

18 June 2019



Our ref: L/1/3/17A

Dear Consultee

**DISCUSSION PAPER ON HERITABLE SECURITIES: PRE-DEFAULT
(DISCUSSION PAPER No 168)**

We invite comments on the above mentioned Discussion Paper which has been published today. The paper is available on our website at <https://www.scotlawcom.gov.uk/law-reform/consultations/>, together with a news release and a summary.

The Discussion Paper focuses mainly on the property aspects of securing obligations over land and buildings ('heritable security'), and in particular on how best to ensure that the standard security as created by the Conveyancing and Feudal Reform (Scotland) Act 1970 remains fit for purpose.

It is intended that there will be a second discussion paper that focuses on the issues that arise when there is a default in the secured obligation (enforcement).

It is of the first importance to the economy and to society that a fair and effective method is available to secure obligations over land. If nothing else, the 'mortgage' is usually the only way for people to own their own homes.

The last major review of security over land took place over 50 years ago, and much has changed since then. The time is right for another 'root and branch' review of this area of law.

It is said for example that the 1970 Act is fussy and over-complicated. A number of court cases have thrown doubt on some key aspects of security law, including how exactly securities can be transferred, and the effect of a transfer. There remains considerable doubt about whether – and if so how – non-monetary obligations can be secured over land.

The Paper seeks consultees' views on a wide range of topics, including:

- **Forms**

The 1970 Act requires that standard forms are used for most transactions, but court cases have thrown doubt on exactly how much latitude there is for varying the forms. Getting it wrong can mean the transaction is invalid. We propose therefore that there should no longer be compulsory forms.

- **Standard conditions**

The 1970 Act has the effect that standard conditions apply by default to all standard securities. The scheme in the Act is however inconsistent, and significantly out of date. We propose that that standard conditions should no longer be imposed in that manner, but we ask if it would be useful to have a 'style' set of conditions that could be used if desired.



- **Non-monetary obligations**

It is at present possible to secure non-monetary obligations (obligations ad factum praestandum) over land, but the effect of doing so is too uncertain. We consider that it should still be possible provided that what is secured is a monetary claim relating to that obligation. We propose however that there should be a separate law reform project to consider this issue given – for example – the economic importance of options to buy land at some future time.

- **Assignment**

A standard security is transferred by being assigned, but it is unclear what effect a transfer has where for example the security is for 'all sums' and the debtor owes additional sums to the new creditor. Are those sums secured or not? We seek to clarify the issues, and obtain views on the options for reform.

Consultation is critical in all our law reform projects to ensure that the final recommendations contained in our report would, if implemented, result in law which is just, principled, responsive and easy to understand.

We would therefore be grateful to receive your views on any or all of the proposals in this Discussion Paper; they will be fully considered and analysed in the course of reaching our final conclusions. Even if you agree with our proposals but do not wish to make any further comments, a brief note to that effect would be most helpful as an indication that our proposals are on the right lines.

Where possible, we would prefer the electronic submission of comments. For example, you can use the downloadable electronic response form for this Discussion Paper on our website at <http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/2010present/>. The MS Word form has a questionnaire format which allows you to comment - briefly or at length - on any of the paper's proposals which interest you. The form can be downloaded and emailed to us at info@scotlawcom.gsi.gov.uk, as can comments composed in other electronic formats. Alternatively, you may prefer to send your comments on the Discussion Paper by using the general comments form to be found on the website Contact us page (<http://www.scotlawcom.gov.uk/contact-us>).

PLEASE NOTE that the consultation process for this project will conclude on 30 September 2019; accordingly, we would be grateful if comments were submitted by then.

PLEASE ALSO NOTE THAT information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may also (i) publish responses on our website (either in full or in some other way such as re formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

More information about the work of the Commission can be found on our website at <https://www.scotlawcom.gov.uk/>. Finally, should you wish to offer any comments on the way in which we conduct our consultation exercises, we would be pleased to hear from you.

Yours faithfully

MALCOLM McMILLAN
Chief Executive