sequestration and protected trust deeds, in the case of individuals and other non-companies; and winding up, receivership and administration in the case of companies.

54. The effect of subsection (2) is that an assignment of a specified type of future claim is ineffective if the claim comes into being on or after the effective date of the insolvency. The specified types are claims that relate to money paid, to property or services supplied, or to work done. The result is that the assignor is protected in such cases as the result of their efforts after that point will not go to the assignee, and will be available to the assignor or to the creditors otherwise in accordance with the existing law.

Example 1: A tradesman assigns future invoices to a factor. The tradesman is sequestrated, and carries out a new job on or after the date of sequestration. The invoice for that job will not be transferred to the factor, because it arose from the tradesman's efforts after that date.

Example 2: A landlord assigns the future rent on a property to a bank. The landlord is sequestrated. The assignment remains effective for rents arising after the date of sequestration because the rents derives from an asset (the property) rather than from the effort of the landlord.

55. Subsections (1) and (2) apply whether or not a trust deed is granted over either all or part of the assignor's estate. This takes account of section 166 of the Bankruptcy (Scotland) Act 2016 in terms of which a creditor in a loan secured over a dwellinghouse may, by an agreement with the debtor as set out in the definition of "trust deed" in section 228 of that



Act, be excluded from the trust deed. In effect, an agreement under that Act makes it possible for an insolvent debtor to stay in their home.

56. Subsections (3) and (4) deal with the position where a future claim has been assigned by an individual who is sequestrated or has granted a protected trust deed, and who is subsequently discharged from the insolvency. Any claim which comes into being after the discharge is not transferred by the assignment, with the effect that the individual is helped to make a fresh start. Legal persons such as limited companies will generally cease to exist after insolvency because the effect of the insolvency is to bring the corporation to an end.

57. Subsection (5) gives the Scottish Ministers power to amend the list of insolvency processes in subsection (1), as well as to apply subsections (3) and (4) to circumstances other than sequestration or the granting of a trust deed.

## **Section 6      Assignment in part**

58. Subsection (1) clarifies that a claim may be assigned in whole or in part. It is based in part on paragraph 5.107 of Chapter 5 of Book III (obligations and corresponding rights) of the DCFR.

Example: Andrew lends £2,000 to Brenda. He then has a claim for repayment of that sum. But he could assign £500 of that claim to Carol and the other £1,500 to Doris. These would be assignments in part.

59. Subsection (2), as read with section 7(2), has the effect that:

- the debtor (the person who must perform the obligation which is the subject of the claim) and the holder of the claim can agree, or
- the party whose unilateral undertaking gives rise to the claim can stipulate,

that assignment in part is not permissible, or is only permissible in particular circumstances.

60. Subsection (3) provides that where the claim is not one requiring payment of money, then assignment in part is only permissible in two circumstances.

The first is where the debtor consents.

The second is where the claim is divisible, and the assignment in part does not result in a significantly greater burden on the debtor. Thus an obligation to supply two cars to two people rather than to one might not be much more burdensome, but delivering 500 cars to 500 people may well be.

61. Subsection (4) enables the debtor, by default, to recover the expense attributable to a claim being assigned in part from the assignor under subsection (1).

Example: Sending payments to several partial assignees rather than one assignee may be more costly.

62. The section does not make provision as to how any agreement is to be constituted. It might, for example, be in the agreement which gives rise to the claim or in a subsequent agreement.

## **Section 7 Limitations as to assignability**

63. Subsection (1) confirms the existing rule that the assignment of a claim may be debarred by either common law or statute. For example, the assignment of certain social security payments is forbidden under section 187 of the Social Security Administration Act 1992.

64. Subsection (2)(a) and (3) make it clear that the debtor and the holder or prospective holder of the claim can agree, or a person giving a unilateral undertaking can state, that it is non-assignable in whole or in part. This is known as an anti-assignment, or non-assignment, clause.

65. Subsection (4) has the effect that subsection (2) is subject to any enactment which renders anti-assignment clauses ineffective, such as sections 1 and 2 of the Small Business, Enterprise and Employment Act 2015.

66. Like section 6, this section does not make express provision as to how any agreement or statement is to be constituted.

## **Section 8 Claim in respect of wages or salary**

67. This section prevents individuals assigning their wages or salary and associated payments such as fees and bonuses. Existing statutory provisions prohibiting assignment of wages etc. in particular cases will also continue to apply.

## **Section 9 Intimation of the assignment of claim**

68. Section 3 of the Bill sets out that an assigned claim may be transferred by intimation under subsection (1) of this section.

69. Subsection (1) therefore sets out a new rule on the types of intimation that must be used in order to effect the transfer of a claim. It replaces the existing statutory rules on intimation in the Transmission of Moveable Property (Scotland) Act 1862, which is therefore repealed by section 41 of the Bill.

70. Subsection (1)(a) provides that either the assignee or the assignor may serve notice of the assignment on the debtor. The effect when read with subsection (3) is that written notice is required.

71. Subsection (1)(b) provides for “constructive” intimation to a debtor who has knowledge of the assignment of the claim.

Example: Having become aware of the assignment other than by notice, the debtor may promise to perform, or actually perform, something which the assigned claim obliges the debtor to perform to the assignee. The claim is transferred as a result without any need for written intimation to the debtor.

72. Subsection (1)(c) provides for intimation to be given, and the claim transferred, where the debtor is a party to judicial proceedings in which the assignment is founded on.

Example: The assignee raises an action against the debtor for performance of the obligation to which the claim relates. Thus if Andrew lends £2,000 to Brenda, and then he assigns the right to repayment to Carol, intimation to Brenda would be effected by Carol raising proceedings against Brenda founding on the assignment.

73. Subsection (2) confirms that intimation to any one co-debtor is to be treated as intimation to all the co-debtors, as under the existing law.

Example: Kenneth lends £1,000 to Leslie and Max. If he then assigns the right to repayment to Nicola then the claim will be transferred to her by intimation to either Leslie or Max.

74. Subsections (3) to (10) and (12) provide more detail on assignment by notice to the debtor.

75. Subsection (3) concerns the form and content of the notice. It should be read with section 15 of the Bill which sets out the right of the debtor to seek confirmation of an assignment. The notice must provide (i) the name and address of both the assignor and assignee; and (ii) details of the claim (or part claim) being assigned. It may be in any form that is prescribed by the Scottish Ministers (see section 118(1) of the Bill for the meaning of “prescribed”).

76. There is no requirement in subsection (3) that the notice is signed (in ink or electronically), or that it should consist of or be contained in a single document. The effect is to authorise modern practice in factoring where stickers are often placed on invoices instructing the debtor to pay the factor, but the stickers are not signed.

77. Subsection (3) also provides for a power for the Scottish Ministers to prescribe a style form of notice for the assignment of monetary claims. While the style would not be mandatory, it could be helpful to parties involved in assignments to have a clear statutory style.

78. Subsections (4) to (10) and (12) provide for service of the notice, and are based on section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010.

79. Subsection (4) permits three forms of service: (a) by personal delivery; (b) by post or courier; and (c) by electronic transmission. The Bill deviates from section 26 of the 2010 Act by allowing ordinary post and couriership because modern debt-factoring practice is to use this rather than registered delivery (despite it being harder to prove delivery). Intimation can be made either to the “proper address” of the debtor as defined in subsection (6), or an address supplied by the debtor.

80. Subsection (5) defines certain terms by reference to the Postal Services Act 2011.

81. Subsection (7) provides that where a notice is served by post in the UK it is deemed to be received 48 hours later unless earlier receipt can be shown. Subsection (8) has a similar rule for electronic transmission, in this case 24 hours.

82. The purpose of these provisions is to provide certainty as to the time of intimation when the claim transfers. This is important in a question with third parties, such as creditors carrying out diligence. If the notice has not actually reached the debtor (for example, by going missing in the post) then the good faith protection rules in section 11 will apply.

83. Subsections (9) to (11) allow the parties to make a determination that a notice must be served by means of one of the permitted ways (e.g. by electronic means), or to a particular address. In other words, the default rules can be replaced up to a point. Intimation by oral means is not permitted.

84. Subsection (11) in particular clarifies that a determination can be entered into between a debtor and the prospective holder of a claim.

85. Subsection (12) allows service to be made on a party who is authorised to act on behalf of the debtor for that purpose, such as a solicitor.

## **Section 10 Warrandice implied in the assignation of a claim**

86. This section provides for warranties that an assignor is deemed, unless agreed otherwise, to give to the assignor in respect of a claim being assigned. It puts the current law into statutory form, and clarifies the effect of that law (for which see section 17(1)(d)).

87. Subsection (2) provides for both assignments for value and for gratuitous (free) assignments. In the first case the implied warranties apply the common law principle of warrandice *debitum subesse* (the debt exists). In the second case the warrandice implied relates to the principle of warrandice of facts and deeds only.

88. Subsection (3) clarifies that the assignee is not held to warrant that the debt will be paid. In other words, the assignor does not guarantee that the debtor is solvent and can pay the debt that is due.

89. Subsection (4) has the effect that the warranties are where applicable implied in any contract relating to the assignation of a claim as well as in the assignation itself.

## **Section 11 Protection of debtor who performs in good faith**

90. Under the existing law, a claim will only transfer if it is intimated to the debtor, but the effect of the changes in the Bill is that a claim may transfer by either of intimation or registration.

91. The debtor may not know that a registered claim has been assigned, and may in good faith pay the wrong creditor. This section has the effect that a debtor who does not, and should not, know that a claim has been assigned will still be discharged from the debt to the extent of any payment made to the assignor (or any person nominated by the assignor).

Example: Paul lends Roger £5,000. Paul assigns his right to repayment to Susan, and she registers the assignation in the RoA. The effect is to transfer the claim. But Roger who knows nothing of the assignation repays Paul (who accepts rather than telling Roger to pay Susan). Roger does not require to pay Susan if she then intimates the assignation to him.

92. Subsections (1) and (2) provide for a general rule protecting a debtor who performs in good faith to the assignor where a claim has been assigned in whole or in part.

The “last known holder of the claim” formulation in subsection (1) deals with the fact that there may have been a chain of assignments rather than only one.

93. Subsection (3) provides that the fact that an assignment has been registered, or that it is deemed to have been intimated, does not of itself mean that the debtor does not perform in good faith. In particular, debtors should not be expected to have to check the Register of Assignations set up under section 19 of the Bill.

94. Good faith is not further defined in this section. The concept is to an extent subjective, and whether or not a debtor is in good faith will depend on the facts of the case.

Example: Susan might make intimation to Roger by means of a 200 page document with the words of intimation half way down page 172. Roger may be in good faith if he still pays Paul.

95. See also section 120 of the Bill which places the onus of showing that the debtor has performed other than in good faith on the person making such an assertion.

Example: Imagine in the example in the previous paragraph that Roger pays Paul because he says that he never received substantive intimation from Susan. Susan could try to prove that intimation was properly given in the 200 page document, but in practice she might choose to get the debtor to confirm that the claim has been intimated so that there is no question of it having gone missing in the post or the like.

## **Section 12 Further provision as to protection of debtor**

96. This section provides further protections for debtors acting in good faith.

97. Subsection (1) sets out the four criteria which must each be met in order for the protection in subsection (2) to apply.

The first is that the holder of the claim grants more than one assignment document in respect of the same claim (or part claim).

The second is that the claim is transferred by one of the assignments. Typically, this will be by a registration of which the debtor is unaware.

The third is that the debtor is informed of one of the assignments, either by means of a notice or by being made party to judicial proceedings founding on that document, by virtue of which the claim is purportedly assigned.

The fourth is that by virtue of being so informed the debtor performs to the grantee of that assignment document.

98. Subsection (2) provides that if the performance to the grantee of the assignment document is in good faith then the debtor is discharged from the claim (or part) to the extent of the performance.

Example: Liana owes Kimberley £1,000. Kimberley assigns her claim to repayment to Monica. Monica registers the assignation in the Register of Assignations. She does not intimate to Liana. Kimberley then assigns the same claim again to Neil. Neil intimates to Liana. Liana pays Neil, and provided that Liana is in good faith she should be discharged from the claim and not have to pay Monica.

99. Subsection (3) imports the rules that apply under section 11(3) of the Bill, namely that the debtor is not in bad faith merely because an assignation has been registered in the RoA, or because intimation has been deemed to have taken place. Once again section 120 of the Bill is relevant as to the onus of showing that performance was other than in good faith.

### **Section 13 Performance in good faith where claim assigned is of a prescribed type**

100. This section provides further protections for debtors acting in good faith.

101. Subsection (1) sets out the two criteria which must each be met in order for the protection in subsection (2) to apply. The first is that the assignation relates to a claim of a type prescribed by the Scottish Ministers under section 3(6) of the Bill as being one that can only be transferred by registration, and the assignation has not been registered. The second is that, despite the claim not having transferred, the debtor performs in good faith to the assignee.

102. Subsection (2) provides that the debtor is discharged from the claim (or part) to the extent of the performance.

103. Subsection (3) sets out that the debtor will not be taken to be in good faith where the debtor knows both that the assignation has not been registered (perhaps because the assignee has stated as much), and that registration is required.

### **Section 14 Asserting defence or right of compensation**

104. This section puts the common law rule *assignatus utitur jure auctoris* (the assignee takes the rights of the assignor) into statutory form. It is also based in part on paragraph 5.116 of Chapter 5 of Book III (obligations and corresponding rights) of the DCFR.

105. The new statutory rule applies by default, so that it is open to the debtor and the assignor to agree that the debtor may not assert a right that would otherwise be available. This section does not make express provision as to how any agreement is to be constituted, although it will need to pre-date the assignation.

106. The effect of subsection (1)(a) is that, unless agreed otherwise by the debtor and the assignor, any defences which the debtor can plead against the assignor can also be pled against the assignee.

Example: Ona sells goods to Peter for £1,000. The sale is on credit and Ona assigns the claim for payment to Quentin. It turns out that the goods are defective. If this entitled Peter to refuse to pay Ona, he is equally entitled to refuse to pay Quentin. It does not matter that Quentin is in good faith.

107. Subsections (1)(b) and (5) provide a special rule for compensation (which includes contractual set-off).

Example: Ian owes John £1,000 but John owes Ian £200. Ian is entitled to set-off the £200 debt and only pay John £800. This entitlement remains good if John assigns the £1,000 claim to Kirsten. Ian only has to pay Kirsten £800.

108. Subsection (2) has the effect that compensation can be pled in respect of any debt becoming due in the period up to the date that the debtor knows that there has been an assignment. This replaces the existing law that compensation can only be pled in relation to debts which arose prior to the date of intimation of the assignment, and is necessary because under the Bill a claim can transfer by registration.

109. Subsection (3) applies the rules set out in section 11(3), for which see the commentary to that provision.

110. Subsection (4) states that any agreement made by the parties that a defence cannot be asserted against the assignee is subject to a contrary rule in any enactment. For example, a consumer debtor may be protected by the unfair contract terms provisions in the Consumer Rights Act 2015.

## **Section 15 Right to withhold performance until evidence of, or statement as to, assignment is provided**

111. This section provides protections for debtors.

112. It will often be the case that the debtor has no knowledge of the assignee, particularly as there is no requirement under the Bill to send a copy of the assignment document when intimating the assignment.

113. Subsection (1) applies where intimation of an assignment has been given either by notice or in court proceedings, and has the effect that the debtor may request sufficient evidence of the assignment (and of any previous assignment) from the assignee.

Example: George owes Henry £500. Henry assigns the claim for payment to Imogen. She registers the assignment in the RoA. She then assigns to Jay. Jay intimates to George. George can request reliable evidence of both the Henry/Imogen and Imogen/Jay assignments.

114. Subsection (2) gives an example of “sufficient evidence”, namely written confirmation of the assignment from the assignor. There is no express requirement to provide a copy of the assignment document as it may contain information confidential to the assignor/assignee or a third party.

115. Subsections (3) and (4) apply where the debtor has not received a formal intimation of the assignment, but has reasonable grounds to believe that the claim has been assigned. The debtor may state those grounds to the supposed assignor, and require that party to confirm the position in writing. If the claim has been assigned then the assignor must provide the name and address of the person to whom the debtor must perform the

obligation, which might be the assignor if the assignee and the assignor have an agreement to that effect.

116. A request for evidence, or a statement of grounds, need not be in writing.

117. Subsection (5) sets out the remedy where no reply is received to an enquiry in either of the above cases. The debtor is entitled to withhold performance from either of the assignor or the assignee until the evidence or a statement is provided.

118. Subsection (5)(a)(ii) prevents performance being withheld where the assignor confirms that there has been no assignation. This deals with the situation where the “assignee” is a fraudster who wants to prejudice the holder of the claim by making a fake intimation.

119. The right to withhold performance under this section is a free-standing right and separate from the protections provided for by sections 11 to 13 of the Bill.

## **Section 16 Accessory security rights**

120. It is an existing rule of Scots law that where a claim is assigned the assignee is entitled to the benefit of any accessory rights enjoyed by the assignor. This section puts the rule onto a statutory footing as regards accessory security rights.

121. Subsection (1) makes it clear that the rule is a default one leaving it open to the parties to an assignation to agree otherwise, and that it only applies where the whole claim is assigned. Assignations in part raise more complex questions, and it would be expected that the parties would make their own provision in such cases. If they do not, the partial assignation will not carry the security right.

122. Subsection (2) has the effect that the assignation will transfer any security which relates to the claim assigned, and is restricted to that claim.

Example 1: David lends Edgar £100,000. Edgar grants a standard security over his house in respect of the £100,000 debt. If David assigns the right to repayment of the £100,000 to Flora then she acquires the security unless agreed otherwise.

Example 2: As for example 1, but the standard security is granted for all sums due and that may become due. The assignation of the right to repayment of the £100,000 does not carry the security unless agreed otherwise, because the security is not restricted to the £100,000.

Example 3: As as for example 2, but the assignation document expressly states that the all sums security is carried. Flora acquires the security.

123. In terms of subsection (3), if the assignee acquires a security then the assignor is required as soon as reasonably practicable to perform any steps necessary to transfer the security to the assignee. For example, in the case of a standard security an assignation under section 14 of the Conveyancing and Feudal Reform (Scotland) Act 1970 must be registered in the Land Register of Scotland.



124. Subsection (4) defines “security” as including both a right in security (see section 42(3) of the Bill) and cautionary obligations (such as a personal security or guarantee).

## **Section 17 Abolition of certain rules of law**

125. Subsection (1) abolishes four common law rules.

126. The first is any rule that a mandate (personal instruction) to deal with a claim may operate as an assignation of the claim. The existing law is unclear and abolishing any such rule will therefore clarify the law.

127. The second is any rule under which an assignation is made ineffective by an instruction to the debtor by the assignee to continue to perform to the assignor. There is some authority suggestive of such a rule, which is inconvenient in commercial practice.

128. The third rule is the one permitting the assignee to sue in the name of the assignor. The result is that the assignee must now raise proceedings in his or her own name.

129. The fourth rule is any rule in relation to the warrandice to be implied in an assignation, or a contract relating to an assignation. Section 10 now deals with this matter.

130. Subsection (2) makes it clear that the abolition of those rules is without prejudice to any rule as respects subrogation, which may be regarded as a form of assignation. The effect is to preserve the well-established practice that insurers sue in the name of the insured in personal injury and other insurance cases.

## **Section 18 Saving as respects International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015**

131. This is a saving provision which relates to certain rights (known as “associated rights”) which are governed by the 2015 Regulations.

132. The 2015 Regulations implement the 2001 Convention on International Interests in Mobile Equipment (the “Cape Town Convention”). The Convention was agreed under the auspices of the International Institute for the Unification of Private Law, also known as UNIDROIT.

133. The Cape Town Convention makes provision, amongst other things, for an international security right in respect of aircraft objects as defined in the Convention. There are special rules in relation to the assignment (assignation) of such a right, and these rules take precedence over the provisions in Part 1 of the Bill.

134. For example, regulation 27 of the 2015 Regulations deals with the effect of the assignment of “associated rights” (rights to payment or to other performance) on the related international interest.

## **Chapter 2 – Register of Assignations**

### **Section 19 The Register of Assignations**

135. Subsection (1) establishes the new register in which assignments of claims can be registered. The register is to be known as the “Register of Assignations” (and is referred to in these notes as the “RoA”).

136. Subsection (2) provides that the register is to be under the management of the Keeper (see section 118(1) of the Bill for the definition of “Keeper”).

137. Subsection (3) states, that subject to the requirements laid down by the Bill, the Keeper has discretion as to the form in which the register is kept. That will therefore include being kept in a wholly electronic form.

138. The RoA, like other registers under the Keeper’s control, is an important public asset. Subsection (4) provides that the Keeper is to take such steps as appear reasonable to the Keeper to protect the register from interference, unauthorised access or damage (for example by hacking).

139. Subsection (5) enables the Scottish Ministers, in consultation with the Keeper, to set fees in relation to the RoA using their powers in section 110 of the Land Registration etc. (Scotland) Act 2012.

## **Section 20 The parts of the Register of Assignations**

140. This section provides for the Keeper to set up and maintain the RoA in two parts, namely the assignments record and the archive record.

## **Section 21 The assignments record**

141. This section sets out the types of data and documents which must be included in an entry in the assignments record, and provides that the assignments record is the totality of such entries.

142. The details of the assignee will be included in the entry in the assignments record, although it will not be possible to search against the assignee under section 32 of the Bill (unless the Scottish Ministers specify accordingly in RoA rules made under section 40 of the Bill). It will however be possible for an entitled person as defined in section 36 of the Bill to request information about the assignment from the assignee under that section.

143. An assignor or assignee may be a legal person with a unique identifying number, such as a UK limited company or limited liability partnership. The Scottish Ministers will be able to specify that these unique numbers are included in the entry in the assignments record: see section 40(1)(c)(ii) of the Bill.

144. This section provides that an entry in the assignments record must include a copy of the assignment document. The Scottish Ministers may however specify in RoA rules that information in the record including data in such a document is not to be available to persons searching the RoA, in order to protect confidential information of the parties where appropriate (see section 40(1)(f)) .

## **Section 22 The archive record of the Register of Assignations**

145. This section sets out that the archive record is the totality of the entries which have been moved there from the assignments record, and of any other data required to be entered in the record by RoA Rules.

### **Section 23 Application for registration of assignment**

146. Subsection (1) enables the assignee to apply to the Keeper to register an assignment in the Register of Assignations.

147. Subsection (2) sets out that the Keeper must accept the application if it is in due form as specified in this section and any RoA rules, and any fee is or will be paid.

148. Subsection (3) sets out that the Keeper must reject an application that does not conform to subsection (2).

149. Subsection (4) provides that the Keeper must on accepting an application make up and maintain the appropriate entry in the RoA (which includes allocating a registration number (as defined in section 118(1) of the Bill)).

### **Section 24 Verification statement**

150. This section provides that when the Keeper has, as a result of a successful application under section 23, registered an assignment the Keeper must send a statement to the applicant verifying what has been done.

### **Section 25 Date and time of registration**

151. Subsection (1) provides that the date and time of registration of an assignment will be the date and time shown for the relevant registration on the entry for the assignment.

152. Subsection (2) requires the Keeper to process applications for registration of assignments in the order in which they are received. The effect is to ensure that the priority of registration (and therefore of ranking of claims in for example an insolvency) is clear.

### **Section 26 Effective registration of assignment**

153. Subsections (1) and (2) set out two circumstances in which a purported registration in the assignments record is wholly or partly ineffective.

The first is that the entry does not include a copy of the assignment document.

The second is that the entry contains an error or omission which as at the time of registration is “seriously misleading” (for which see section 27(1)).

154. Subsection (3) enables an ineffective registration to become effective by means of a correction. The effect of this provision when read with section 31(2) of the Bill is that the registration becomes effective on the date of the correction.

### **Section 27 Seriously misleading errors or omissions in entries in the assignments record**

155. This section makes further provision as to when an entry in the assignments record will contain an error or omission which is seriously misleading for the purposes of the generality of section 26(1)(b) of the Bill.

156. Subsection (1) or (2) has the effect that an entry is seriously misleading if a search of the assignments record by the Keeper for the purposes of sections 32 and 33 of the Bill using the specified criteria fails to disclose an assignor or a co-assignor. The specified criteria are as appropriate the proper name, proper name and date of birth, or any unique number (for which see paragraph 173 below).

157. The proper name of a person is to be determined by RoA Rules under section 40(1)(c) – see also subsection (9). RoA Rules might also prescribe a hierarchy of documents that could be used to evidence a proper name: for example passport, driving licence, birth certificate *etcetera*.

158. The time at which the search should be able to disclose an assignor or a co-assignor is the time at which the entry for the assignment was made up in the RoA. This is because there is no requirement to update the entry to correct a supervening inaccuracy such as a change of name by the assignor, for example on marriage.

159. Subsection (3) provides that in determining whether an error or omission is seriously misleading, the assignment document is not to be considered. The effect is that the person searching the record does not have to look at the document to determine whether the details are correct.

Example: An assignment document assigns a claim to John Smith, but the entry in the assignments record shows the assignee as Ali Baba. The entry is treated as being seriously misleading even although the true assignee could be discerned from the document.

160. Subsection (4) makes it clear that whether an error or omission is seriously misleading is to be determined objectively.

161. Subsections (5) to (7) deal with partial ineffectiveness, and have the effect that an entry in the assignments record may be partly effective.

Example: A single assignment of rents and other receivables is registered. RoA Rules made under section 40 provide for certain types of claims including rents and receivables to be identified in a tick box on the application form for registration, and for that information to be included in the entry. A failure to tick the rents box would lead to the registration being ineffective as regard the rents, which would not therefore transfer to the assignee. The receivable would however transfer if the relevant box on the application form was ticked.

162. Subsection (8) enables the Scottish Ministers to make regulations setting out further circumstances in which an error or omission is seriously misleading.

## **Section 28    Correction of the assignments record**

163. Subsections (1) and (2) of this section provide for the Keeper to correct a manifest inaccuracy in the assignments record, where what is needed to correct the inaccuracy is also manifest.

164. Subsections (3) and (4) provide for the Keeper, on correcting the record, to notify the relevant parties confirming what she has done.

### **Section 29    Directions for, or in relation to, correction of the assignments record**

165. This section ensures that the courts can where appropriate direct the Keeper to correct an entry in the RoA, and that the Keeper must comply with such a direction.

166. The Bill does not provide for an express right of appeal against or review of any decision by the Keeper. An issue relating to the accuracy of the register might however be raised in other proceedings including the judicial review of a decision by the Keeper.

Example 1: An assignment document is reduced by the court because it has been forged by one of the apparent parties. The court can direct the Keeper to correct the entry in the assignments record.

Example 2: An entry has been created in the assignments record for an assignment by P Ltd in favour of Q Ltd. But in the application form for registration of the assignment, Q Ltd erroneously states that Z Ltd is the assignor. Z Ltd could seek removal of the entry by the court. In practice they would be likely to use section 28 instead, as it would be less costly.

### **Section 30    Proceedings involving the accuracy of the assignments record**

167. This section provides for the Keeper to be entitled to be heard in any court or tribunal proceedings that may affect the exercise of his or her functions under the Bill.

### **Section 31    Correction of the assignments record: general**

168. This section deals with some general matters in relation to corrections.

169. Subsection (1) explains the various types of correction that are possible, but not all these types are relevant to all of the preceding provisions.

170. Subsection (2) sets out what is taken to be the date and time of correction. This is particularly important as regards section 26(3) under which an ineffective registration may be made effective by correction, enabling the claim to transfer.

### **Section 32    Searching the assignments record**

171. The RoA is a public register (see section 19(1) of the Bill), and this section provides for any person to be able to search the assignments record on payment of any fee (or on making arrangements for such payment).

172. The Bill does not make express provision for any person to be able to search the archive record. The Scottish Ministers may however make provision to that effect in RoA rules made under section 40(1)(h) of the Bill. It is also open to any person to obtain from the Keeper an extract of an entry in either the assignments record or archive record under section 35 of the Bill.

173. Subsection (2) sets out that only such searches in the assignments record as are specified in that subsection, or are specified under RoA rules, are permitted. They are a search by reference to:

- The name of the assignor,
- The name and date of birth of an individual assignor,
- The unique number of an assignor if required by RoA rules to be identified by the number,
- The registration number allocated to an entry by the Keeper, or
- Some other factor or characteristic specified in RoA rules.

174. The restriction on searches in the assignments record in this section has two effects.

175. The first effect is to reduce the risk of identity theft by ensuring that it will not be possible to search against date of birth alone. In addition, the Scottish Ministers will be able to prevent dates of birth from being disclosed on the face of the public register by using the power in section 40(1)(i) to specify information which will not be available to those inspecting the register.

176. The second effect is to reduce the risk of unfair commercial practices by not permitting a search against the assignee, which will often be a bank or finance company, that might enable a competitor to obtain a list of customers. This is a common feature of personal security regimes based on UCC-9, although the Scottish Ministers will have power to vary that restriction in RoA rules made under the Bill.

### **Section 33 Keeper's duties and powers as regards the provision of search facilities**

177. This section sets out that the Keeper must provide a search facility where the search criteria are specified in RoA rules, and may provide other searches.

178. Sections 32 and 33 of the Bill provide for searches for the purposes of the "seriously misleading" test in those sections. It will therefore be for Ministers to make such RoA rules as are needed under this section for those purposes.

### **Section 34 Printed search results and their evidential status**

179. This section enables printed search results obtained, in relation to an entry in the Assignations Record, from the Keeper to be used as evidence of certain matters and, moreover, to prove certain matters unless there is evidence to the contrary. There are similar provisions in PPSAs in other jurisdictions.

180. This section should be read with section 35 which relates to obtaining an extract from the Assignations Record, and provides for the admissibility and sufficiency of such an extract in evidence.

### **Section 35 Extracts and their evidential status**

181. This section provides that it is possible to obtain an extract of any entry or part of an entry in the RoA, on payment of any fee (or making an arrangement to pay). An extract is sufficient evidence of the contents of an entry at the time the extract is issued, and is admissible as such in for example any court proceedings.

### **Section 36 Assignee's duty to respond to request for information**

182. This section provides for entitled persons as specified in or under subsection (2) to be able to request information about a claim from the person identified as the assignee in the assignments record. The request does not require to be in writing.

183. The information that may be requested is, first, which claims are carried by the assignment and, second, whether a suspensive condition in the assignment has been purified. The right to request these types of information is of particular importance to future claims.

184. The effect is that persons with a legitimate interest in a claim that may be subject to an assignment will be able to obtain information that might not otherwise be available by searching the RoA, including whether a claim has become subject to an assignment for the purposes of section 3(2) and (3) of the Bill (future and conditional claims). Information provisions of this type are a common feature of UCC-9 and PPSA regimes.

Example: D Ltd is a plumbing business. It assigns its future customer invoices to B Ltd. D Ltd becomes insolvent. Its liquidator requires to see a list of the actual (now present rather than future) invoices which have been assigned, and makes an information request under this section.

185. Subsection (2) provides for the persons who are entitled persons for the purpose of making a request under subsection (1). Such a request may relate to whether or not a specified claim is assigned, or to whether or not a specified condition to which an assignment is made subject has been satisfied, and in either case the entitled person is any person who may have a right to exercise diligence against the claim. A person who is authorised to execute a charge for payment but has not yet done so may have a right to executed diligence for that purpose. In addition, an entitled person is any person who has the consent of the assignor to make the request or is a person prescribed for the Scottish Ministers (see section 118(1) of the Bill for the definition of "prescribed").

186. Subsection (3) gives the person named as assignee 21 days to respond, unless subsection (7) applies.

187. Subsection (4) allows the reasonable costs of responding to the request to be charged to the person making the request.

188. Subsection (5) gives the court power either to exempt the person named as assignee from complying with the request, or to grant further time. Depending on the circumstances, 21 days may be too short a period to assemble data.

189. Subsection (6) enables the court to order the person named as assignee to comply with the request for information without delay.

190. Subsection (7) excuses the person named as assignee from providing information in certain circumstances, namely (a) where the position as to whether the claim has been assigned is clear from the register or (b) where the information has been given within the last six months and has not changed.

### **Section 37 Liability of Keeper**

191. This section provides for the Keeper to compensate any person who has suffered a loss for a reason specified in subsection (1).

192. The liability under subsection (1) is strict in that the person does not have to show that the Keeper is at fault, but subsection (2) limits the losses that can be recovered by excluding certain types of claim. The limitation is similar to that in section 106 of the Land Registration etc. (Scotland) Act 2012.

### **Section 38 Liability of certain other persons**

193. This section provides for certain persons to be liable, on fault shown, for losses suffered by another person in the circumstances specified in subsection (1). The liability is fault-based.

194. Subsection (1)(a) applies where a person suffers loss as a result of an error or omission in an entry where the person who made the application which led to the entry did not exercise reasonable care.

Example: B maliciously registers a forged assignation bearing to be granted by C in an effort to affect his credit rating. C has a claim against B if he suffers loss.

195. Subsection (1)(b) applies where as a result of a failure to take reasonable care there is an error or omission in responding to an information request under section 36 of the Bill.

Example: Information is supplied by B that a certain claim is not carried by an assignation from A to B. B does not take reasonable care and the information is wrong. The party who receives the information then takes what will be an invalid assignation of the claim from A, because it has already been transferred to B. The person will have a claim against B.

196. Subsection (1)(c) applies where a person has failed to provide information under section 36 of the Bill without reasonable cause.

Example: A has granted an assignation of certain claims to B. C, a prospective funder of A, (with A's consent) seeks information about which claims are assigned and obtains a court order to obtain the information. B still does not comply and C departs. A has a claim against B for loss suffered due to being unable to obtain funding from C.

197. Subsection (2) imposes the same restrictions on liability as those set out in section 37(2).

### **Section 39 Service of notices for the purposes of certain provisions of this Chapter**



198. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 makes provisions in relation to the service (including sending) of documents in Acts of the Scottish Parliament.

199. This section modifies those provisions for the purposes of certain provisions in Part 2 of the Bill.

200. Paragraph (a) refers to subsection (4) of section 26 of that Act, which deals with the sending of notices. The effect of paragraph (a) is that a notice should be sent to the address for the person that is given in the register entry.

201. Paragraph (b) refers to subsection (2)(c) of section 26 of that Act, which deals with electronic communication of notices. The effect of paragraph (b) is that where an e-mail address is given for a person in the register entry, the electronic communication should be to that e-mail address.

#### **Section 40    RoA Rules**

202. This section sets out that the Scottish Ministers may, by regulations, make rules (referred to in the Bill and in these notes as “RoA Rules”) providing for the operation of the Register of Assignations. They must consult the Keeper before doing so.

203. The power to make RoA Rules includes the powers in paragraphs (f), (g) and (i) of subsection (1) to authorise the redaction of information or signatures from an entry in the RoA, or to make certain information unavailable to searchers (which might include an individual’s date of birth).

### **Chapter 3 – Miscellaneous and interpretation of Part 1**

#### **Section 41    Repeal of Transmission of Moveable Property (Scotland) Act 1862**

204. The 1862 Act makes provision for intimation of claims, is superseded by the Bill, and is therefore repealed by this section.

#### **Section 42    Interpretation of Part 1**

205. This section defines key terms used in this Part.

206. Subsection (2) defines “claim” as the right to the performance of an obligation, but excluding both non-monetary rights relating to land and negotiable instruments.

207. Subsection (3) makes it clear that the references in the Bill to “right in security” mean a right in security over property and includes a floating charge. The expression is not to that extent limited to “true” securities where the secured creditor has a subordinate real right in the asset.

208. Subsection (4) confirms that “performance” includes the fulfilment of negative obligations.

## **PART 2            SECURITY OVER MOVEABLE PROPERTY**

### **Chapter 1 – Pledge**

## **Section 43 Pledge**

209. Subsection (1) confirms that a pledge is a right in security over moveable property.

210. Subsection (2) sets out the methods by which the two types of pledge can be created. A possessory pledge over corporeal moveable property (the only type lawful under the common law) is created by delivery. A non-possessory pledge over corporeal or incorporeal moveable property is created by registration. Section 117 of the Bill has the effect that a reference to registering (however expressed) is a reference to registration of a pledge by the Keeper in the Register of Statutory Pledges under sections 89 and 91 of the Bill.

211. Subsection (3) provides for a pledge created by registration to be known as a statutory pledge, and subsection (4) defines the terms “secured creditor” and “provider”.

212. Subsection (5) sets out that nothing in subsection (2)(a) (creation of a possessory pledge) affects any rule of law in relation to a pledge over a negotiable instrument such as a bill of exchange or cheque.

## **Section 44 Secured obligation and secured property**

213. Subsection (1) sets out that the obligation secured by a pledge is referred to in the Bill as a “secured obligation”.

214. Subsection (2)(a) provides that a pledge can cover present and future obligations, as is the case for example with a real security over heritable property (see section 9(8)(c) of the Conveyancing and Feudal Reform (Scotland) Act 1970 in respect of obligations that can be secured on land). The effect is that it will be competent for a debtor to grant a pledge to a creditor for all sums due and to become due by the debtor.

215. Subsection (2)(b) provides, first, that a pledge can secure third party debt.

Example: George has an overdraft with a bank, and the bank is willing to accept a pledge over a car as security for the debt. But George does not have a car so his friend Holly kindly agrees to pledge her car. Holly is thus a third party providing security for the loan to George.

216. Subsection (2)(b) provides, second, that the secured obligation may be owed to a party other than the secured creditor. This would be the case where, for example, the secured creditor is a security trustee.

217. Subsection (2)(c) is influenced by the DCFR Book IX.-2:401(1), and provides that ancillary obligations are also covered by the security. The classic ancillary obligation is interest on a debt, but the effect of this subsection is that the security will extend to all ancillary obligations applying to a particular pledge. That might include securing an obligation to pay damages to the creditor, which is particularly important where non-monetary obligations are secured. It might also secure an obligation to reimburse the reasonable expense of extra-judicial recovery of interest or damages, such as interest accruing following the late payment of debts for the purposes of Directive 2000/35/EC on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p 35).

218. Subsection (3) sets out that the property over which a pledge is created and subsists is referred to in the Bill as the “secured property”.

219. Subsection (3)(b) again gives statutory effect to a general rule of law. Unless agreed otherwise, the secured creditor is entitled to the natural fruits of the secured property (such as the young of animals), but not entitled to the civil fruits (such as dividends on shares, or rent payments).

220. Subsection (4) provides that the secured property must be transferable. This gives statutory effect to a general rule of law applying to security rights, as a security over a non-transferable right has no practical value as the property could not be sold or leased. Sometimes the property is transferable subject to restrictions, and it will be possible to take security over such property (for example, certain intellectual property licences).

221. Subsection (5) provides that the default rule set out in subsection (3)(b) is without prejudice to the secured creditor’s right to enforce the security by leasing the property and taking the rental payments in satisfaction of the debt.

## **Section 45    Delivery**

222. This section puts the law on delivery of property by the owner for the purposes of a possessory (common law) pledge onto a statutory footing, with reforms.

223. Subsection (1) confirms that the property pledged must belong to the person providing the pledge.

224. It sets out four options for effecting delivery, at which time the pledge will be created. It makes clear, contrary to the decision in *Hamilton v Western Bank* (1856) 19 D 152, that the delivery required to create a pledge of corporeal moveable property is not restricted to actual (physical) delivery.

225. Subsection (2)(a) provides for physical delivery, either to the secured creditor or to the secured creditor’s agent. For example, Peter might decide to pledge his watch to Renata in respect of a loan, and will create the security by handing her the watch.

226. Subsection (2)(b) provides for delivery by means of giving control of the premises in which the property is kept. For example, Sean might pledge his boat to Teddy in respect of a loan by giving Teddy the only key to the boathouse in which the boat is stored.

227. Subsection (2)(c) provides for constructive delivery by means of an instruction to a third party holder of the property. It clarifies the law as it stood following the decision in *Inglis v Robertson & Baxter* (1898) 25 R (HL) 70.

Example: Ulrike might have whisky stored in a warehouse owned by Val. She wishes to use the whisky as security for a loan to her by Zebedee. Delivery is effected, and the pledge created, if Ulrike instructs Val to hold the whisky on behalf of Zebedee.

228. Subsection (2)(d) provides for symbolic delivery of property by means of delivery of a title document for the property, such as cargo aboard a ship as represented by the bill of

lading, or shares or bonds as represented by a bearer instrument. The title document will where necessary require to be endorsed in favour of the secured creditor.

229. Subsection (3) provides that delivery is not required if the property is already in the direct possession or custody of the prospective secured creditor.

Example: Joan has borrowed Karen's bicycle. Karen subsequently agrees that the bicycle can be pledged as regards a debt owed by Joan. The pledge is created when the agreement is made.

230. Subsection (4) confirms that section 2 of the Factors Act 1889 (which allows mercantile agents to pledge goods by means of handing over documents of title) continues to apply. A mercantile agent as defined in section 1 of that Act is an agent having in the customary course of business authority to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

## **Section 46    Constitutive document**

231. This section is the first of 19 sections (sections 46 to 64) that make provision for a statutory pledge.

232. Subsection (1) provides that a statutory pledge must have a constitutive document, with the effect that it is not competent to grant an oral non-possessory pledge. There is no equivalent rule for a possessory (common law) pledge as a security of that type is created by delivery as set out in section 45 of the Bill.

233. Subsection (2)(a) requires that the document must be subscribed by the provider using a physical signature ("executed") or signed electronically ("authenticated"). Section 118(1) of the Bill defines "authenticated" for that purpose. There is however an exception to that general rule for constitutive documents that evidence a security financial collateral arrangement in respect of a financial instrument, for which see section 51(5) of the Bill.

234. Subsection (2)(b) provides that the constitutive document must describe the secured property in which the secured creditor will have a subordinate real right. A general description of the property is competent (for example, "my computers"), as is a description by reference to another document, all subject to any requirements in regulations made by the Scottish Ministers under subsection (5). It should be noted that an entitled person as defined in section 110(2) of the Bill is able to obtain further information in respect the secured property by making a request to that effect to the secured creditor under that section.

235. Subsection (3) clarifies that a statutory pledge may be granted over property not yet owned by the granter at the time the pledge is granted. This subsection should be read with section 50(2) of the Bill which sets out that such a pledge is not created until (and if) the property becomes the property of the provider of the pledge.

236. Subsection (4) sets out that a pledge over multiple items may be granted by describing the items in terms of an identifying class. This subsection should be read subject to section 53(2) of the Bill which sets out that where an individual grants a statutory pledge he or she must generally describe each asset to be subject to the pledge.

237. Subsection (5) provides that the Scottish Ministers may by regulations make provision for the description of property described in a constitutive document. That might for example include requiring certain property to be identified by a unique serial number allocated to the property such as the VIN (vehicle identification number) of a motor vehicle as required by the Driver and Vehicle Licensing Agency.

#### **Section 47 Competence of creating statutory pledge over certain kinds of property**

238. This provision sets out the types of moveable property in respect of which it is not competent to grant a statutory pledge.

239. Subsection (1) provides for exclusions from the scope of a pledge that are needed in order to take account of the alternative modern security that exists for the types of property specified in those paragraphs. Thus for aircraft and for certain ships (and shares in a ship) it is possible to create an aircraft or ship mortgage. For aircraft objects it is possible to create an international interest under the Cape Town Convention as implemented - following ratification by the United Kingdom on 27 July 2015 - by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912).

240. The Cape Town Convention is an international treaty intended to standardise transactions involving movable property, and it creates in particular international standards for security interests, and various legal remedies for default in financing agreements (including repossession).

241. Subsection (2) limits the scope of a statutory pledge over incorporeal moveable property to the types of property listed in that paragraph. It has the effect of excluding all other types of incorporeal property from the scope of a pledge.

#### **48 Creation of statutory pledge by registration: general**

242. Subsection (1) provides the fundamental rule that a statutory pledge must - with one exception considered in paragraph 246(b) below - be registered in the Register of Statutory Pledges established under section 87 of the Bill (see section 117 for the meaning of references to “registering” or similar expressions).

243. This section also makes provision for the time of creation of a registered pledge.

244. Subsection (1)(a) has the effect that a pledge is created at the time of registration if the secured property is identifiable as property to which the constitutive document relates.

245. Subsection (1)(b) has the effect that where the property is not identifiable at the time of registration, then the pledge is created on it becoming so identifiable. For example, the constitutive document might not list all the motor vehicles belonging to the provider at that date which are to be subject to the pledge. The document might instead provide for the vehicles to be listed in a schedule to be delivered to the creditor, and if so the pledge will be created when the schedule is delivered as the property is then identifiable as property subject to the pledge.

246. Subsections (2) and (3) qualify the effect of this section in three respects:

(a) Subsection (1) is without prejudice to section 49(1) of the Bill, with the effect of clarifying that property can be added to the pledge by means of an amendment document,

(b) The section is subject to section 51(2)(a) of the Bill, with the effect that a statutory pledge over a financial instrument can be created coming into the possession of, or under the control of, a collateral-taker, and

(c) The section is subject to section 95 of the Bill, with the effect that registration is ineffective - and the pledge is not created - if the entry in the statutory pledges record kept under section 89 of the Bill does not include a copy of the constitutive document or is otherwise seriously misleading.

#### **Section 49 Addition to secured property of property which is property of the provider when an amendment document is registered**

247. This section provides for the creation of the security over property added to a statutory pledge.

248. Subsection (2) has the same effect for property added to a pledge as section 48(1) has for property described in the pledge at the time of registration (see paragraph 245 above).

249. Subsection (3) sets out that subsection (2) is subject to section 96 of the Bill, with the effect that registration is ineffective - and the added property is not subject to the security - if the entry in the statutory pledges record kept under section 89 of the Bill does not include a copy of the amendment document or is otherwise seriously misleading.

250. This section is not subject to section 51 of the Bill, which provides for a statutory pledge over a financial instrument, as a pledge of that type is not amendable by an amendment document (but see section 61(5) of the Bill in that respect).

#### **Section 50 Property not property of provider when statutory pledge registered but described as secured property in constitutive or amendment document**

251. This section provides for the creation of a pledge over property which does not belong to the provider when the pledge is granted or amended.

252. Subsection (2) has the effect that a pledge in respect of property not yet acquired by the provider (see section 46(3) of the Bill) is created when or if the property is acquired.

253. Subsection (3) qualifies the effect of this section in two respects:

(a) It is without prejudice to section 48(1) of the Bill, with the effect of clarifying that to be subject to the pledge the property must be both identifiable and the property of the provider, and

(b) It is subject to the effect of any intervening insolvency as provided for under section 52 of the Bill.

#### **Section 51 Creation of statutory pledge over financial instrument**

254. This section deals with statutory pledges over financial instruments as a security financial collateral arrangement (“SFCA”) for the purposes of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226). The parties to a SFCA must both be non-natural persons.

255. The 2003 Regulations implement Directive 2002/47/EC on financial collateral arrangements (OJ L 168. 6.6.2002, p 43).

256. Subsection (2) provides that a statutory pledge for the purposes of a SFCA can be created by registration in the same way as any other statutory pledge, or it can be created on the collateral coming into the possession or under the control of the secured creditor.

257. Subsection (3) defines the meaning of terms used in both subsection (2) and in the 2003 Regulations.

258. Subsection (4) gives an extended meaning for the purposes of an SFCA to the methods by which the creation of a constitutive document may be evidenced, and does so in order to be consistent with the 2003 Regulations.

259. Subsection (5) removes the need for a constitutive document for the purposes of a SFCA to be executed or authenticated, also in order to be consistent with the 2003 Regulations.

## **Section 52    Creation of statutory pledge: insolvency**

260. Sections 46(3) and 61(3) of the Bill set out that the property to be secured as described in the constitutive document of a statutory pledge, or an amendment document in respect of a pledge, may be property to be acquired by the provider of the pledge.

261. This section makes provision for the effect of the intervening insolvency of the provider.

262. Subsection (1) sets out a list of the types of personal and corporate insolvency to which the provision in subsection (2) will apply.

263. Subsection (2) provides that the statutory pledge is not created over property acquired by the provider on or after the date of an insolvency listed in subsection (1). The effect is that the property in question is treated as an asset of the provider for the purposes of the insolvency, and may for example be sold or realised for the benefit of the creditors as a whole.

264. Subsection (3) confers a power on the Scottish Ministers to amend subsection (1) by regulations. That power could for example be used to add a further type of insolvency to the list in subsection (1).

## **Section 53    Providers who are individuals**

265. This section sets out three protections for individuals granting a statutory pledge over their personal property.

266. The protections in this section complement the provisions of the Consumer Credit Act 1974, which apply to the grant of any security right by an individual (as defined by that legislation).

267. Subsection (2) sets out that the assets must be individually described in the constitutive document. It would not therefore be competent for an individual to grant a statutory pledge which merely described the secured property as “my books” or “the contents of my house”.

268. In addition, subsection (2) has the effect that an individual may not normally grant a statutory pledge over an asset he or she has yet to acquire. An exception to this general rule applies where the individual is supplied with credit for the purchase, and the secured obligation is the obligation to repay that credit. Thus where a motor vehicle is to be acquired, a statutory pledge can be granted over that vehicle, to secure funding for the purchase.

269. Subsection (3) applies to a pledge by an individual over corporeal property, and sets out that the asset to be pledged must have a monetary value exceeding £1000 (or such other sum as may be prescribed by the Scottish Ministers by regulations). The effect is that it will not be possible for an individual to grant a statutory pledge over low-value but essential items such as clothes, bedding, furniture and toys.

270. Subsection (4) has the effect that the debtor protection in subsections (2) and (3) do not apply to an individual who is a sole trader as respects any asset used wholly or mainly for the purposes of the trader’s business.

#### **Section 54    Restriction on freedom to deal with secured property encumbered by a statutory pledge**

271. The creation of a statutory pledge requires registration of the pledge in the Register of Statutory Pledges, rather than for example delivery of corporeal moveable property to the secured creditor.

272. The effect is that the provider of the pledge can, and typically will, keep possession of the secured property. This section therefore gives statutory effect to a general principle of the law of rights in security, by providing that the statutory pledge will continue to encumber the secured property if it is transferred without explicit written consent by the secured creditor to the particular transfer.

273. A consequence of the requirement for explicit consent to the particular transfer is that the secured creditor will not be able to agree in advance that the provider is free to deal with the secured property, as that would enable the pledge to operate in the same manner as a floating charge granted by a legal person such as a limited company. That in turn would facilitate the grant of a pledge over stock-in-trade, which is likely to be treated as a floating charge in an insolvency, and if so ranked below other otherwise equivalent fixed charges (in Scotland, a real right in security).

274. Subsection (1) sets out that where the provider of the statutory pledge transfers the secured property to a third party without the secured creditor’s consent under subsection (2)



then the secured property remains in principle encumbered by the pledge (but see subsection (5)).

275. Subsection (2) requires a specific form of consent. Under subsection (2)(a), it must be in writing and to the particular transfer. Thus the consent cannot be to a transfer to any unnamed person, or to a class of persons. It must be a consent to a transfer first to a specific person, and second to that person taking the property unencumbered by the pledge.

276. Subsection (2)(b) requires that the consent must be given not more than 14 days before the transfer, or where the transfer is further to a contract, not more than 14 days before that contract is concluded.

277. Subsection (3) sets out that the decision on whether or not to give consent must be at the discretion of the secured creditor. Thus it would be ineffective to have a contractual provision under which the secured creditor must consent to any or all disposals.

278. Subsection (5) gives the Scottish Ministers power to amend the consent provisions. This would for example enable Ministers to take account of possible future developments under English law, perhaps in relation to the fixed/floating characterisation of charges in an insolvency.

279. Subsection (4) is an anti-avoidance provision, given that section 55 protects acquirers in good faith in the ordinary course of a business. A statutory pledge could become tantamount to a floating charge if the secured creditor acquiesces in the provider dealing with property without consent. If this does happen, the effect of this subsection is to extinguish the statutory pledge.

280. Subsection (6) makes it clear that the provision is subject to sections 55 to 58 which protect good faith acquirers in certain circumstances.

281. This section does not apply to possessory (common law) pledge, as there the fact that the secured creditor holds the property limits the provider's ability in practice to deal freely with the property.

## **Section 55 Acquisition in good faith in ordinary course of business**

282. Sections 55 to 58 provide for the circumstances in which a person who acquires secured property in good faith will acquire the property unencumbered by the statutory pledge, despite the consent mentioned in section 54(2) not having been obtained.

283. The statutory pledge is generally not an appropriate security right for stock-in-trade because the consent of the secured creditor is required for individual transfers (see paragraphs 272 and 275). Even so, property encumbered by a statutory pledge may become inventory of a business.

Example: Alistair grants a statutory pledge over his piano to a bank, and then subsequently sells the instrument to a music shop. A good faith purchaser from the shop should be protected.

284. Subsection (1) sets out that secured property transferred without the consent of the secured creditor will be acquired unencumbered by a statutory pledge if two requirements are met.

285. First, the transferor must have been acting in the ordinary course of that person's business. For example, a motor dealer which only sells vehicles, would not on the face of it be acting in the ordinary course of business if it sold its office furniture.

286. Secondly, the acquirer must be in good faith at the time of the acquisition. If the acquirer knows that the property is subject to the pledge they will not be protected.

287. Subsection (2) makes it clear that the acquirer is not to be deemed to have constructive knowledge of a statutory pledge for the purposes of this section merely because the pledge is registered.

## **Section 56 Acquisition in good faith for personal, domestic or household purposes**

288. This section provides for where individuals acquire property of limited value for private purposes, and has the effect that such persons do not need to search the Register of Statutory Pledges before acquiring the property.

289. Subsection (1) sets out that individuals (also sometimes described as natural persons) who acquire secured property which is transferred, or has previously been transferred, without the consent of the secured creditor acquire the property unencumbered by the pledge if certain criteria are satisfied.

290. First, in terms of subsection (1)(a), the value of the property at the time of acquisition must not exceed an amount to be specified by the Scottish Ministers in regulations. The effect of applying the protection at the time of acquisition is to make it easier for the individual to prove the value of the asset than would be the case if any other time was fixed for that purpose.

291. Second, in terms of subsection (1)(b), the acquirer must be in good faith. See also subsection (3) as considered below.

292. Third, in terms of subsection (1)(c), the person must give value for the property acquired. Normally, that will be adequate monetary value (i.e. payment of a purchase price) but it could be by means of exchanging other property.

293. Fourth, in terms of subsection (1)(d), the property must be wholly or mainly acquired for personal, domestic or household purposes. Business purchasers are not protected.

294. Subsections (2) and (4) have the effect of excluding motor vehicles from the ambit of this section, because they are dealt with by section 57.

295. Subsection (3) makes it clear that the acquirer is not to be deemed to have constructive knowledge of a statutory pledge for the purposes of this section merely because it is registered.

## **Section 57 Acquisition in good faith of motor vehicles**

296. This section makes provision for motor vehicles that are subject to a statutory pledge, and is similar in effect to section 27 of the Hire Purchase Act 1964 for motor vehicles hired under a hire-purchase contract or purchased under a conditional sale agreement.

Example: D Ltd supplies a motor vehicle to Barry under a hire purchase agreement with a three year duration. Barry will not become the owner until he makes the final payment at the end of the three years. But after six months Barry sells the vehicle to Charlotte, who believes that Barry is the owner. Under section 27 of the 1964 Act, Charlotte will become owner of the vehicle because she is in good faith and is a private purchaser.

297. This section achieves the same result where Barry is the owner of the vehicle, but grants a statutory pledge over it. Charlotte should take the vehicle encumbered by the pledge if she is a good faith private purchaser from Barry.

298. The term “motor vehicle” is defined in section 29 of the 1964 Act as “any mechanically propelled vehicle intended or adapted for use on roads”, and that definition is adopted by the Bill for the purposes of this section.

299. Subsection (1) sets out four criteria which must be satisfied if the secured property is to be acquired unencumbered by the statutory pledge, despite the consent of the secured creditor to the transfer not having been obtained.

300. In relation to subsection (1)(c), subsection (5) makes it clear that the purchaser or acquirer is not to be regarded as knowing about the statutory pledge only because it appears in the Register of Statutory Pledges.

301. Subsection (1)(d) sets out that the hirer or purchaser of the secured property cannot be carrying on a business described in the section 29(2) of the 1964 Act, namely a business which consists of purchasing motor vehicles for the purpose of offering or exposing them for sale, or of providing finance by purchasing motor vehicles for the purpose of hiring them under hire-purchase agreements or selling them under conditional sale agreements.

302. Subsection (3) protects the purchaser or hirer by preventing enforcement of the statutory pledge prior to the property being transferred in implement of an earlier hire or sale agreement.

303. Subsection (4) entitles the secured creditor to a limited right of compensation against a motor dealer who transfers the vehicle to a party who is protected by subsection (2).

Example: John grants a statutory pledge over his car to a bank. He then sells the car to a motor dealer without the bank’s permission. The motor dealer is not protected by subsection (2) because it should have made a search in the Register of Statutory Pledges against John and/or the car. But if the motor dealer then sells the car to a private purchaser who is in good faith (and so protected), then the bank is entitled to be compensated as set out in this subsection.

304. Subsection (6) provides for terms defined in the 1964 Act, and used in this section, to have the same meanings as in that Act.

305. Subsection (7) provides for the Scottish Ministers to be able to exclude by regulations certain classes of vehicle from the application of this section.

Example: The Driver and Vehicle Licensing Agency requires UK registered vehicles to have a vehicle identification number (VIN). If it became compulsory to include the VIN in a relevant entry in the RSP then Ministers might consider that private purchasers should lose the protection in this section, as it would be easier for the purchaser to check whether a particular vehicle was subject to a statutory pledge by searching against the VIN.

## **Section 58 Acquisition of certain financial instruments in ordinary course of trading**

306. This section enables the Scottish Ministers by regulations to specify certain types of financial instruments and markets, in respect of which a good faith acquirer for value in the ordinary course of trading on the specified market will take an instrument that is secured property unencumbered by the statutory pledge.

307. A financial instrument for the purposes of this section is an instrument as defined in section 116(1) of the Bill, which provides that the term is to be construed in accordance with the definition in regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226). That definition is wide and covers shares in companies, securities equivalent to shares, and bonds tradeable on the capital market.

308. Subsection (2) sets out the circumstances in which the instrument would be acquired unencumbered by the statutory pledge. They are that at the time of acquisition the acquirer does not know about the pledge, and that the acquisition takes place under the rules of the specified market.

309. There is therefore no requirement for the acquirer to be in good faith, or for the acquirer to give value. The effect is that this section protects the integrity of the specified market by setting a high threshold for any challenge of an applicable transaction.

## **Section 59 Occupancy and other rights following grant of statutory pledge**

310. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives unentitled spouses occupancy rights in their matrimonial home, and in some circumstances the right to use furniture and furnishings in the home.

311. Section 22 of the 1981 Act defines “matrimonial home” to include a caravan or houseboat. It defines “furniture and furnishings” to mean any article in the home that is reasonably necessary to enable the home to be used as a family residence. Either type of moveable corporeal property as so defined could be secured property for the purposes of a statutory pledge.

312. The Civil Partnership Act 2004 makes the equivalent provision for civil partners as the 1981 Act does for spouses. Section 1 of the 2004 Act sets out that a civil partnership is a relationship between two people of the same sex which is formed when they register as civil partners under that Act.

313. In both cases, the measures in those Acts apply where one spouse or partner is entitled (or permitted by a third party) to occupy the home and the other spouse or partner is not.

314. The effect of subsections (2) to (3) is that, subject to sections 2 and 102 respectively of the 1981 and 2004 Acts, an order granting a spouse or civil partner the possession or use of furniture or furnishings will not prejudice the rights of any secured creditor in relation to the non-performance of an obligation secured by a statutory pledge. Sections 2 and 102 of those Acts confer ancillary and consequential rights on non-entitled spouses and partners, including the right to payments in respect of a secured obligation by the entitled spouse or partner.

315. Sections 6 and 106 respectively of the 1981 and 2004 Acts provide that the continued exercise of the rights conferred on a spouse or partner by those Acts will not be prejudiced by a dealing of the entitled spouse or partner relating to the home. The effect of subsections (4) and (5) is that a dealing will for that purpose include the grant of a statutory pledge.

316. Sections 8 and 108 respectively of the 1981 and 2004 Acts provide that the rights of a third party with an interest in the home as a creditor under a secured loan shall not be prejudiced by reason only of the rights of a non-entitled spouse or partner under those Acts, provided that in each case the creditor obtains:

- (a) either a declaration from the entitled spouse that there are no occupancy rights, or
- (b) a consent to the granting of the security by the non-entitled spouse.

The effect of subsections (7) to (10) is to clarify the application of those rules to the grant of a statutory pledge.

## **Section 60    Assignment of statutory pledge**

317. This section confirms that a statutory pledge may be transferred by means of an assignment document duly executed or authenticated by the secured creditor (with an exception in subsection (3) for the case of an unregistered statutory pledge over a financial instrument).

318. A pledge is a security rather than a claim, so Part 1 of the Bill does not apply to the assignment of a pledge. The effect is that it is not competent to register an assignment of a pledge in the new Register of Assignations.

319. Subsection (2) makes it clear that a statutory pledge which is being enforced can be assigned by the secured creditor, and that the assignee can continue with the enforcement rather than having to re-commence the enforcement procedure or re-serve any notice.

## **Section 61    Amendment of statutory pledge**

320. This section provides for the amendment of a statutory pledge by an amendment document (as defined in this section and in section 116(1) of the Bill).

321. Subsection (1) provides that a statutory pledge may only be amended by an amendment document executed or authenticated by the secured creditor and the provider, subject to three exceptions.

322. The first exception is that the restriction of a pledge to only part of the secured property may be by means of a written statement by the secured creditor (for which see sections 62(1) and 118(2)).

323. The second exception is that an amendment document that only adds property to the secured property need not be executed by the secured creditor (as is the case with the constitutive document).

324. The third exception is that an unregistered statutory pledge over a financial instrument may be amended by evidenced agreement between the provider and the secured creditor.

325. The property described in the amendment document may, as in the case of the constitutive document for a statutory pledge, be property to be acquired by the provider.

326. Subsection (6) has the effect that an amendment document that relates to the addition of property to the secured property, or to variation of the secured obligation, is amended only on registration of the amendment document (for which see sections 92(1) and 96 of the Bill).

## **Section 62    Restriction or discharge of statutory pledge**

327. Subsection (1) provides for the secured creditor power to be able to restrict or discharge a statutory pledge either by written statement or by registration.

328. Subsection (2) excludes unregistered statutory pledges over financial instruments created under section 51(2)(a) from the scope of this section (but see section 63 in that respect).

## **Section 63    Restriction or extinction of statutory pledge created under section 51(2)(a)**

329. This section deals primarily with the restriction or extinction of a statutory pledge over a financial instrument which has not been registered in the Register of Statutory Pledges.

330. Subsection (1) sets out that the statutory pledge is extinguished by the secured creditor (collateral-taker) giving up possession or control of the instrument, and may be restricted or discharged by means of an evidenced statement by the collateral-taker (for which see in addition section 64 of the Bill).

331. Subsections (2) to (4) provide for statutory pledges over financial collateral which are created by possession or control, and later registered in the Register of Statutory Pledges. If possession or control is lost after registration then the pledge cannot be extinguished under subsection (1), and the pledge ranks in any competition with another creditor or in an insolvency as if it was created on being registered.

Example: On day one D Ltd creates a statutory pledge over financial collateral in favour of a bank by giving the bank possession or control of a financial instrument. On day five the bank registers the security in the Register of Statutory Pledges. If on day thirty the bank gives up possession or control of the collateral, then the pledge is not extinguished and instead ranks as if created on day five.

332. Subsection (5) has the effect that the terms “possession”, “control”, “collateral-taker” and “collateral-provider” are to be construed in terms of regulation 3 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226).

333. Subsection (6) has the effect that the registration of a pledge is only effective for the purposes of this section if the registration is an effective registration within the meaning of section 95 of the Bill.

#### **Section 64 Further provision as regards evidenced agreements and evidenced statements**

334. This section ensures that the use of evidenced agreements and evidenced statements for the purposes of sections 60(3), 61(5) and 63(1)(b) of the Bill will comply with the requirements of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226). For example, a telephone recording of a conversation may suffice to evidence an agreement to restrict a statutory pledge in respect of a financial instrument.

#### **Section 65 Ranking**

335. This section applies to both possessory (common law) and statutory pledges.

336. Subsection (1) sets out the general rule that pledges rank in accordance with their time of creation, and is declaratory of the fundamental principle of property law *prior tempore potior jure* (earlier by time stronger by right).

Example: On day one Patrick grants a statutory pledge over his painting to Quentin. On day two the pledge is registered in the Register of Statutory Pledges. On day three Patrick agrees to grant a possessory pledge over the same painting to Robert, and delivers the painting to Robert. The statutory pledge ranks above the possessory pledge because the former was created first.

337. Subsections (2) and (3) apply where two or more statutory pledges are granted in respect of property not yet acquired by the provider of the pledge, and have the effect that the pledges will rank on that property when acquired according to their date of registration.

338. Subsection (4) regulates the ranking of pledges and of rights in security arising by operation of law so that the right in security has priority. An example of a right of that kind is the right of a retainer to retain repaired property as security for payment of the bill. This mirrors the rule on priority between such rights in security and floating charges as set out in section 464(2) of the Companies Act 1985.

339. Subsection (5) gives a pledge priority for the entirety of the sums secured, both current and future. It follows that there is no procedure under which a party can limit the priority of a higher ranking creditor by serving a notice to that effect on the creditor (as is the

case for standard securities over land under section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970). The effect is a party seeking a higher ranking security than is otherwise available for sums not yet due to an existing creditor will have to negotiate a ranking agreement with that creditor.

340. Subsections (6) and (7) provide for it to be possible to have a ranking agreement in respect of a pledge or security, but it needs to be in writing. Any such agreement will only have contractual effect, and cannot be registered in the Register of Statutory Pledges.

## **Section 66 Amendment of Companies Act 1985 and Insolvency Act 1986**

341. This section amends the Companies Act 1985 and the Insolvency Act 1986 to give effect for statutory pledges to the general rule that a real right in security if created prior to the attachment of a floating charge, will rank above the charge. Broadly, a security is described as a fixed charge or fixed security because when created it “attaches” to the secured property.

342. Section 464 of the 1985 Act provides that a fixed security, which has been constituted as a real right before a floating charge has attached on an insolvency to the property of the company, has priority of ranking over the floating charge. Subsection (1) amends that section so that a statutory pledge is treated as real right for that purpose.

343. Subsection (2) amends both the 1985 and 1986 Acts to make it clear that a statutory pledge falls within the definition of “fixed security” in those Acts.

## **Section 67 Effect of diligence on pledge**

344. This section governs the priority of a pledge as regards a diligence executed against the secured property. The basic rule is *prior tempore potior jure* (earlier by time stronger by right). If the diligence is executed first it prevails, and if the statutory pledge is created first it prevails.

345. Subsection (2) includes a special rule about further advances made by the secured creditor. It has the effect that an advance made by the creditor after the diligence is executed does not have priority over the sum attached by the diligence unless there is a prior contractual obligation to make the advance.

Example: Jill Ltd grants a statutory pledge over its machinery for all sums due and become due to the Kirkintilloch Bank, and the bank advances £20,000. Louise who is an unsecured creditor of Jill Ltd attaches the machinery for a £5,000 debt. The next day the bank advances another £8,000 to Jill Ltd. The bank’s priority over Louise will be limited to the original £20,000 unless it was contractually bound to make the further advance of £8,000.

## **Section 68 The expression “pledge” in sections 69 to 82**

346. Sections 69 to 82 set out a statutory framework for the enforcement of both possessory (common law) and statutory pledge.

347. This section provides that the expression “pledge” for the purposes of those sections does not include a pledge as defined in section 189(1) of the Consumer Credit Act 1974.



The effect is that a 1974 Act pledge (described in that Act as a 'pawn') falls to be enforced under the enforcement regime for pawnbrokers in that Act.

## **Section 69    Enforcement of pledge: general**

348.    This section sets out general rules on enforcement of pledges.

349.    Subsection (1) provides that a pledge cannot be enforced using a method not provided for by the Bill.

Example: A borrows £1,000 from B, and grants a statutory pledge to B for that debt over a vintage car worth £100,000. The Bill does not provide for secured property to be forfeited. It is therefore unlawful for B to stipulate that if there is default on the debt that the car is forfeited to B so that B obtains a £99,000 windfall.

350.    Subsection (2) sets out that a pledge may be enforced on default or in such circumstances as are agreed by the provider and the secured creditor, and is influenced by the DCFR Book IX.-1:201(5).

351.    Subsection (2)(b) allows for the parties to be able to agree a wide range of further circumstances in which a pledge may be enforced, but in order to protect the provider subsection (3) insists on writing for this.

352.    Subsection (4) requires the secured creditor to conform with reasonable standards of commercial practice, and is influenced by the DCFR Book IX.-7:103(4). Similar provision can be found in regulation 24 of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912). What is unreasonable will differ from case to case, but might include taking an excessively long period to complete an enforcement procedure.

353.    Subsection (5) provides that the secured creditor's right to enforce is subject to section 70 (requirement to serve a pledge enforcement notice) and section 71 (the need to obtain a court order in limited cases).

## **Section 70    Pledge Enforcement Notice**

354.    This section provides for a notice, to be known as a pledge enforcement notice, to be served on the provider by the secured creditor before any enforcement action is taken by the creditor.

355.    There are two types of notice. The first and usual type is a notice served on the provider, as provided for by subsection (1)(a).

356.    The second and far rarer type is provided for by subsection (1)(b). It is a notice served on any occupant of the secured property, be that the provider or another individual. This will only apply to secured property that can be occupied, such as motorhomes and house boats.

357.    Subsection (2) allows the Scottish Ministers to prescribe different forms of notice for different categories of provider or occupier. For example, a form for individual providers

might contain information on how to obtain legal advice, or the information that the creditor will need to obtain a court order before the pledge can be enforced.

358. Subsections (4) and (5) make it clear that the requirement to serve a pledge enforcement notice is subject to section 88 of the Consumer Credit Act 1974, which requires a 14-day default notice to be served before the enforcement of any right in security which is subject to that Act.

359. If the 1974 Act applies then the default notice for the purposes of that Act will have to be served 14 days before the pledge enforcement notice can itself be served.

## **Section 71 Whether court order required for enforcement of pledge**

360. This section sets out that, unless agreed otherwise by an individual, a court order is required before a pledge is enforced against the individual.

361. Subsection (1) has the effect that a court order will normally be required where the provider is an individual. There are exceptions to the general rule that a court order is required that apply:

- First, where after default under section 70 the provider agrees in writing that no order is required, and
- Second, where the individual is a sole trader and the enforcement is against business assets.

362. Subsection (2) deals with secured property which is a sole or main residence, although that will be unusual as a pledge can only be granted over moveable property. In this situation a court order is required unless there is a written agreement to enforcement after default between the person in residence, the provider (if a different person) and the secured creditor.

363. Subsection (3) sets out that a court order is not required in other cases.

364. Subsections (4) and (5) apply where the property a sole or main residence, and are similar to the provisions for standard securities in the Conveyancing and Feudal Reform (Scotland) Act 1970.

365. Subsection (6) sets out that subsection (3) is subject to sections 72 and 73 of the Bill, and clarifies that in the case of a statutory pledge over either corporeal moveable property or a financial instrument a court order will be required in the circumstances set out in those sections.

## **Section 72 Secured creditor's right to take possession of corporeal property**

366. This section concerns statutory pledges over corporeal moveable property, where the provider will usually be in possession of the secured property.

367. Subsection (1) sets out that a pledge enforcement notice must have been served in respect of that the secured property.

368. Subsection (2) provides for the taking of possession by the secured creditor in order to realise the asset, and for the immobilisation of such an asset where appropriate.

369. Subsection (2)(b) is influenced by the DCFR Book IX.-7:202(1), and is aimed at larger assets such as machinery, which might be easier to be sold from the provider's premises rather than taken away. Instead the secured creditor may simply want to immobilise the asset, or physically protect it, so that it cannot be taken away.

370. Subsection (3) describes the three ways in which possession may be taken. First, it may be taken with the consent of the provider or holder of the property. Second, it may be taken by an authorised person, such as an insolvency practitioner. Third, it may be taken by the secured creditor personally if authorised by the court. The provision thus ensures that gives the secured creditor cannot simply turn up and seize the property using unauthorised methods.

371. Subsection (4) only applies where the secured property is occupied as a sole or main residence, which might be the case for a caravan or boat. Here a secured creditor with either a court order or an agreement to enforce has power to remove any individual from the property. The power, however, must be exercised by using an authorised person. Once again this provision has the aim of protecting the provider (and any other party in occupation).

372. Subsection (5) places restrictions on the taking of possession, or other steps such as immobilisation, by reference to subsections (6) and (7).

373. Subsection (6) restricts the right of the secured creditor under this section where the property is in the possession of an equal or higher ranking secured creditor, or a creditor who has executed diligence against the property.

374. Subsection (7) has effect where subsection (6) applies and allows possession to be taken by consent, or with the authority of the court. Thus it may be that the higher ranking creditor does not wish to enforce its security. In these circumstances the lower ranking statutory pledge holder may seek consent (if necessary judicially) to obtain possession of the property so that the statutory pledge can be enforced.

375. Subsection (8) applies the rule in subsection (4), restricting how a person can be removed from the property, to where possession is taken from a higher or equal ranking creditor.

376. Subsections (9) and (10) have the effect of defining "authorised person" for the purposes of this section, and enables the Scottish Ministers to prescribe by regulations additional categories of persons who are to fall within this definition.

377. Subsection (11) makes this section subject to section 71, so that where applicable a court order will be required before enforcement can be taken.

## **Section 73 Secured creditor's right to take possession of certificate of financial instrument**

378. This section makes provision for the secured creditor to be able to take possession of a financial instrument as defined in section 116(1) of the Bill in the same manner as section 72 makes provision for the creditor to take possession of corporeal moveable property.

379. This section is, in addition, without prejudice to the rights of a collateral-taker under the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226) on the occurrence of an enforcement event (as defined in regulation 3(1A) of those Regulations).

#### **Section 74 Secured creditor's entitlement to sell**

380. This section sets out the standard remedy for enforcing a right in security: selling the secured property.

381. The secured creditor will need to ensure that they are able to transfer the secured property to the purchaser, if necessary by taking possession under sections 72 or 73 of the Bill.

382. Subsection (1) enables the secured creditor to sell the secured property once a Pledge Enforcement Notice has been served. The sale may be by private bargain.

383. Subsection (2) puts the common law into statutory form by setting out that all reasonable steps must be taken to ensure that the price is the best that can reasonably be obtained. This rule protects the provider (and indeed the debtor if different from the provider).

384. Subsection (3) allows the secured creditor to purchase the property, but only in the limited circumstances set out in that subsection.

385. Subsection (4) requires the proceeds of sale to be held in trust until distributed under section 78 of the Bill. It is similar to effect to section 27 of the Conveyancing and Feudal Reform (Scotland) Act 1970 which provides for the proceeds of sale under a standard security over land. A standard security is another type of subordinate real right in security.

386. Subsection (5) makes the section subject to section 71. Thus where applicable a court order will be required before enforcement.

#### **Section 75 Sale effected by virtue of section 74(1): unencumbered acquisition**

387. The consequences of sale on other rights in security and diligence affecting the secured property are dealt with by this section.

388. Subsection (2) provides that the purchaser acquires the property free of the pledge that is being enforced, and of any right in security or diligence which ranks equally with or after the pledge.

389. Subsection (3) provides a separate rule for higher ranking rights in security or diligence. These continue to affect the property unless the relevant creditor consented to the sale (as influenced by the DCFR Book IX.-7:213(2)).

#### **Section 76 Secured creditor's entitlement to let**

390. This section provides an alternative remedy where it is lawful to sell corporeal moveable property under section 74, namely leasing the property. It is influenced by the DCFR Book IX.-7:207(b).

391. Subsection (2) applies an equivalent rule to section 74(2) with the effect that the secured creditor must achieve the best reasonably obtainable income.

392. Subsection (3) requires the proceeds of sale to be held in trust until distributed under section 78 of the Bill.

393. Subsections (4) and (5) provide for the parties to be able to agree in writing to exclude the lease of the secured property as a remedy on default. For example, the provider may wish to have sale as the sole remedy on the basis that this would pay off the secured debt more quickly (and the secured creditor may also favour speed).

### **Section 77 Secured creditor's entitlement to grant licence over intellectual property**

394. A licence of intellectual property rights is effectively a lease of property of that kind, and this section has a similar purpose and effect for such property as section 76 does for corporeal moveable property.

### **Section 78 Application of proceeds arising from enforcement of pledge**

395. This section provides for the application by the secured creditor of any proceeds raised by the enforcement of a possessory (common law) or statutory pledge are to be applied.

396. Subsection (1) provides for the distribution of the proceeds. Paragraph (a) sets out that the proceeds are to be applied firstly towards the expenses of the enforcement (as further defined in subsection (10)), and paragraph (b) sets out that the proceeds are then to be applied towards the amount due under any right in security or to a creditor who has executed diligence.

397. Subsection (2) provides for distribution to be in accordance with the ranking of claims to the proceeds. Thus higher ranking creditors will be paid before lower ranking creditors.

398. Subsection (3), however, set out that no payment is to be made to creditors with a higher ranking than the pledge being enforced unless they have consented to the enforcement. If they have not then their security or right under the diligence is unaffected, and that will affect the marketability of the secured property (see section 75(3) in that respect).

399. Subsection (4) provides that any residue left is to be paid to the provider, which includes for that purpose any successor in title or representative (see paragraph (c) of the definition of "provider" in section 116(1) of the Bill).

400. Subsection (5) deals with abatement of claims where the proceeds are insufficient to pay equally ranked creditors in full, and provides that the payment must abate in equal proportions.

Example: The secured property is sold for £100,000. There are two equal ranking rights in security. Creditor 1 is owed £200,000, and creditor 2 is owed £50,000. Creditor 1 obtains £80,000 and creditor 2 obtains £20,000, that is 40% of what is due to each of them.

401. Subsection (6) to (9) provide for the situation, which is likely to be uncommon, where it is unclear who is to be paid or a receipt for payment cannot be obtained (perhaps because a secured creditor cannot be traced). The effect is that the secured creditor must consign an amount in court for the benefit of the person who appears to have the best right to the payment from the proceeds.

402. Subsection (11) provides for a statement to be made to relevant parties as to how the proceeds as a whole have been distributed. It provides for the secured creditor to give a statement to such persons with relevant statutory duties as are prescribed by the Scottish Ministers (see section 118(1) for the definition of “prescribed”).

403. Subsection (12) has a special rule for where the property is leased or licensed, and there is an income stream to be accounted for rather than the single proceeds from a sale.

### **Section 79 Secured creditor’s right to appropriate in satisfaction of part or all of secured obligation: general**

404. This section provides for the secured creditor to be able to appropriate the secured property in certain limited circumstances as specified in subsection (2). It should be read with sections 80 to 82.

405. A creditor who appropriates property becomes the owner of the property. There is the potential for abuse of any such right as the value of the asset could greatly exceed the debt, so modern practice such as that set out in the DCFR recognises as here only limited rights of appropriation (for which see the DCFR Book IX.-7:105 and 7:216).

406. Subsection (2) excludes appropriation in respect of an individual other than in respect of the business assets of a sole trader. It excludes, for practical reasons, appropriation by the secured creditor of corporeal property or bearer bonds that are not possessed by the creditor. It excludes appropriation of property the value of which is greater than the amount remaining due under the secured obligation.

### **Section 80 Appropriation where no agreement reached under section 81(1)**

407. Sections 80 and 81 of the Bill deal respectively with appropriation without, and with, an agreement to the use of appropriation as a remedy on default.

408. Under this section, the provider is entitled to object in principle to the use of appropriation in respect of particular secured property.

409. Subsection (1) requires notice of the intended appropriation to be given to the parties it will affect. The provision is self-explanatory, except for sub-paragraph (e) which is aimed at insolvency officials and provides for the Scottish Ministers to have a similar power as that described in paragraph 402 above.

410. Subsection (2) sets out that the notice on intended appropriation must identify the property to be appropriated, and specify both the amount owing to the secured creditor and the amount to be obtained by the appropriation.

411. Subsection (3) requires the appropriation to be for an amount which bears a reasonable relationship to the market value of the property. Thus machinery worth £10,000 cannot be appropriated as being worth £1,000.

412. Subsection (4) gives the parties to whom the notice is served a right to veto the appropriation, provided they do so within 14 days after receipt of the notice of the intended appropriation.

413. Subsection (5) disapplies this section where there is a pre-default agreement on appropriation under section 81(1).

### **Section 81 Agreement as to appropriation by virtue of section 79(1)**

414. This section allows the provider and the secured creditor to agree, before any enforcement for the purposes of section 69 of the Bill, that there may be appropriation subject to certain conditions. It is influenced by the DCFR Book IX.-7:105.

415. Subsections (1) and (2) permit the provider and the secured creditor to enter into such an agreement, but it must be in writing. The agreement could for example be included in the constitutive document for the pledge.

416. Subsection (3) has the effect that the agreement may only relate to the two types of property specified in this subsection.

417. The first type is fungible property traded on a market specified by the Scottish Ministers by regulations (for which see subsection (7)(b)), where prices are published and widely available. Fungible property is as defined using the term “fungible asset” in subsection (7)(a), and is a type of property where individual units are capable of mutual substitution as is the case for example with company shares.

418. The second category is an asset which is not traded on a specified market as for the first type, but in respect of which the agreement sets out a method of easily determining a reasonable market price. That might include for example an agreement in relation to appropriation of used cars which states that the prices listed in a specified used car guide are to be used.

419. Subsection (3) also provides that the appropriation must be for value according to the published market price or the price that is so determined.

420. Subsections (4) to (6) mirror sections 80(1) to (3), with the important difference that the provider is omitted from the requirement to give notice as the provider will have agreed to the appropriation.

421. Subsection (8) provides for flexibility in the making of these regulations.

### **Section 82 Appropriation by virtue of section 79(1): unencumbered acquisition**

422. This section provides that any other right in security over or diligence in respect of the secured property is extinguished by an appropriation under section 79 of the Bill. Any other secured creditors or creditors who have executed diligence will have been able to object to the intended appropriation under sections 80 or 81 of the Bill.

### **Section 83    Circumstances in which application must be made for removal of an entry from the statutory pledges record**

423. This section provides for the removal by the secured creditor of a statutory pledge from the Register of Statutory Pledges, where appropriation has extinguished the security or other enforcement has exhausted the value of the secured property.

424. Subsection (1) applies where the secured creditor enforces the security resulting in either the entire debt being paid, or as much of that debt as can be obtained by realising the secured property. The secured creditor then must apply under section 100(1) of the Bill for the removal of the statutory pledge from the statutory pledges record (from where it will move to the archive record).

425. Subsections (2) and (3) apply a similar rule in relation to a statutory pledge held by a creditor other than the creditor who has enforced the pledge.

Example: A grants a statutory pledge in favour of B for £10,000 over machinery. A then grants a second ranking statutory pledge to C for £5,000 over the same machinery. A subsequently defaults on its secured obligation to C. B consents to C enforcing the second pledge subject to B, as higher ranking creditor, being paid from the proceeds. The machinery is sold for £20,000, with the result that C divides the proceeds so that-

- B is paid £10,000,
- C keeps £5,000, and
- A keeps the remaining £5,000.

B and C are both then subject to a duty to remove their pledge from the statutory pledges record.

### **Section 84    Sections 69 to 83: saving**

426. Where a statutory pledge is over financial collateral the enforcement provisions in the Bill are without prejudice to the rights of the secured creditor under Part 4 of the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226).

### **Section 85    Liability for loss suffered by virtue of enforcement**

427. This section imposes liability on the secured creditor for failing in any duty imposed by the Bill on the creditor in relation to enforcement of a possessory (common law) or statutory pledge.

428. Subsection (2) places restrictions on the liability, but does not exclude liability for non-patrimonial loss. The effect is that there may be circumstances, for example taking of possession of a houseboat in an unlawful manner, where solatium (compensation for pain and suffering) could be claimed by the provider.



## **Section 86    Service of documents for purposes of this Chapter of Part 2**

429. The default rules for service of documents in or under an Act of the Scottish Parliament are set out in section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010.

430. The section provides for the provider and the secured creditor to be able to agree in writing that service may be in accordance with this section. Thus, for example, the parties might provide that an enforcement notice may only be sent by registered delivery.

431. Any agreement under this section could be in the constitutive document for the statutory pledge.

432. Subsection (4) has the effect that where service cannot be affected in accordance with the agreement then the default rules in the 2010 Act will apply.

## **Chapter 2 – Register of Statutory Pledges**

### **Section 87    The Register of Statutory Pledges**

433. Subsection (1) establishes the new register in which statutory pledges can be registered, to be known as the Register of Statutory Pledges (That Register is, in these notes, referred to as the “RSP”).

434. Subsection (2) provides that the RSP is to be under the management of the Keeper (for which see the definition in section 118(1) of the Bill).

435. Subsection (3) states that, subject to the requirements laid down by the Bill, the Keeper has discretion as to the form in which the RSP is kept. That would include keeping the RSP in electronic form.

436. The RSP, like the other registers under the Keeper’s control, would be an important public asset. Subsection (4) provides that the Keeper is to take such steps as appear reasonable to protect the register from interference, unauthorised access, or damage.

437. Subsection (5) enables the Scottish Ministers, in consultation with the Keeper, to prescribe fees in relation to the RSP.

### **Section 88    The parts of the register**

438. This section provides for the RSP to be kept in two parts, being the statutory pledges record and the archive record (conforming to sections 89 and 90 of the Bill).

### **Section 89    The statutory pledges record**

439. This section provides for the information to be included by the Keeper in an entry for a statutory pledge in the statutory pledges record, and for the record to be comprised of the totality of such entries.

440. Some of that information will be as specified in, or determined under, rules made by the Scottish Ministers by regulations under section 114 of the Bill (“RSP Rules”).

## **Section 90 The archive record**

441. This section has the effect that the archive record will comprise entire entries formerly in the statutory pledges record which are archived in accordance with Chapter 2 of Part 2 of the Bill.

442. The archive record may also include such other data as is specified by the Scottish Ministers in RSP Rules.

## **Section 91 Application for registration of statutory pledge**

443. This section provides for the secured creditor to be able to apply to the Keeper for registration of a statutory pledge in the RSP.

444. Subsections (2) and (3) have the effect that the Keeper must accept an application that is conform to this section, and reject an application that does not so conform.

445. Subsection (4) imposes a duty on the Keeper to make up an entry in the statutory pledges record for an application that is accepted, and to allocate a registration number to the entry.

## **Section 92 Other applications for registration**

446. This section provides for the secured creditor to be able to apply to the Keeper for registration in the RSP of an amendment, restriction or discharge of a statutory pledge.

447. Section 61 of the Bill has the effect that a statutory pledge may only be amended by an amendment document as defined in that section, subject to one exception as set out in section 62(1)(a) of the Bill. A secured creditor who intends to restrict a security to part of the secured property may do so either by registration, or off-register by way of a written statement to that effect. The secured creditor must however submit any amendment document with an application for registration of an amendment.

448. The discharge of a statutory pledge may also take place off-register by means of a written statement for the purposes of section 62 of the Bill. A discharge is not an amendment, and so it follows that neither an amendment document nor a deed of discharge need to be submitted with a relevant application for registration.

449. Subsections (2) and (3) have the effect that the Keeper must accept an application that is conform to this section, and reject an application that does not so conform.

450. Subsection (4) imposes a duty on the Keeper, other than where subsection (5) applies, to amend an entry in the statutory pledges record for the statutory pledge in respect of which an application under this section is accepted.

451. Subsection (5) provides for the removal to the archive record of the entry for a statutory pledge in respect of what an application for a discharge has been accepted.

452. Subsection (6) has the effect of clarifying that a secured creditor can apply for the discharge of a statutory pledge that has been extinguished by means other than registration under this section, such as a pledge that has been discharged by the creditor by a written statement for the purposes of section 62(1) of the Bill, or by operation of the general rule that a security for loan of a fixed sum is extinguished by repayment of the debt.

### **Section 93 Verification statement**

453. This section provides for the Keeper to issue a verification statement to the applicant after registering a statutory pledge or other event under sections 91 or 92. The statement must be conform to any requirement prescribed in RSP Rules.

### **Section 94 Date and time of registration**

454. Subsections (1) to (3) have the effect that a statutory pledge, the amendment of a pledge, or the discharge of a pledge are each deemed to have been registered (or removed if appropriate) on the date and time entered in the entry for the pledge in relevant part of the RSP.

455. Subsection (4) sets out that the Keeper must deal with applications for registration in the order in which they are received, and allocate registration numbers accordingly. The effect is that pledges which rank by registration will rank in date order.

### **Section 95 Effective registration of statutory pledge**

456. Subsection (1) sets out that the registration of a statutory pledge in the RSP will be ineffective if the entry in the statutory pledges record does not include a copy of the constitutive document, or if at the time of registration the entry contains an inaccuracy that is seriously misleading.

457. Section 98 provides for the meaning of the term “seriously misleading”.

458. The effect of determining for the purposes of this section whether an entry is seriously misleading as at the time of registration is that a supervening inaccuracy will not render the entry ineffective (although see section 97 in that respect).

459. Subsection (2) makes subsection (1) subject to section 98(5) to (7), with the effect that a registration may be partially effective as regards the secured property or co-providers or co-creditors.

460. Subsection (3) has the effect that a registration that is ineffective at the time of registration can be made effective by correction under this Chapter.

### **Section 96 Effective registration of amendment to statutory pledge**

461. This section makes the same provision for amendment of a statutory pledge as section 95 does for registration of the pledge.

### **Section 97 Supervening inaccuracies: protection of third parties relying on the register**

462. This section protects a person who acquires in good faith either secured property or a right in secured property where an entry in the statutory pledges record comes to include, after registration, an inaccuracy that is seriously misleading in respect of the property.

463. The effect of this section is that the pledge will be extinguished as regards so much of the secured property as is property in respect of which the inaccuracy is seriously misleading.

464. This protection does not apply where secured property is required by RSP Rules to be identified by a unique identifying number, such as the vehicle identity number (VIN) for a UK registered motor vehicle. Any person intending to acquire such an asset could in that example readily obtain information about the pledge by searching the statutory pledges record against the VIN.

## **Section 98 Seriously misleading inaccuracies in entries in the statutory pledges record**

465. This section makes further provision for the meaning of “serious inaccuracy” for the purposes of sections 95 to 97 of the Bill. The “seriously misleading” test is a feature of analogous schemes for security over moveables such as the UCC-9.

466. Subsections (1) and (2) have the effect that an entry in the statutory pledges record is seriously misleading if a search using any of the criteria specified in this subsection fails to disclose the entry. The criteria are:

- (a) The proper name of the provider,
- (b) The unique number of any provider that is required by RSP Rules to be identified by such a number (which might include for example the registration number of a limited company), or
- (c) The unique number for secured property that is required by RSP Rules to be identified by such a number (which might include for example a vehicle identity number or the registration number for a patent or trademark).

467. The search must be in accordance with the type of searches of the RSP permitted by section 106 of the Bill, and which the Keeper is required by section 107 of the Bill to make available to any person requiring such a search.

468. Subsection (3) has the effect that in determining whether an entry is seriously misleading no account is to be taken of the constitutive document or any amendment document. This is needed because a search for the purposes of section 106 of the Bill will not disclose the content of such documents.

469. Subsection (4) provides that the test for whether an inaccuracy is seriously misleading is an objective test, in that no account is to be taken of whether any persons has in fact been misled by an entry.

470. Subsections (5) to (7) provide for entries that are misleading only in some respects, and have the effect that a registration may be partly effective.

471. Subsection (8) enables the Scottish Ministers by regulations to specify further instances in which an entry will be seriously misleading for the purposes of this section.

472. Subsection (9) has the effect that the proper name of a person for the purpose of this section will be determined in accordance with RSP Rules.

### **Section 99 Power of Scottish Ministers as regards duration of statutory pledge**

473. This section provides for the Scottish Ministers, in consultation with the Keeper of the Registers of Scotland, to be able by regulations to specify a period at the end of which an entry in the statutory pledges record will be extinguished.

474. This power could be used, for example, in the event that a large number of pledges extinguished off-register continue to appear in the record. Similar powers are seen in the UCC and schemes for moveable securities based on that Code.

### **Section 100 Application to Keeper by secured creditor for correction of statutory pledges record**

475. This section provides for the secured creditor to be able to apply to the Keeper for correction of an entry for a statutory pledge in the statutory pledges record.

476. A correction might remove, amend or substitute data (including copy documents). This section might be used for example to change the provider's name following a change of name on marriage. It could not however be used to restrict or discharge a statutory pledge, for which an application under section 92 of the Bill is needed whether or not the restriction or discharge was originally effected off-register under section 62 of the Bill.

477. The Keeper must accept an application that conforms to subsection (2), and reject one that does not.

478. Subsections (4) and (5) provide that the Keeper must on accepting an application correct the entry (and note in the entry that this has been done), and issue to the applicant a verification statement in the form required by RSP Rules.

479. Subsection (6) provides for the manner in which the Keeper must correct the record in order to give effect to an application for correction that is accepted..

### **Section 101 Demand that application be made for correction to the statutory pledges record by the removal of an entry or of data included in the entry**

480. This section provides for a persons with an interest in a statutory pledge to be able to demand that person identified as the secured creditor in the entry for the pledge should apply under section 100 of the Bill for correction of the record, and on default by the secured creditor for the specified person to be able to apply for the correction.

481. The secured creditor can however apply to the court if they dispute that the record should be corrected as proposed. The effect of this section is that the creditor will have a minimum of 42 days in which to obtain a direction from the court in relation to the proposed correction.

482. Subsection (1) specifies that a person can make such a demand if they are identified as the provider in the entry for a pledge in the statutory pledges record, or if they are a person with a right in the property identified as the secured property in the record. The demand for correction must be in the form prescribed by the Scottish Ministers (see section 118(1) of the Bill for the definition of “prescribed”).

483. Subsection (2) sets out that the circumstances in which a demand may be made are that the person making the demand is not the provider of the statutory pledge, or that property identified as secured property is not such.

Example 1: An entry states that a statutory pledge has been created over the car with VIN 12345. In fact the statutory pledge was created over the car with VIN 12335. The owner of the car with VIN 12335 can demand a correction.

Example 2: An entry states that a statutory pledge has been created over a car with VIN 12335. This was true, but the secured creditor has subsequently been discharged off-register. The provider can demand correction.

484. Subsections (3) and (4) provide for the demand to set out a period of not less than 21 days after receipt of the demand in which the secured creditor must comply with the demand, and for the creditor to be unable to charge a fee for doing so. The effect is that the creditor will bear the cost of correcting their mistake.

485. Subsection (5) and (6) have the effect that the specified person may on default by the secured creditor apply directly to the Keeper, in accordance with RSP rules, for the correction of the statutory pledges record.

486. Subsections (7) and (8) require the Keeper to intimate an application by the specified person for correction to the secured creditor, and to effect the correction after 21 days have elapsed unless the creditor obtains a court order as regards any proposed correction under subsection (9).

487. Subsections (10) to (11) provide for notification of any correction, and for giving effect to the correction as appropriate in the statutory pledges or archive records.

## **Section 102 Correction of the statutory pledges record**

488. Subsections (1) and (2) of this section provide for the Keeper to correct a manifest inaccuracy in the assignments record, where what is needed to correct the inaccuracy is also manifest.

489. Subsection (3) provides for the Keeper to note any inaccuracy that cannot be corrected.

490. Subsections (4) and (5) provide for the Keeper, on correcting the record, to note on the entry that the correction has been made and to issue to the applicant a verification statement confirming what the Keeper has done.

## **Section 103 Directions in relation to correction by removal of entries from, or of data included in entries in, the statutory pledges record**

491. This section ensures that the courts can where appropriate direct the Keeper to correct an entry in the RSP, and that the Keeper must comply with such a direction.

492. The Bill does not provide for an express right of appeal against or review of any decision by the Keeper. An issue relating to the accuracy of the register might however be raised in other proceedings, including a judicial review of a decision by the Keeper.

Example 1: A constitutive document is reduced by the court because it has been forged by one of the apparent parties. The court can direct the Keeper to correct the entry in the assignments record.

Example 2: An entry has been created in the statutory pledges record for a security by A in favour of B. However, in the application for registration of the assignment B erroneously states that C is the creditor. C could seek removal of the entry by the court (as an alternative to a demand for a correction).

#### **Section 104 Proceedings involving the accuracy of the assignments record**

493. This section provides for the Keeper to be entitled to be heard in any court or tribunal proceedings that may affect the exercise of his or her functions under the Bill.

#### **Section 105 Correction of statutory pledges record: general**

494. This section deals with some general matters in relation to corrections.

495. Subsection (1) sets out the various types of correction that are possible, although not all these types are relevant to all of the preceding provisions.

496. Subsection (2) sets out what is taken to be the date and time of correction. This is particularly important as regards sections 95 and 96 of the Bill under which an ineffective registration may be made effective by correction (so creating the statutory pledge).

#### **Section 106 Searching the statutory pledges record**

497. This section provides that any person may search the statutory pledges record on payment of any search fee, provided first that the search accords with RSP rules, and second that the search is one of the types of search permitted under subsection (2).

498. Subsection (2)(a) sets out that a search can be made by reference to the name of the provider, or in the case of an individual his or her name and date of birth, or the unique number for the provider (where RSP Rules require identification by number).

499. Subsection (2)(b) to (d) sets out that a search may be against the registration number of the pledge, any identifying number for the secured property, and any other factor or characterisation specified in RSP Rules.

500. It will not therefore be possible to search against the secured creditor or in the archive record unless the Scottish Ministers made provision for this in RSP Rules. It will however be possible to obtain an extract of an entry in the archive record under section 109 of the Bill.

501. It will not be possible to search against date of birth alone, in order to reduce the risk of fraud from identity theft. The Scottish Ministers will in addition be able through RSP Rules to prevent dates of birth from being disclosed on the face of the Register, or to limit the number of searches by reference to the same name and different dates of birth that can be made in a particular time period.

### **Section 107 Keeper's duties and powers as regards the provision of search facilities**

502. This section sets out that the Keeper must provide a search facility using criteria specified in RSP Rules, and may provide a search facility using other criteria.

503. The Keeper has in that last respect the power under section 108 of the Land Registration etc. (Scotland) Act 2012 to provide commercial services, on such terms as may be agreed between the Keeper and those to whom the services are provided.

504. Sections 95 to 98 of the Bill set out a "seriously misleading" test for the purpose of those sections. It will therefore be for Ministers to make such RoA rules as are needed under this section for those purposes.

505. Subsection (2) sets out that "search criteria" means the criteria in accordance with which what is searched for must match data in an entry in order to retrieve the entry.

506. RSP Rules will, amongst other matters, be able to determine whether the search criteria will provide for an exact match or a close match search.

Example: A search against "John A Smith" would return a match against John Smith if RSP Rules set out that the search criteria do not require an exact match with middle initials. It might not return a match against John A Smythe if the search criteria require an exact match with the family name of an individual.

### **Section 108 Printed search results and their evidential status**

507. This section enables printed search results obtained from the Keeper to be used as evidence of certain matters and, moreover, for them to have the effect of proving certain matters unless there is evidence to the contrary. There are similar provisions in PPSAs in other jurisdictions.

508. This section should be read with section 109, which enables the Keeper to provide an extract from the RSP, and would provide conclusive evidence of the contents of the relevant entry at the date the extract is issued.

### **Section 109 Extracts and their evidential status**

509. This section provides that it is possible to obtain an extract from the Keeper of any entry or part of an entry in the RSP, on payment of any fee (or making an arrangement to pay). An extract is sufficient evidence of the contents of an entry at the time the extract is issued, and can be used for that purpose in for example any court proceedings.

### **Section 110 Secured creditor's duty to respond to request for information**



510. This section places a duty on the secured creditor in specified circumstances to provide information about a statutory pledge to certain entitled persons.

511. A duty of this type is also to be found in modern comparator legislation in relation to security over moveables, such as the DCFR Book IX. The duty to provide information works to protect third parties who may otherwise lack detailed information about the property secured by a particular pledge. For example, the secured property might be described by reference to a class of property, or be intended to include assets to be acquired by the provider.

512. Subsection (1) sets out that an entitled person may request the person identified in the statutory pledges record as the secured creditor to say whether or not particular property is secured property, and if that person is not in fact the secured creditor to provide further information including the identity of any assignee.

513. Subsection (11) sets out that any such an assignee may be a secured creditor for the purposes of a further request under this section.

514. Subsection (2) provide for the meaning of “entitled person” so that it covers any person who has a right to the property specified in the request, a right to exercise diligence against that property, the consent of the provider, or is a person specified in RSP rules.

515. Subsection (3) sets out that the secured creditor must respond to the request with 21 days after receipt, unless the court makes an order in that respect under subsection (5), or the making of a request is barred under subsection (8).

516. Subsection (4) provides that the secured creditor may on complying recover reasonable costs from the entitled person.

517. Subsections (6) and (7) provides for the entitled person to be able to apply to the court on default by the secured creditor, and the court has power in particular on such application to extinguish the pledge.

518. Subsection (8) sets out three circumstances in which there is no requirement to respond to the request. The first is where it is clear that the registration is not effective. The second is where it is clear from the entry that the property is not encumbered by the pledge. The third is where a request has been made within the previous 3 months, and the information that would otherwise be disclosed is still correct.

Example: A grants a statutory pledge over his Rolls Royce (only). A search in the RSP against A reveals only the entry for that statutory pledge. A request to the person named as secured creditor as to whether the pledge covers the yacht belonging to A can be ignored as it is clear from the register that it does not.

519. Subsections (9) and (10) set out a special rule to protect purchasers of secured property, and are influenced by the DCFR Book IX.-3:322(1). If a person making a request is advised wrongly by the secured creditor that the particular property is not subject to the pledge, and within three months the person acquires the property in good faith (or a right in the property such as a further pledge), then that person takes the property unencumbered by the pledge.

## **Section 111 Liability of Keeper**

520. This section provides for the Keeper to compensate any person who has suffered a loss for a reason specified in subsection (1).

521. The liability under subsection (1) is strict in that the person does not have to show that the Keeper is at fault, but subsection (2) limits the losses that can be recovered by excluding certain types of claim.

522. The limitation is similar to that in section 37 of the Bill, and in section 106 of the Land Registration etc. (Scotland) Act 2012.

## **Section 112 Liability of certain other persons**

523. This section provides for certain persons to be liable, on fault shown, for losses suffered by another person in the circumstances specified in subsection (1). The liability is fault-based.

524. Subsection (1)(a) applies where a person suffers loss as a result of an error or omission in an entry where the person who made the application which led to the entry did not exercise reasonable care.

Example: A maliciously registers a forged constitutive document bearing to be granted by B over property owned by C. C has a claim against A for any loss.

525. Subsection (1)(b) applies where as a result of a failure to take reasonable care there is an error or omission in responding to an information request under section 110 of the Bill.

Example: A informs B that a particular vehicle is not pledged, and B registers a pledge over the vehicle. A had failed to take reasonable care to check the accuracy of the information and the vehicle was in fact already pledged. The pledge B has taken will rank after the earlier pledge, and B therefore has a claim against A for any loss caused by that failure.

526. Subsection (1)(c) applies where a person has failed to provide information under section 110 of the Bill without reasonable cause.

527. Subsection (2) imposes the same restrictions on liability as those set out in section 112(2) of the Bill.

## **Section 113 Service of notices for the purposes of certain provisions of this Chapter**

528. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 makes provisions in relation to the service (including sending) of documents in Acts of the Scottish Parliament.

529. This section modifies those provisions for the purposes of certain provisions in this Chapter of the Bill.

530. Paragraph (a) refers to subsection (4) of section 26 of that Act, which deals with the sending of notices. The effect of paragraph (a) is that a notice should be sent to the address for the person that is given in the register entry.

531. Paragraph (b) refers to subsection (2)(c) of section 26 of that Act, which deals with electronic communication of notices. The effect of paragraph (b) is that where an e-mail address is given for a person in the register entry, the electronic communication should be to that e-mail address.

### **Section 114 RSP Rules**

532. This section sets out that the Scottish Ministers may, by regulations, make rules providing for the operation of the Register of Statutory Pledges (referred to in the Bill, and in these notes, as RSP Rules). They must consult the Keeper before doing so.

533. The power to make RSP Rules includes the powers in paragraphs (e), (f) and (h) of subsection (1) to authorise the redaction of information or signatures from an entry in the RSP, or to make certain information unavailable to searchers (which might include an individual's date of birth).

## **Chapter 3 – Miscellaneous and Interpretation of Part 2**

### **Section 115 Competence of creating an agricultural charge**

534. This section prevents the creation of a new agricultural charge, which is a security right little used in practice. It will however be competent to grant a statutory pledge under the Bill over any asset that can be subject to such a charge.

### **Section 116 Interpretation of Part 2**

535. This section defines key terms used in this Part.

536. Subsection (2) defines “right in security” so that it does not include, unless the context requires otherwise, a right to use diligence. The effect is that an effectively executed diligence is not to be treated as a security right for the purposes of the Part.

537. A “right in security” does include, unless the context requires otherwise, a floating charge.

538. The expression “right in security” can be used in various legal senses, including being limited to “true” securities where the secured creditor has a subordinate real right in the asset. For floating charges, however, there is no such real right prior to attachment (crystallisation) of the charge as a result of the insolvency of the legal person who granted the charge.

### **Section 117 References in Part 2 to “registering”**

539. This section provides for the meaning of references to registration in this Part.

## **PART 3 INTERPRETATION OF THIS ACT AND GENERAL**

### **Section 118 Interpretation of this Act**

540. This is the main interpretation provision. Other sections provide for the interpretation of terms used only in Parts 1 or 2 respectively, or for the definition of terms used for the purposes of particular provisions. Only some of the terms in subsection (1) call for explanation.

541. The definition of “authenticated” refers to the Requirements of Writing (Scotland) Act 1995, and its requirements for execution of electronic documents. But it is also possible for the Scottish Ministers to make alternative provision.

542. In subsection (2), the definition of the various types of “written” document require to be in the form of a hard copy or in an electronic communication (such as an e-mail). In other words, word of mouth is insufficient.

543. Subsection (5) lets the Scottish Ministers prescribe a different standard for authenticating electronic documents than that provided for by the Requirements of Writing (Scotland) Act 1995.

### **Section 119 Automated computer system**

544. This section authorises the Keeper to operate the Registers provided for under this Act by means of an automated computer system.

### **Section 120 Good faith**

545. This is a general provision relating to good faith provisions in the Bill, for example sections 11 to 12. Where a question is raised as to whether someone is in good faith it is for the person challenging this to prove that the person was not in good faith.

### **Section 121 Ancillary provision**

546. This is a regulation-making power, enabling the Scottish Ministers to make provision for consequential and other incidental matters in order to give full effect to the Bill.

547. The power in this section allows the Scottish Ministers to amend any enactment, including the Bill. For the meaning of “enactment” see schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

### **Section 122 Regulations**

548. This provision sets out which of the regulation-making powers in the Bill are subject to the affirmative or the negative procedure in the Scottish Parliament.

### **Section 123 Commencement**

549. This provision is self-explanatory.

### **Section 124 Short title**

550. This provision gives the short title of the Bill, by which it will be cited.