Scottish Law Commission
promoting law reform

RESPONSE FORM

DISCUSSION PAPER ON HERITABLE SECURITIES: NON-MONETARY SECURITIES AND SUB-SECURITIES

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

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

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Name:
Organisation: Faculty of Advocates
Address: Advocates Library, Parliament House, Edinburgh EH1 1RF
Email address:

Summary of Questions

1. What information or data do consultees have on:

   (a) the economic impact of the current legislation on heritable securities in relation to transactions involving non-monetary securities or secondary standard securities?

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

(Paragraph 1.21)

Comments on Question 1

The Faculty does not possess any information or data on any potential economic impacts.

2. Which of the following approaches do consultees prefer and why?

   (a) A standard security may not secure a non-monetary obligation, but it may secure an obligation to pay damages for non-performance of that obligation.

   (b) A standard security may secure a non-monetary obligation, but the security will entitle the holder only to damages for non-performance of that obligation.

(Paragraph 3.12)

Comments on Question 2

The Faculty is of the view that parties must have a legal means of securing a non-monetary obligation. The Faculty supports legal reform in respect of the proposal discussed later in the discussion paper in relation to a bespoke mechanism to protect obligations to transfer or grant rights in land. However if a bespoke mechanism is not to be provided a standard security should continue to be a competent legal means of securing a non-monetary obligation.

The Faculty notes that the two options under this question both proceed on the basis that the ultimate remedy for the creditor will be to seek damages (rather than, for example, seeking implement of any obligation). Of the two options proposed, and in the absence of a bespoke mechanism, the Faculty prefers the second, as the first option would appear wholly to eliminate the ability for parties to use standard securities for non-monetary obligations.

The Faculty cannot comment in any substantive detail on the economic impacts of the first proposal but it seems likely that the first option might thwart or discourage commercial transactions without an alternative means of security or protection.

3. If a standard security under any new legislation entitles its holder only to monetary remedies:

   (a) Is specific provision required to deal with the ranking of such a security?

   (b) If so, what provision is required?

(Paragraph 3.17)

Comments on Question 3

This question seeks practitioner's experiences in respect of ranking. The experience of the Faculty is limited to the extent that either advice is sought or litigation arises from the issue of ranking.

However where a monetary remedy is to be secured it is the view of the Faculty that a default position on ranking should be provided in any legislation. The default position should be ranking by date of registration i.e. the oldest security being ranked first. All holders of securities should be free unanimously to agree to 'opt-out' of any default provisions in the legislation.

4. Should the law provide a means by which contractual obligations to transfer or grant subordinate real rights in land can be protected beyond the usual contractual remedies?

(Paragraph 4.14)

Comments on Question 4

The Faculty supports legal reform whereby contractual obligations to grant or transfer subordinate real rights in land are protected beyond conventional contractual remedies.

5. Which of the following approaches do consultees prefer?

(a) A party wishing to protect the priority of an obligation to transfer or grant a subordinate real right in land should continue to take a standard security in respect of that obligation and rely on the rule against offside goals to protect that obligation.

(b) The law should be reformed to provide a bespoke mechanism for protecting the priority of an obligation to transfer or grant a subordinate real right in land.

(Paragraph 4.20)

Comments on Question 5

The Faculty prefers the second proposal that the law is reformed to provide a bespoke mechanism for protecting the priority of an obligation to transfer or grant a subordinate real right in land.

It is not clear what difficulties, if any, would arise if parties were free to choose to either rely on a standard security, or alternatively a bespoke mechanism.

The Faculty wishes that it be noted that if the law is not to be reformed parties to an appropriate obligation should be able to take a standard security as currently available.

6. If a new form of notice is introduced to protect the priority of obligations to transfer land or grant a subordinate real right, should this be known as a conditional advance notice? If not, what name should be used?

(Paragraph 4.34)

Comments on Question 6

The Faculty does not hold any strong views on the name to be given to the proposed scheme. However, the Faculty would observe that "conditional advance notice" might well cause some confusion with the existing "Advance Notice" regime (which is conceptually very different). Standing this, we would suggest that an alternative name might sensibly be used (perhaps, "Notice of Proprietor's Obligations" or the like).

7. If a conditional advance notice scheme is introduced:

(a) Should the conditional advance notice include the same content as the advance notice?

(b) Should the conditional advance notice also include identification of the contract or undertaking in which the obligation to grant the intended deed is set out?

(c) Should any further information be included in the conditional advance notice?

(Paragraph 4.39)

Comments on Question 7

(a) Yes

(b) Yes

(c) No

The Faculty agrees with the proposals in this regard. The Faculty also believes that referring to the document in which the obligation was created would provide clarity for parties dealing with assignations of, or indeed disputes about, the notice at a later date.

8. If a conditional advance notice scheme is introduced:

(a) Should it be possible for an application for a conditional advance notice to be made by the person with the power to validly grant the intended deed?

(b) Should it be possible for an application for a conditional advance notice to be made by any other person? If so, which person and why?

(Paragraph 4.46)

Comments on Question 8

(a) Yes

(b) No

The Faculty is persuaded by the policy arguments given at paragraph 4.43 of the report that third parties should not be able to make such an application.

9. If a conditional advance notice scheme is introduced:

(a) Where the intended deed relates to a property in the Land Register, should a conditional advance notice be entered on the title sheet of that property?

(b) If so, in which section of the title sheet should it be noted?

(c) If not, where in the Land Register should the conditional advance notice be located?

(d) Where the intended deed relates to a property in the Register of Sasines, should a conditional advance notice be recorded in that Register?

(Paragraph 4.54)

Comments on Question 9

(a) Yes

(b) The security section

(c) N/A

(d) Yes

10. If a conditional advance notice scheme is introduced:

(a) What should be the duration of the protected period and why?

(b) At the end of the protected period, should it be possible to extend the period by the same fixed duration? If not, why not?

(c) Should it be possible for the person intending to grant the deed to extend the period of the notice? Should it also be possible for the intended grantee of the deed to extend the period of the notice? If not, why not?

(Paragraph 4.61)

Comments on Question 10

(a) The Faculty queries whether a fixed period for such notices is appropriate.

(b) If there is to be a fixed "protected period", yes

(c) If there is to be a fixed "protected period", yes, both parties should be able to extend the period of notice

The Faculty favours a scheme which can provide some effective security for the period that the parties have agreed they are to be bound (and also may reflect the fact that their circumstances may change). At first blush, a total period of ten years as the duration of the notice may appear to be excessive when compared with the period of positive prescription for rights in land and the period of negative prescription for enforcement of contractual rights, suggesting that there should be a rather shorter initial period than five years. That said, the Faculty would also acknowledge that conveyancing solicitors with experience of the practicalities in this area may be able to provide information that would point towards a different duration being appropriate – for example, if options are regularly granted for a period significantly in excess of 3 years, it may be appropriate to reflect this in the duration of the protected period (with a view to avoiding the need for multiple extensions of the period of notice and the consequent possibility of the need for such extensions being overlooked). It may, in particular, be most practically effective simply to avoid imposing a time limit on such notices, notwithstanding that this may leave some notices which no longer serve a purpose on the Register.

11. If a conditional advance notice scheme is introduced:

(a) Should the priority of the deed specified in the notice be protected against any voluntary competing deed registered during the protected period? If not, why not?

(b) Should performance of the obligation to deliver the deed specified in the notice be protected against any voluntary competing deed registered during the protected period? If not, why not?

(Paragraph 4.74)

Comments on Question 11

(a) Yes

(b) Yes

12. If a conditional advance notice scheme is introduced, should the priority of the deed specified in the notice be protected against:

(a) Any involuntary competing deed registered during the protected period?

(b) An inhibition, or another entry in the Register of Inhibitions which takes effect as if an inhibition, during the protected period?

Please provide reasons in support of your answers if you wish.

(Paragraph 4.80)

Comments on Question 12

(a) No

(b) No

The option holder should not take any sort of controlling interest in the administration of the insolvency process simply by virtue of the role of the option in their dealings with the insolvent party. It appears to the Faculty that the solution of that party taking a separate security for damages, if that is desired and can be negotiated, accords with our analysis of the purpose of the conditional advance notice, and makes that purpose more transparent to parties using them.

13. If a conditional advance notice scheme is introduced, should it be provided that:

(a) Where the claim protected by the notice is assigned, the assignee acquires the right to the notice;

(b) The intended grantee of the protected deed has the power to apply for transfer of the notice, and must do so where necessary to transfer the notice following assignation of the protected claim?

(Paragraph 4.84)

Comments on Question 13

(a) Yes

(b) Yes

14. If a conditional advance notice scheme is introduced:

(a) Should provision be made for discharge of the notice as under the advance notice scheme, subject to the reform of the requirement of consent from the intended recipient?

(b) Should the intended recipient be required to consent to the discharge application in writing?

(c) Should a court process be available for discharge where the intended recipient cannot be found, fails to respond or refuses to consent?

(Paragraph 4.92)

Comments on Question 14

(a) Yes

(b) Yes

(c) Yes

15. Do you have any comments on the use of conditional advance notices in relation to purchase options held by tenants in respect of the property they lease?

(Paragraph 4.98)

Comments on Question 15

It seems unlikely that many such options would be granted were conditional advance notices used to secure them, but we have little information about the relative negotiating power of landlords and tenants in relation to such options.

16. Is further exploration required of the potential to protect obligations to transfer land by way of a standard security, a personal real burden or an inhibition? If so, why?

(Paragraph 5.24)

Comments on Question 16

No. This is certainly the Faculty's view in relation to standard securities, and indeed we see the proposal to phase out their use for these purposes as helpful in promoting their conceptual coherence. The Faculty agrees with the analysis given that, of the other two options, a solution based on inhibitions would be a better fit with the outline of property law, but can see no practical reason to favour it over the current approach.

17. In what circumstances is a standard security taken over a standard security in practice?

(Paragraph 6.27)

Comments on Quesion 17

These sorts of arrangements are usually dealt with by solicitors specialising in conveyancing or banking law. Whilst individual members of Faculty may see examples of these from time to time, the Faculty considers that those undertaking these transactions on a regular basis would be better placed to comment on what is currently happening in practice.

18. Should the grant of a standard security over a standard security cease to be competent? If not, why not?

(Paragraph 7.14)

Comments on Question 18

In response to a previous consultation, the Faculty expressed the view that it should remain competent to grant a standard security over a standard security (hereinafter referred to as a sub-security). That was on the basis that those involved in financial transactions perceived them to have a benefit. It is understood that, in transactions where a sub-security is taken, a separate agreement will be entered into which provides for the primary claim to be assigned to the party taking the sub-security.

The Faculty can see the merit in what is proposed regarding the abolition of the sub-security. In particular, if an assignation of the standard security were to take place instead, that would avoid the need to go through the expensive process of calling up the sub-security. However, it is less clear to us whether there are perceived benefits to retaining the sub-security and having it registered in the Land Register. Those who are dealing with sub-securities in practice will be better placed to advise on this.

In the event that the grant of a sub-security is to cease to be competent. It appears to us that the following questions will require to be considered:

- Will the change be prospective only? We presume that the answer to this question will be yes.
- Will there be exceptions in circumstances where parties have contracted to provide a sub-security but not yet granted it? This question would apply equally to options.

19. (a) Should it be possible to assign in security a standard security?

(b) If so, what consequences should follow from such an assignation in security?

(Paragraph 7.35)

Comments on Question 19

For the reasons identified in Answer 18 above, the Faculty considers that those who are dealing with the creation of sub-securities in practice are better placed to comment on whether an assignation in security of a standard security is preferable to a sub-security.

At [7.34] the Commission expresses the view that there is no need in any new legislation to make provision for assignation in security of a standard security. That view proceeds upon the view, expressed in [7.21], that, following the enactment of section 15(2) of the Moveable Transactions (Scotland) Act 2023, the assignation of a claim will carry with it all accessory security rights.

Section 15(3) of the Moveable Transactions (Scotland) Act 2023 provides that where performance of some act by the assignor is necessary for the security to transfer to the assignee, the assignor must perform that act. Accordingly, that provision will entitle the assignee to an assignation of the standard security.

The Faculty considers that there would be benefit in the legislation relative to standard securities making it clear that the standard security may be assigned in those circumstances. This would avoid the risk of an argument that the assignation was invalid as being an impermissible security over a real right in land.

There might also be benefit in the assignation that is executed identifying that it is an assignation in security so that this is clear from the face of the Land Register. Again, those involved in undertaking this type of work in practice will be better placed to comment on the practicalities that arise.

General Comments

If assignations in security of standard securities are to be permissible, the consequences flowing from those assignations should be identified in the legislation in order to avoid uncertainty. This could be done by setting out basic default rules which could be supplemented by the parties if necessary.

For the reasons identified in Answer 18 above, the Faculty considers that those who are dealing with the creation of sub-securities in practice are best placed to comment on the consequences which ought to follow on an assignation in security of a standard security.

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