

## **ECONOMY, ENERGY AND FAIR WORK COMMITTEE**

### **MOVEABLE TRANSACTIONS**

#### **SUBMISSION FROM       CITIZENS ADVICE SCOTLAND**

Scotland's Citizens Advice Network empowers people in every corner of Scotland through our local bureaux and national services by providing free, confidential, and independent advice. We use people's real life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.

In 2018-19, the Citizens Advice Service network helped over 270,000 clients in Scotland and dealt with almost 750,000 advice issues. With support from the network, clients had financial gains of over £131 million and our self-help website Advice in Scotland received approximately 3.7 million page views. The CAS network gave advice on 159,849 occasions on debt, financial and consumer issues.

#### **Recommendations**

- Consumer transactions should be excluded in the clearest way possible from the proposed changes to ensure that there is no consumer detriment. This can be achieved through the adaptation of established jurisdictional concepts. Our proposal is that the provisions should not apply to consumer contracts where individuals are "contracting" for a purpose out with their trade or profession.
- Income protection measures should be put in place for individuals whose income source in the form of rights, licences and permissions etc., is proposed as the security. Protections on the income sources should be analogous to those applicable to the earnings of debtors.
- Care should be taken to ensure the status quo and not to create any potentially detrimental consumer markets that could potentially undermine existing established rights in other areas. For example undermine the established protections in hire purchase. Our proposal on excluding consumer transactions would achieve this and would not render the proposals unusable in a proper commercial context.
- The public register should exclude the registration of extinguished or statute barred debts. This will provide public protection from a bad practice whereby, purchased debts which are extinct or no longer exist are put forward as being enforceable.
- For debt purchase the register should require prior intimation to the debtor. This will ensure the receipt of accurate information on who is to be paid and the fact that it can be checked on the register if required. It would also aid accuracy.
- Access to the register should be limited to the assignee, assignor and the individual debtor i.e. only those with a legitimate interest. It should also be free of charge to appropriate individual consumers whose debt has been assigned.

## **Moveable Transactions**

### **1. Have difficulties raising finance on moveable goods in Scotland affected your business or area of activity? If so, what practical impact has this had?**

This question is not applicable to CAS nor CABs in terms of their own financial arrangements. However, we represent the consumer interest and have specific consumer concerns which we address later in this response. We are not convinced these measures are even necessary for business transactions and would simply refer the committee to the following statement from the Scottish Central Research Unit's 2002 empirical study:

“The perception that Scots law creates problems for SMEs has not been backed by systematic evidence. More specifically, when this study was commissioned there was little empirical evidence to support the suggestion that business finance is more difficult to obtain in Scotland because SMEs are unable to grant a non-possessory security over moveable assets, or that it is more difficult for unincorporated Scottish SMEs to obtain finance because they cannot grant a floating charge.”<sup>1</sup>

#### *Impact on microbusinesses*

This would depend on the size of the microbusiness; there is a spectrum going from a structured business to zero-hour contractor. The issue is that the smaller the business which is an assignor, the nearer it becomes analogous to a consumer concern. For example, the finances and in particular the liabilities of unincorporated sole traders are legally indivisible between their business and personal transactions. Even if there is a general business case for reform, in our view, there is no consumer case and we would urge the committee to think about where the line is drawn in terms of consumer protection.

### **2. The Committee understands that there are various work-arounds used by Scottish businesses to enable access to finance on moveable goods. Are these sufficient, or would the law benefit from being reformed?**

Not applicable. We have no direct experience of such work-arounds or comments to make about them.

### **3. The Scottish Government will have to invest money in creating the two new registers recommended by the Scottish Law Commission. Do you think there is sufficient demand to justify this? Do you have any evidence to support this?**

We do not approach this question in terms of sufficient demand but rather what effect it would have. There are several aspects to this.

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<sup>1</sup> *Business Finance and Security Over Moveable Property*, Hamilton, Coulson, Wortley and Ingram (for Scottish Executive Central Research Unit) (2002), [Introduction](#).

*Effect of registration on individuals owing debts*

Firstly, we firmly believe that registration of an assignation should confer no greater enforcement power than would pertain to the contract or obligation as the law would apply in the absence of registration. There would be a clear incentive to register for lenders/creditors if it conferred a greater enforcement power, but this would mean reducing the consumer's rights to protection from enforcement without any prior agreement by them. The existing rules for enforcement of debt obligations are clear, as are the opportunities for people in debt to challenge, delay or renegotiate payment according to what they can realistically afford. Provided that the effect of the proposed Bill would confer no change in this, we would be content with this aspect.

*Effect of registration generally*

Secondly, although there may be some merit in registers of the type proposed by the Scottish Law Commission, there would be an inherent limit in their value since they would not be definitive. Assignation will still be able to be effected by notice rather than by registration. Any subsequent trade in goods with securities over them would therefore incentivise purchasers to demand, and sellers to provide, not only evidence of no registered security via an entry in the register but also an undertaking that no such *unregistered* security has been created or is outstanding.

This seems antithetical towards recent trends for public registers to offer certainty. For example the land registration provides certainty and the key purpose is to enable reliance upon the register (and upon certificates as extracts from it).

However, the permanence and value of land and buildings, and the relative infrequency of their conveyance, means that searches are generally accepted as part of the necessity of effecting a transfer or acquisition of interests in them, and are also justified by a public interest in being able to know who holds interests in land and what these are. These assumptions may not hold true for secured moveables.

Nonetheless, if the Government and the Parliament consider that there would be merit in a register, we would not object in principle provided that this would not replace assignation by means of notice, or perhaps that registration could only be effected upon proof of intimation having occurred. We assume that assigned creditors would always want to intimate this to debtors to ease payments being made to the correct account, but a legal route to effect a transfer of debt without intimation risks detriment to the debtor.

Placing the onus on any debtor to familiarise him/herself with a public register before making any payment in or towards satisfaction of a debt would be inequitable. In a similar vein the proposed protection in the bill for this is for the debtor to prove that they paid the assignor. We see no reason why the debtor should be "piggy in the middle". The current method of notification of assignation deals directly with the debtor and does not treat them as an afterthought.

Equally, the current rules about effective intimation exist to protect debtors' interests, but an intimation carried out in practice which was not legally required could become more perfunctory and less effective. There is a separate question about whether and in what circumstances intimation by email rather than service of a document would be deemed acceptable.

#### *Access to the registers*

If registers are created, only the assignor, assignee, registrar and the individual debtor should have access to the relevant details, and only for their legitimate purposes. The principles of the GDPR as they apply to collecting, retaining and using personal data – including the requirement to have a lawful basis – should apply equally to accessing the register.

Secondly, access to appropriate individual records must be free of charge to any consumer whose debt is registered. To charge a fee to the individual debtor would be out of step with public policy and existing practice. The Accountant in Bankruptcy's Debt Arrangement and Bankruptcy registers are free of charge to consult. On a more general basis, credit scores are now provided free of charge by reference agencies as a matter of practice.

#### **4. The proposals in the Scottish Law Commission's draft bill would apply to consumers as well as businesses. Do you think there are enough protections in place for consumers?**

Before dealing with our main concerns regarding consumer transactions, we would point out that there is absolutely no limit or protection proposed for assigning incomes derived from incorporeal moveable sources for example royalties, licenses, rights and shares.

Our concern is where income derived in these ways is securitised against a loan, particularly if it is an individual's sole source of funds, there are no protections similar to those in place for people whose income derives from earnings, pensions or benefits when the security is enforced. This situation allows for an all or nothing gamble and could lead to the destitution of the borrower and an unduly harsh outcome.

We also note that the whole thrust of consideration and consultation engaged in the Scottish Law Commission's 2011 discussion paper and the 2017 report relate to a business case for reform. Both the advisory group to the Commission for the 2011 discussion paper, and the organisations and individuals responding to it, seem to us either to be engaged predominantly or exclusively in the fields of finance or commercial law. As far as we can ascertain, there are no obvious members of the advisory group or respondents with a consumer brief. Neither is there any research content or contribution from the main UK regulator, the Financial Conduct Authority (FCA), or its predecessor the Financial Services Authority.

We know from experience that the FCA as well as being a regulator also has a considerable body of market insight and research to call upon. We recognise that the proposals are entirely aimed at matters of competence within the Scottish jurisdiction and are wholly business focused, but that does not seem to us to be a strong rationale for consumer or independent voices to be silent.

Our main intent here is to prevent consumer detriment, especially where there is no obvious consumer advantage, and we believe that this is best achieved by explicitly excluding consumer transactions from the main scope of the Bill's provisions. We have some specific concerns with consumer debt to which we would also draw the attention of the committee.

#### *Consumer debt: securities*

It is true to say that the proposed Bill does not directly interfere with rights under the Consumer Credit Act 1974 in relation to its provision on securities, but it does have the potential to distort the market and undermine existing rights in other areas of the 1974 Act. Currently, most car finance is provided via hire purchase and conditional sale. An important protection here is the consumer's right to hand back the goods once half the total price is paid. If assigning a vehicle subject to a new security was to be used as an alternative means of obtaining finance for goods instead of HP, then potentially this provides a work around the current provisions. We can reasonably anticipate that the more favourable position this would create for lenders would find favour in their general offer for financed sales to consumers. Consumers' relative inequality of bargaining power might mean they have less practical opportunity to shop around for a better deal on the basis of enhanced consumer protections, if they are even aware of that right.

#### *Consumer debt: debt purchase and assignation*

Our main concern with consumer debt purchase is that often what is bought is prescribed or statute barred debts, which are then pursued. Debt buyers often take advantage of the adversarial nature of the justice system to obtain decrees for payment, even of prescribed and time-barred debts, unless the debtor appears in court to oppose the basis of the alleged debt and allow presiding Sheriffs to enquire further. We do not believe that a public register should be used to validate extinguished or statute barred debts. We do not oppose registration of purchased debts, but as a matter of public protection from bad practice it should exclude statute barred or extinguished debts.

#### *Restriction of the Bill to businesses*

We note that during Stage 2 of the consideration of the Consumer Scotland Bill before Parliament, the definition of consumer was expanded to include small and micro-businesses for the purposes of defining the remit of the proposed new Consumer

Scotland Agency, so this demonstrates that definitions of consumers in law are changeable, and changeable for devolved purposes by the Scottish Parliament.

Our proposal is that the provisions would not apply to consumer contracts relating to individuals who are definitively “contracting” for a purpose outwith their trade or profession.<sup>2</sup> This provides the basis for a transactional approach, it does require some further refinement, but it comes with some case law guidance refining the definition of consumer contract.

Transferring that jurisdictional concept to the Bill is not at odds with its general purpose and does not restrict genuine small-scale business transactions and access to the benefits the Bill seeks to confer. At the same time, it provides suitable consumer protection and draws a firmer line between the two.

**5. Do you have comments on any of the other proposals contained in the draft bill?**

No.

**6. Do you agree with the Scottish Law Commission’s view that the law relating to moveable transactions should be changed?**

We are not opposed to some changes in the law providing these meet the parameters set out above. We have no evidence that these are necessary, however.

**7. Do you have any other comments?**

We have no other comments at this stage.

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<sup>2</sup> [Civil Jurisdiction and Judgements Act 1982, Sched 8, Para 3\(1\)](#); see also *Semple Fraser WS v. Ian Quayle* 2001 SLT (Sh Ct) 33, and *Lynch & Co v Bradley* 1992 SCLR 733.