Minister for Public Finance, Planning and Community Wealth
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Scottish Government
Riaghaltas na h-Alba
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Stuart McMillan MSP
Convener
Delegated Powers and Law Reform Committee

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Dear Convener,

When I gave evidence to the Committee in relation to the Moveable Transactions (Scotland) Bill on 1 November, I undertook to revert to the Committee's questions and I am happy to do so now.

Electronic signatures

Jeremy Balfour MSP asked about the requirement for electronic signatures under the Bill and queried whether this may pose accessibility issues for potential users under the Bill.

It should be noted that there is no strict requirement for electronic signatures under the Bill. Section 1(1) requires the assignation document to be "*executed"* (wet signature) or "*authenticated*" (electronic signature) by the assignor. In the same vein, section 43(2) requires the constitutive document for a pledge also to be either "*executed"* (wet signature) or "*authenticated*" (electronic signature) by the provider. The definitions of "*executed*" and "*authenticated*" are provided in section 116(1) of the Bill and derive from the corresponding definitions provided in the Requirements of Writing (Scotland) Act 1995. Furthermore, the Scottish Ministers have the power under section 116(3) to modify the aforementioned definitions should it be deemed necessary.

Further to the accessibility issue raised by Mr Balfour, it should be noted that the definition of "authenticated" in the Bill (as described above), taken in combination with the authentication requirements for registration in the Keeper's registers contained in section 9G of the 1995 Act, means that only a qualified electronic signature (QES) is permissible under the Bill. QES is the highest standard of electronic signature and involves the identity of the signatory being verified by a qualified trust service provider before the signature can be applied. QES offers the highest level of security and evidential value and the Scottish Law Commission's

discussion on this issue in respect of constitutive documents under the Bill can be found at paragraphs 4.23 and 23.5 of its Report on Moveable Transactions.

This means that, should assignors or providers decide upon using electronic signatures as opposed to wet signatures, they will require to have computer software that facilitates QES (such as that provided by DocuSign). This is distinct to what is known as a simple electronic signature (SES) or an advanced electronic signature (AES), which both have a lower evidential value. Added QES functionality in such software currently comes at extra cost and complexity.

Therefore, in consideration of the above, it is the position of the Government that, given there is Ministerial power under section 116(3) to modify the definition of "authenticated" should it be necessary, it would not be prudent at this early stage to downgrade the level of electronic signature required under the Bill. Time is required to evaluate how the registers will be used in practice and the effect the electronic signature provisions have on uptake before changes can be considered on this point – this desired flexibility is further discussed again in the abovementioned paragraphs of the SLC report. That being said, the accessibility point raised by Mr Balfour in relation to electronic signatures is important and we welcome any comments the Committee may have on this issue.

Agricultural charges

Jeremy Balfour also raised the argument submitted to the Committee by one of its respondents that Scotland would benefit from having a new kind of agricultural charge which any farmer could grant over moveable business assets, including livestock. The respondent has suggested that this would operate either as a fixed or floating charge and that, instead of abolishing agricultural charges in Scotland, the Bill should provide a new form of such a charge.

Agricultural charges were introduced by the Agricultural Credits (Scotland) Act 1929. They can only be granted by agricultural co-operatives in favour of banks. At the time of reporting in 2017, the Scottish Law Commission stated its impression (at paragraph 38.14 of its Report on Moveable Transactions) that agricultural charges were rarely used in practice and this view was confirmed by the Scottish Agricultural Organisation Society Ltd and the Law Society of Scotland. Absent any evidence to the contrary, the Scottish Government has no reason to believe that the position has now changed.

The Commission indicated that co-operatives grant floating charges rather than agricultural charges. Under floating charge, assets acquired by an entity automatically fall under the charge, but assets disposed of are automatically freed from the charge. So the entity remains free to deal with its assets. Floating charge would therefore appear to provide the flexibility suggested by the respondent and would, for example, mean that individual animals would be released from the floating charge when sold off. This is a niche area in which the use of floating charges is fit for purpose.

We are not aware that any other representations have been received by the Scottish Government about the reform, rather than abolition, of agricultural charges. It would be extremely unusual for an amendment to be made to a Bill affecting one particular sector of industry or society without consulting that sector on whether it believes such a change is required or desirable. We have no evidence that the new kind of agricultural charge proposed is necessary or desirable.

In these circumstances, the Government is minded to proceed to abolish agricultural charges in the form prescribed by the 1929 legislation, but to keep under review the need for charges along similar, but reformed, lines if evidence is presented that they are required.

Section 104 Order

As you know, the draft Bill was amended prior to introduction because the Scottish Government consider that several of the provisions of the Scottish Law Commission's Bill, concerning financial collateral arrangements and financial instruments, are outwith the legislative competence of the Scottish Parliament.

It is hoped that it will be possible to agree in principle with the UK Government a section 104 Order under the Scotland Act 1998 which would make provision for those matters for which the Scottish Parliament is deemed at present not to have legislative competence. Officials have raised this possibility with the Scotland Office in the first instance and a policy summary was sent for consideration by the Scotland Office and the Office of the Advocate General (OAG) in January 2022 with a view to having the section 104 Order agreed and passed at Westminster as soon as possible after the enactment of the Bill.

Agreement in principle from the UK Government is still awaited, but as the Bill is largely seen as a business-friendly initiative that affects the operation only of Scots law, it is hoped that the UK Government will be supportive and will support an Order which would implement the full scheme proposed by the Scottish Law Commission.

My officials have again been in touch with the Scotland Office about their consideration of the Scottish Government's request for a section 104 Order

The Scotland Office has indicated that the OAG is still currently reviewing the policy summary which the Scottish Government submitted to the Scotland Office in support of the request for the section 104 Order. They have explained that it can sometimes take a while to work through a policy summary and, as this is a particularly technical area of law, want to ensure that they get this right.

The Scotland Office has undertaken to revert to the Scottish Government with a substantive response as soon as possible. I will similarly revert to the Committee as soon as there is something to report in relation to the proposed section 104 Order.

Tom Arthur