

Economy and Fair Work Committee
Wednesday 5 February 2025
5th Meeting, 2025 (Session 6)

Note by the Clerk on two Scottish Statutory Instruments relating to the Movable Transactions (Scotland) Act 2023

Overview

1. Four Scottish Statutory Instruments (SSIs) have been laid relating to the Moveable Transactions (Scotland) Act 2023.
2. The Committee took evidence on 29 January from Ivan McKee, Minister for Public Finance and officials from the Scottish Government and Registers of Scotland. In response to members' questions, the Minister undertook to provide responses in writing and return to the Committee this week. **This response is attached at Annexe C.**
3. The Committee will continue its evidence taking with the Minister and officials on the four instruments, before debating and taking decisions on the motions to approve the two instruments subject to affirmative procedure. A separate paper has been prepared covering the two negative instruments.
4. The two draft Scottish Statutory Instruments (SSIs), which require approval by resolution of the Parliament before they can become law, are noted below.

Title of instruments:

- I. [The Moveable Transactions \(Scotland\) Act 2023 Amendment Regulations 2025](#); and
- II. [The Registers of Scotland \(Fees and Plain Copies\) Miscellaneous Amendments Order 2025](#).

Laid under:

- I. [Moveable Transactions \(Scotland\) Act 2023](#); and
- II. [The Land Registration \(Scotland\) Act 2012](#)

Laid on: 16 December 2024

Procedure: Affirmative

Lead committee to report by: 9 February 2025

Commencement: If approved, the instruments come into force on 1 April 2025.

Procedure

5. Under the affirmative procedure, an instrument must be laid in draft and cannot be made (or come into force) unless it is approved by resolution of the Parliament.
6. Once laid, the instrument is referred to—
 - the Delegated Powers and Law Reform (DPLR) Committee, for scrutiny on various technical grounds; and
 - a lead committee, whose remit includes the subject-matter of the instrument, for scrutiny on policy grounds.
7. The lead committee, taking account of any recommendations made by the DPLR Committee (or any other committee), must report within 40 days of the instrument being laid.
8. The normal practice is to have two agenda items when an affirmative instrument is considered by the lead committee—
 - an evidence session with the Minister and officials; followed by
 - a formal debate on a motion, lodged by the Minister, inviting the lead committee to recommend approval of the instrument.
9. Only MSPs may participate in the debate, which may not last for more than 90 minutes. If there is a division on the motion, only committee members may vote. If the motion is agreed to, it is for the Chamber to decide, at a later date, whether to approve the instrument.

Delegated Powers and Law Reform Committee consideration

10. The DPLR Committee considered the instruments on 7 January 2025 and reported on them in its [1st Report, 2025](#).
11. It made no recommendations in relation to the instruments.

Purpose of the instruments

The Moveable Transactions (Scotland) Act 2023 Amendment Regulations 2025

12. These regulations amend sections 4 and 50 of the Movable Transactions (Scotland) Act 2023 to update the definition of insolvency for the purposes of the Act, following stakeholder consultation.

13. They also make minor technical amendments and corrections to sections 6 and 14 of the Act for the purposes of, and for giving full effect to, the Act.
14. Additionally, the original legislation refers to consulting the Keeper of the Registers of Scotland on any draft regulations under the Act containing the rules of procedure for the Register of Assignations and the Register of Statutory Pledges (sections 39(1) and 111(1)). Any changes to the rules around these registers will be made under the negative procedure, rather than the affirmative procedure, and therefore do not require that consultation. These regulations amend this error by removing the requirement.
15. The policy note accompanying this instrument is attached at Annexe A. A SPICe briefing on both affirmative instruments is also attached.

The Registers of Scotland (Fees and Plain Copies) Miscellaneous Amendments Order 2025

16. The Movable Transactions Scotland Act 2023 created two new registers to simplify and facilitate moveable transactions in Scotland— the Register of Assignations and the Register of Statutory Pledges. Both are under the management and control of the Keeper of the Registers of Scotland.
17. This instrument amends the Registers of Scotland (Fees) Order 2014 (as amended) to set the fees Registers of Scotland may charge for their use. It also further amends the 2014 Fees Order to correct historic typographical errors and amends the Registers of Scotland (Information and Access) Order 2014 to apply its terms to both new registers.
18. The policy note accompanying this instrument is attached at **Annexe B**. A SPICe briefing on both instruments is also attached.

Report

19. **Following today’s consideration, a draft report will be prepared by the clerks. The Committee is invited to delegate responsibility for agreeing the draft report to the Convener.**

**Clerks to the Committee
January 2025**

POLICY NOTE

THE MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023 AMENDMENT REGULATIONS 2025

SSI 2025/XXX

The above instrument will, if approved, be made by the Scottish Ministers in exercise of sections 4(7)(c), 50(4) and 119 of the Moveable Transactions (Scotland) Act 2023 (“the 2023 Act”). The instrument is subject to the affirmative procedure.

Summary Box

<p>The purpose of this instrument is to amend the 2023 Act to amend the definition of insolvency, and to make minor technical amendments and corrections to sections 6 and 14 of the 2023 Act for the purposes of, and for giving full effect to, that Act.</p>

Policy Objectives

The 2023 Act reforms and modernises Scots law to make it easier for businesses and individuals to assign claims or raise finance using moveable property by creating two new registers, the Register of Assignations (“RoA”) and the Register of Statutory Pledges (“RSP”) under the management and control of the Keeper of the Registers of Scotland (“the Keeper”). The registers will simplify and facilitate moveable transactions in Scotland:

- the ownership of debts and other obligations will be able to be assigned (transferred) by registering the assignation in the RoA rather than by giving notice (intimation) to the debtor (although intimation will remain available); and
- corporeal (tangible) moveable property and incorporeal (intangible) moveable property (such as intellectual property and financial assets) will be able to be used as security for loans by registering a statutory pledge in the RSP, removing the current need to transfer either possession of, or title to, the property to the creditor or the use of expensive and inefficient workarounds.

This instrument would amend the 2023 Act as follows.

Definition of insolvency - sections 4(6)(a) and 50(3)(a) of the 2023 Act

The 2023 Act sets out, in sections 4(6) and 50(3) respectively, circumstances in which either the assignor of an assignation or the provider of a statutory pledge, respectively, would be deemed insolvent for the purposes of the 2023 Act.

At Stage 2 of the parliamentary scrutiny of the Moveable Transactions (Scotland) Bill, amendments were made to the insolvency definitions in these sections. Some of these amendments were reversed and others corrected at Stage 3 on the basis that the Scottish Government would undertake further stakeholder consultation on the definition of insolvency for the purposes of the 2023 Act during the pre-commencement period and, if the consultation pointed to further amendments being necessary, that these would be made by regulations under the specific powers in sections 4(7)(c) and 50(4) of the 2023 Act as passed. This consultation ran from 16 October to 15 November 2023.

Consideration of the resulting stakeholder consultee responses resulted in one common issue being identified, that of the inclusion in the insolvency definitions of an application for a debt payment programme under a Debt Arrangement Scheme (see further under 'Consultation' below). Regulation 2(2) and (6) accordingly remove the corresponding provisions from the definitions contained in sections 4(6)(a) and 50(3)(a) of the 2023 Act respectively.

Assignability and defences – sections 6(3) and 14(1) of the 2023 Act – existing and future claims

A central tenet of the reforms provided for in the 2023 Act is the ability to assign both existing *and* future claims. This is not currently possible in a practical sense under Scots law and therefore it was part of the policy intention, going back to the 2017 Scottish Law Commission report on moveable transactions, for the reforms to remedy this. The 2023 Act does so by allowing registration (as an alternative to intimation) as a competent method for assigning a claim. This allows both existing claims and those not yet in existence to be assigned competently - as provided for in section 1(4) of the 2023 Act. For example, a business would be able to grant an assignation document, have it registered and competently assign future invoices to future customers that don't exist yet – these claims would later transfer to the assignee once the business becomes the holder of the claim (i.e. at the point the future invoices come into being). This is because the 2023 Act provides for registration as an alternative to intimation – you cannot intimate to future customers that don't exist yet, hence the need for publicity by registration.

Sections 6(3) and 14(1) of the 2023 Act provide for different elements, concerning respectively limitations on assignability and defences of the debtor, but the amendments proposed under this instrument at regulations 2(3) and (4)(a) and (b) are of similar effect. There are two important elements to an assignation – the *grant* of the assignation document assigning the claim, and the *transfer* of the claim itself. In a standard assignation of an existing claim not subject to any conditions, the transfer element will occur upon registration or intimation and will likely be within a short timeframe after the grant of the document. However, for an

assignment of a *future* claim, the assignment document can be granted some time before the eventual transfer of the claim – as it only transfers once it comes into existence. Therefore, sections 6(3) and 14(1) as passed, by limiting the agreement not to assign a claim or agree that a defence should not be asserted to the time of the *granting* of the assignment document, whilst it covers existing claims, will not work correctly for future claims. The salient point in time for the operation of these provisions is the *transfer* of the claim (and in relation to section 6(3) the point at which the claim would have otherwise transferred), not the grant of the assignment document. These limited amendments would not affect the applicability of these provisions to existing claims, and would preserve the ability of the parties to agree otherwise in both sections 6(3) and 14(1).

The Scottish Government accordingly considers the amendments proposed to these provisions in this instrument are appropriate to ensure that the overall policy intention of the reforms in Part 1 of the 2023 Act apply equally to existing and future claims as otherwise provided for in the 2023 Act. These amendments are consequential and incidental and are considered appropriate in light of the regime of the 2023 Act, in particular section 1(4), to allow the 2023 Act to be implemented and operate in the manner intended.

Compensation etc. – section 14(3) of the 2023 Act – registration, intimation and deemed delivery of notice

It was the intention when passing section 14 to put the common law rule “the assignee takes the rights of the assignor” on a statutory footing. Section 14(3), which specifically deals with the assertion of a right of compensation etc. of this rule, provides that a debtor is not to be treated as having been told about the assignment of a claim only because an assignment document has been registered. A technical amendment to section 14(3) is considered necessary for the purposes of giving full effect to both that provision and the wider 2023 Act because, whilst registration is carved out for the purposes of section 14(3) because it does not form part of the existing common law rule, it was an error not to also carve-out the new deemed notice provisions found in section 8(9) and (10) of the 2023 Act, which also do not form part of the existing common law rule and apply where an assignment has been intimated instead of registered. We consider it was clearly Parliament’s intention when passing section 14(3) that on notice being given to the debtor, compensation in relation to subsequent dealings could not be pled as per the existing common law rule. But there are no deemed delivery notice provisions in the existing law, and it is considered to be unfair to debtors to have compensation pleas cut off because of a transfer of a claim they know nothing about. The introduction of registration means that a claim can be transferred without the debtor’s actual knowledge, but so too do the deemed notice provisions where it is intimated. Regulation 2(4)(c) remedies this gap and is considered appropriate as consequential, incidental on and supplementary to section 8(9) and (10) of the Act.

Consulting the Keeper on the Rules – sections 39(3) and 111(3) of the 2023 Act

The 2023 Act provides that the Scottish Ministers may make regulations containing the rules of procedure for the RoA and the RSP, under sections 39(1) and 111(1)

respectively. Any such regulations providing for the register rules are to be subject to the negative procedure, as provided for in section 118(4) of the 2023 Act.¹¹ However, the requirement to consult the Keeper in sections 39(1) and 111(1) erroneously make reference to “laying a draft of a Scottish statutory instrument [...] before the Scottish Parliament [...]”. The Keeper has in any event been consulted before making the Regulations containing the Rules which have been made at the same time as this instrument is laid, and to which the amendments to be made by this instrument will not apply (as they will not be in force when the Rules Regulations are made). Regulation 2(5) and (7) nonetheless amend sections 39(3) and 111(3) to reflect the correct negative procedure. The Scottish Government consider these amendments are appropriate as consequential and incidental to allow for the aforementioned provisions to operate as intended without impacting the purpose of the provisions as passed by Parliament. This will apply to any future exercise of the rule-making power.

In conclusion, the Scottish Government consider the amendments proposed are appropriate to make the required limited technical amendments to the 2023 Act to ensure that the 2023 Act is implemented in line with the manner Parliament intended.

Anticipatory exercise of powers

Insofar as this instrument is made under sections 4(7)(c), 50(4) and 119 of the 2023 Act and, with the exception of the latter, prior to those sections being commenced by the Moveable Transactions (Scotland) Act 2023 (Commencement) Regulations 2024² which will bring sections 4(7)(c) and 50(4) into force on 1 April 2025, the same day as this instrument will come into force, this would be in accordance with section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 which enables a power to make subordinate legislation to be exercised prior to the commencement of the provision of the relevant Act which confers the power. The Scottish Ministers consider it is expedient to exercise sections 4(7)(c) and 50(4) in this way so the changes to the definition of insolvency are in place in order to bring the rules on the assignation of claims and the creation of statutory pledges in section 4 and 50 of the new regime in the 2023 Act into force and to give them full effect as required using the powers in sections 4(7)(c) and 50(4) of the Act for the purposes of those sections.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

The Scottish Ministers have made the following statement regarding children’s rights.

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, the Moveable Transactions (Scotland) Act 2023 Amendment Regulations

¹ The Delegated Powers Memorandum for the Bill as considered by Parliament noted negative procedure for these provisions (sections 37(1) and 109(1) as they were then numbered).

² S.S.I. 2024/378 (C. 27).

2025 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

As mentioned above, a short and targeted consultation on the definition of insolvency for the purposes of the Act was carried out in late 2023. A total of six responses were received. There was consensus that the definitions of insolvency for the purposes of the Act should capture both relevant insolvency procedures as well as the state of being insolvent but beyond that there was a range of views offered on whether the definitions should be narrow or wide. Based on the responses and the preference to adopt a balanced and consistent approach the decision was taken to make only one change – to remove an application for a debt payment programme under the Debt Arrangement Scheme (“DAS”) from the definitions on the basis that, as highlighted by one of the consultees, the Debt Arrangement Scheme is not an insolvency process but a statutory debt repayment process. They considered that it would be inconsistent in terms of wider Scottish Government policy to treat DAS differently in the context of this legislation, to which the Scottish Government concurs.

Impact Assessments

A [Child Rights and Wellbeing Impact Assessment](#) (“CRWIA”) has been completed on this instrument and has been published alongside the laying of this instrument. An Equality Impact Assessment (“EQIA”) was undertaken for the introduction of the Moveable Transactions (Scotland) Bill to Parliament. The EQIA has been reviewed for this instrument and it was concluded that the EQIA meets the needs of this instrument. No equality issues have been identified and there were no issues concerning children's rights and wellbeing identified.

Financial Effects

A Business and Regulatory Impact Assessment (“BRIA”) has not been carried out for this instrument as a BRIA was completed when the Bill was introduced to the Scottish Parliament. No changes made to the Bill through its parliamentary passage alter the overall impact on businesses which was found at that time to be positive. This instrument does not have any material consequence to businesses.

Scottish Government
Justice
December 2024

POLICY NOTE

THE REGISTERS OF SCOTLAND (FEES AND PLAIN COPIES) MISCELLANEOUS AMENDMENTS ORDER 2025

SSI 2025/Draft

The above instrument will, if approved, be made by the Scottish Ministers in exercise of the powers conferred by sections 107(1) and 110(1) and (2) of the Land Registration etc. (Scotland) Act 2012 (“the 2012 Act”). The instrument is subject to affirmative procedure.

Summary Box

The purpose of this instrument is to set the fees Registers of Scotland may charge for use of the Register of Assignations and the Register of Statutory Pledges, and for the provision of extracts and plain copies from those registers under the Moveable Transactions (Scotland) Act 2023 (“the 2023 Act”).

Policy Objectives

The 2023 Act provides for the creation of two new registers – the Register of Assignations (“RoA”) and Register of Statutory Pledges (“RSP”) – the operation of which will simplify and facilitate moveable transactions in Scotland. The 2023 Act provides for both new registers to be under the management and control of the Keeper of the Registers of Scotland (“the Keeper”).

The 2023 Act contains a number of provisions requiring a fee to be paid to the Keeper on the occasion of certain events, namely, when registering a document, when making certain corrections (RSP only), when searching the register and when requesting an extract of a record entry.

As with the other registers under the Keeper’s management and control, the setting of fees for these new registers is a matter for the Scottish Ministers, who will set those fees in this instrument under the powers in section 110 of the 2012 Act.

This instrument accordingly amends the Registers of Scotland (Fees) Order 2014 (as amended) (“the 2014 Fees Order”) so as to make provision for the statutory registration, correction and extract fee regime which will underpin the operation of both the RoA and RSP. It also, at article 2(5)(a) and (b), further amends the 2014 Fees Order to correct historic typographical errors.

The setting of and reviewing of fees complies with the requirements of the Scottish Public Finance Manual to meet full cost recovery.

This instrument does not require to make provision regarding the fee which will apply to the searching of either the RoA or RSP as the 2014 Fees Order already contains a blanket search fee provision which applies to all of those registers under the Keeper's management and control and which will therefore automatically apply to both the RoA and RSP.

Certain other information/access services will additionally be required to be offered by the Keeper to facilitate the effective operation of the RoA and RSP, namely the facility to obtain plain copies of register information (a plain copy is a simple copy which provides a cheaper alternative to customers who wish a copy which does not have the evidential status of an extract) and the facility to request the Keeper to search for, and provide, register information on a customer's behalf (a "register inspection" facility).

The 2014 Fees Order provides for a fee regime for both plain copies and register inspection for those registers under the Keeper's management and control, where specified. The Keeper intends to offer both of these services, at a fee, for users of the RoA and RSP.

This instrument is therefore also needed to accordingly amend the 2014 Fees Order so as to make provision for the fee to be charged for plain copies of information contained in the RoA and RSP.

This instrument does not require to make provision regarding a register inspection fee in respect of the RoA and RSP as the 2014 Fee Order already contains a blanket, under defined exceptions, fee provision for this service which applies to all remaining registers under the Keeper's management and control, and which will therefore automatically apply to both the RoA and RSP.

Further, the Registers of Scotland (Information and Access) Order 2014 makes provision in relation to information to be made available by the Keeper and access to any register under the management and control of the Keeper. Article 2 of that Order details those registers from which a plain copy can be obtained and makes provision as to how such plain copies can be applied for and are issued by the Keeper.

This instrument is therefore also needed to accordingly amend the Registers of Scotland (Information and Access) Order 2014 so as to apply its terms to both the RoA and RSP.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

The Scottish Minister have made the following statement regarding children's rights.

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, the Registers of Scotland (Fees and Plain Copies) Miscellaneous Amendments Order 2025 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

On behalf of the Scottish Ministers, Registers of Scotland ("RoS") publicly consulted on proposals for those fees which would apply to the operation of the RoA and RSP between 8 July 2024 and 16 September 2024. The consultation document was published on the websites of both the Scottish Government and RoS. In total, 14 responses were received and came from two stakeholder groups, seven firms of solicitors, one property search firm, one business finance firm; and three individuals.

The responses of those consulted and who consented to the publishing of their response are included along with the consultation report published on the websites of both Scottish Government and RoS. These include The Law Society of Scotland and UK Finance.

An overwhelming majority of respondents were either dissatisfied or strongly dissatisfied by the consultation's key proposals regarding RoA and RSP registration fees, with respondents' viewing these as prohibitively high and excessive to the extent that the legal reforms intended by the Act could be negatively impacted.

The consultation's registration fee proposals were based on cost-recovery, with registration volumes being estimated from detailed user research undertaken with a wide range of stakeholders, industry experts and academics over several years. Despite this level of engagement, it proved extremely difficult for RoS to obtain accurate estimates of volumes for the new registers. Accordingly, the RoS estimates of volumes which informed the proposed registration fees were necessarily cautious.

The consultation responses indicated that the consultation had the effect of focussing the minds of stakeholders, particularly around the requirement for a "reduced fee for multiples" fee model for the RSP. This prompted further engagement with stakeholders, including with a majority of consultation respondents, and that allowed more informed assumptions on likely usage for the new registers to be developed.

This further engagement has increased the confidence of RoS as to effect of multiple registrations on RSP volumes and also increased confidence on lender uptake and early adoption rates, confirming that RoS' previous estimates of these were overly cautious and enabling the upwards revision of volume estimates for both registers.

Also following the consultation, RoS had more updated data on ongoing running costs that were refreshed.

These revised assumptions on volumes and costs both impacted on RoS' cost-recovery model for fee-setting, allowing RoS to propose a significantly reduced registration fee of £30 across both registers, in tandem with a "reduced fee for multiples" fee model for the RSP which uses a registration fee of £30 for an initial (or single) statutory pledge within a constitutive document, with a £5 fee for each additional statutory pledge for which a separate registration application is made.

The Keeper has been consulted on the proposals in compliance with section 110(3) of the 2012 Act. Following approval by the Minister for Public Finance, the reduced registration fees and the new RSP fee model were included in this instrument.

Impact Assessments

A [Children's Rights and Wellbeing Impact Assessment](#) ("CRWIA") has been completed on this instrument and has been published alongside the laying of this instrument. There were no issues concerning children's rights and wellbeing identified.

An Equality Impact Assessment ("EQIA"), Fairer Scotland Duty and Islands Impact were undertaken for the introduction of the Moveable Transactions (Scotland) Bill ("the Bill") to Parliament. No equality, Fairer Scotland Duty or Islands impact issues were identified at that time.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has not been carried out for this instrument. The BRIA completed when the Bill was introduced to the Scottish Parliament covered the financial aspects including the registration fees that the Keeper may charge. RoS recent consultation on the registration fees for this instrument did not require a further BRIA as the level of fees proposed fell within the range in the existing BRIA. No changes to the Bill through its parliamentary passage altered the overall impact on businesses which was found at that time to be positive.

Scottish Government
Justice
December 2024

Minister for Public Finance
Ivan McKee MSP



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Colin Smyth MSP
Convener
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31 January 2025

Dear Colin Smyth MSP,

THE MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023 – SCOTTISH STATUTORY INSTRUMENTS - MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023 AMENDMENT REGULATIONS 2025, REGISTERS OF SCOTLAND (FEES AND PLAIN COPIES) MISCELLANEOUS AMENDMENTS ORDER 2025, MOVEABLE TRANSACTIONS (FORMS) (SCOTLAND) REGULATIONS 2024 AND MOVEABLE TRANSACTIONS (REGISTER OF ASSIGNATIONS AND REGISTER OF STATUTORY PLEDGES RULES) (SCOTLAND) REGULATIONS 2024

Thank you for the opportunity to provide evidence to the Economy and Fair Work Committee on the four Scottish Statutory Instruments (“SSIs”) relating to the Moveable Transactions (Scotland) Act 2023 (“the Act”). Several queries were by raised by Committee members, generally in connection with the operation of the two registers established under the Act – the Register of Assignations (“RoA”) and the Register of Statutory Pledges (“RSP”) - and I undertook to write to the Committee with further information on those issues. I have set out that information below but thought it might be helpful to firstly set out some context in terms of the enabling Act and the scope of the regulations under consideration.

Scope

When I appeared before the Committee on 29 January 2025, the Committee explored a number of issues in some detail – generally revolving around privacy, fraud and good faith protection for purchasers regarding the operation of the RoA and RSP.

Whilst these issues are undoubtedly important in relation to the new registers being introduced, they are matters which relate primarily to provisions in the Act itself and not the regulations under consideration.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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All three issues were explored in detail by the Scottish Law Commission (SLC) in their 2017 Report on Moveable Transactions which led to the draft Bill as introduced and they were further debated and scrutinised during the passage of the Act. The lead Committee for the Bill was the Delegated Powers and Law Reform Committee

The regulations now before the Committee simply set out the detail on how the new regime and the registers supporting it will operate on a practical level, including how the register will be made up and kept including the presumption in favour of digital registration.

Privacy

With respect to privacy considerations in relation to the new registers, publicity of relevant personal information is an unavoidable consequence of adopting, as the Act does, public registration as a policy solution, at least for significant proportions of registrations under both registers. Without the ability for users to search and view the contents of the registers, they would not be able to function as intended. Registers of this type function in similar ways in many other jurisdictions with the controls in place being effective in striking the correct balance between publicity and privacy/fraud prevention.

The Act itself prescribes the information to be included in entries made following registration, with the Rules simply providing additional clarity on this information e.g. the extent of names to be provided and unique identifiers for companies.

Both the Act and the Rules do, however, take measures to ensure that personal information is not disclosed in a way that could enable fraud.

Firstly, the Act provides that although registered entries will include dates of birth, it will not be possible to search in this way – searches can only be performed using a name which can optionally be accompanied by a month and year of birth. This prevents searching being used as a way to establish full dates of birth of relevant parties named on the register.

Secondly, the rules provide that personal information (as defined) must not be available to anyone searching the registers and must not appear in any extract issued by the Keeper of the Registers (“the Keeper”), and that parties are free to proactively redact such information from the copy documents submitted for registration. It follows that, provided applicants are careful not to provide personal information in the assignation/statutory pledge documents, it will not be unnecessarily disclosed by the Keeper.

The Keeper will also automatically redact a full date of birth from a record entry appearing in a search or extract so that only the month and year is included. This is consistent with the approach taken by Companies House in relation to the disclosing of personal data.

The Keeper will provide full guidance on when redaction may be appropriate as part of both the registration system and published guidance.

Stakeholders have confirmed that in the case of assignations of customer invoices or consumer debt, it is not envisaged that documents disclosing customer information will be routinely uploaded to the register – this information will be held in off-register schedules. Similarly, in respect of the RSP, the copy pledge document will only contain details of the provider and the secured creditor (as required by the Act). Businesses will have sound commercial reasons too for not wishing to publish customer lists.

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Corrections

The 2023 Act provides that each register has its own correction regime.

The RoA is, in effect, a snapshot in time register – a register of documents. The only ways in which an inaccuracy can be created is if the information that is inputted by the applicant is either incorrect or incomplete, if there has been no copy assignment document uploaded or that document is itself invalid, or if the Registers of Scotland (“RoS”) registration system inadvertently removes a registered entry. The RoA cannot, therefore – barring system error – become incorrect unless the information/document was incorrect to begin with.

Where an inaccuracy in the RoA is identified to the Keeper and there is evidence to support this (“a manifest inaccuracy”), the Keeper will correct this if what is needed to correct the register is manifest. Otherwise, the Keeper will note the inaccuracy on the record (section 29(2) of the Act).

There is no restriction on whom can notify the Keeper of a manifest inaccuracy in the RoA – an inaccuracy is either manifest or it is not. The Keeper’s duty to rectify in such an instance is thus not solely applicant-dependent. Separately, a court may also direct the Keeper to correct the register (section 29(1) of the Act).

The RSP has a more involved correction regime. The RSP, being a register of rights, will contain statutory pledges which are capable of extinction (through, for example, discharge) or being the subject of other juridical acts (for example, assignment) which render the register inaccurate because these take place off-register.

Section 101(1) of the Act allows for correction in such instances by providing that there is an “inaccuracy” in the record where the record misstates what the position is, in law or in fact, in relation to a statutory pledge.

Specific routes to RSP correction are provided for. Firstly, a secured creditor can apply to correct any inaccuracy in the register under section 96(1) of the Act (primarily those caused by supervening events such as discharge, but also typos or incorrect document upload). Such corrections will be secure, creditor-led and made online.

Secondly, a person with a specified interest in the accuracy of a record entry, and who maintains that the record is inaccurate, is able to demand (under section 98(1) of the Act) that the registered secured creditor apply for correction under section 96(1), and if no such application is made, apply for the correction themselves under section 98(6) of the Act.

The category of person who would qualify to be able to issue such a demand is restricted to: (a) a person identified in the record as the provider where that person asserts either that they are not the identified provider, or the property identified as being the subject of the pledge is not in fact encumbered property and (b) a person with a right in property which is identified as the encumbered property where that person believes that the property is not in fact encumbered property. The Act does not provide for anyone else other than these persons to be able to issue a correction demand under sections 96(1) and 98(6).

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Thirdly, a court can direct the Keeper to correct the register (section 100(1) of the Act). Lastly, the Keeper can correct the register upon becoming aware of a manifest inaccuracy in the RSP (section 100(2) of the Act).

The effect of section 100(3) of the Act, however, is to exclude court direction, section 96(1) and section 98(6) identified inaccuracies from the type of inaccuracies that can be corrected by the Keeper under section 100(2) of the Act.

Section 100(3) of the Act additionally has the effect of excluding inaccuracies which the Keeper thinks could be reasonably corrected via either the section 96(1) or section 98(6) correction routes from the type of inaccuracies that can be corrected by the Keeper under section 100(2) of the Act.

Where the Keeper decides that it would be unreasonable for a manifest inaccuracy that is brought to her attention to be corrected via either the section 96(1) or section 98(6) application-based routes to correction, she will correct the register.

The applicability of this “reasonableness test” will depend on the facts and circumstances of each individual case. The “reasonableness test” will not be met, however, for reasons of correction fee alone.

Mandatory corrections

A key feature of the debate on the new registers, both when the SLC consulted in their report and when Parliament considered the Act, was where to strike the appropriate balance between the utility of the registers as sources of data and providing ease of doing business (which is the primary policy intention of the Act).

This is most relevant in respect of statutory pledges, which may be assigned, varied or discharged after the initial registration. The Act reflects the strong views of stakeholders that these subsequent events should not be mandatory registration events, but instead should be optional corrections. This, for example, is in line with the existing position for floating charges.

As a consequence, the content of an entry in the RoS or RSP will relate only to fact of the registration/correction of either a registered assignation or a registered statutory pledge having taken place and will not be evidential of anything other than this.

In particular, entries will not be evidential of the capacity of party identified in the register to enter into an assignation or statutory pledge, and the registers should not be used (such as by someone searching the register) to evidence anything other than the fact of registration/correction having taken place. The Keeper will ensure that users are aware of this through the guidance to be published as part of both the online register itself and on her website.

In order to encourage corrections to be made, a number of steps have been taken. Firstly, the Act itself contains straightforward correction provisions which will allow relevant parties to easily make corrections – in most cases, this will be facilitated through the Keeper’s online service, with correction itself being automated.

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Secondly, correction fees have been kept deliberately low at £10 (or free in some cases) to encourage ongoing updates to entries.

Thirdly, the Act provides for a 'correction demand' process in relation to statutory pledges which will allow a provider of a statutory pledge to issue a prescribed demand to the secured creditor to correct the register in certain circumstances – where the secured creditor fails to respond to this demand, the provider can apply to the Keeper to correct the register. Fourthly, the Act enables parties to correct the registers at the instance of a court.

And finally, the Act allows Ministers to make regulations to introduce changes to how updates on statutory pledges must be made. As the registers mature, RoS will monitor customer behaviour in relation to corrections and will be able to provide data to Ministers should they wish to consider using these powers.

Liability

Sections 37(1) and 109(1) of the Act provide, for the RoA and RSP respectively, for a strict Keeper liability regime whereby the Keeper must compensate any person who has suffered a loss in consequence of a matter, amongst other things, an inaccuracy in the record to the extent that it is attributable to the making up, maintenance or operation of the register (including an attempted correction of it). In other words, the person does not have to show that the Keeper is at fault (as opposed to, say, arising from an unavoidable malfunction of the Keeper's automated systems).

However, the effect of both sections 37(3) and 109(3) of the Act is that an inaccuracy in information included in a record entry when being made up or corrected by the Keeper is not covered by those strict liability provisions where the Keeper has been misled into making the inaccuracy and reasonably believed the information to be accurate.

Sections 37(4) and 109(4) of the Act also provide that the circumstances in which the Keeper is entitled to reasonably believe information to be accurate include if it is provided in connection with an application (registration or correction) to which the entry relates.

As such, if the Keeper faithfully replicates the information provided in an application form (registration or correction) and that information proves to be incorrect, that is not an inaccuracy for which the Keeper is liable, though the person who submitted the application may be liable under either section 38(1) or 110(1) of the Act.

In that case, liability would apply (subject to the restrictions in sections 38(2) or 110(2) of the Act) where the person who made the application which led to the entry did not exercise reasonable care, or where the person notified the Keeper of an apparent inaccuracy without taking reasonable care.

A key mitigating action for fraud prevention in relation to correction applications is that the Keeper will notify all parties related to the corrected entry – such as the provider and the secured creditor - upon such correction taking place.

Such notifications will be automatic where email addresses are held for the parties related to the corrected entries. Where an email address is not held, Gov.uk/Notify will be used to send notifications by post. Gov.uk/Notify is an established service, typically very stable, but RoS

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will monitor the external service, so that, if system use was not possible, notifications would be sent when the service was available again.

Sections 37(1)(c), 109(1)(b) and 109(1)(c) of the Act provide for the Keeper to be liable for the issuing/service of correction statements/notifications which are incorrect.

Fraudulent activity

In relation to steps the Keeper should take to minimise fraudulent documents from being registered, the Act itself is clear on the role of the Keeper in this regard – this is not a matter for the regulations.

The Keeper's role in relation to the new registers is administrative, in line with the largely automated nature of these registers. The Act specifies that the Keeper is entitled to rely on the information provided by applicants and further, that she has no duty or power to investigate allegations of fraudulent behaviour. Provided applications meet the requirements as set out in the Act and rules, they will be accepted.

Where there are allegations of fraud, parties will be directed to the police in exactly the same way as would happen if fraudulent activity were to be alleged in any of the other registers under the Keeper's control.

To carry out checks on individual entities (such as companies) involved in the documents registered would not only require change to the primary legislation which has already been passed, but would also significantly increase the operational costs of the register – manual checks would be required, and processing times would increase (whereas an advantage of the current automated approach is instantaneous registration). Such a checking stage would also be out of step with other established registers such as the Land Register. It is also not clear to us of what such checks would comprise.

It is anticipated that the vast majority of applications to the new registers will come from the legal and banking sectors, both of which are subject to strict professional regulation and have a duty of care to provide accurate information in the course of their dealings. These professionals, not RoS, are best placed to carry out anti-fraud checks and will have rigorous processes already in place. For example, law firms are obliged to verify their clients for money laundering reasons.

In addition, as referenced during the Committee session, RoS will verify the identity of applicants. In the case of professional users (such as lawyers and lenders), this will be through the existing RoS onboarding process and will involve identity checks and the establishment of direct debits.

A credit check will also be required in every instance. In the case of non-professional users (for example, a sole trader wishing to register a pledge without the assistance of a lawyer), digital ID verification will be used, supplemented, again, with a credit check.

Exactly the same provisions will apply to applicants for correction in the RSP, whether a secured creditor correcting the register under section 96(1) of the Act or a correction demand applicant under section 98(6) of the Act.

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Correction of the RoA will only be possible on a manifest inaccuracy basis (section 29(2) of the Act). The RSP will also have such a route to correction (section 100(1)(b) of the Act) to supplement those other routes provided for in the Act. All such manifest inaccuracy corrections will be evidence based.

The position of RoS is that all such inaccuracies will either be manifest or they won't. As such, it will not matter whom it is that brings such an inaccuracy to the attention of the Keeper as the duty on the Keeper to correct a manifest inaccuracy will not be dependent on the party bringing that inaccuracy to the Keeper's attention.

The Committee also raised the possibility that someone may establish themselves as a Scottish Limited Partnership through the Companies House Register. They could then go on to register an assignation or a statutory pledge on the relevant Registers. Clearly if someone does not own a claim assigned or an asset pledged fraudulently, the fraudulent assignation or pledge won't assign or pledge anything and the owner can just ignore it.

Alternately, the purpose of registration, may be as a means of providing a legitimacy to their business so that they could go on to carry out fraudulent activities based on that legitimacy. Registration with Companies House may of course be sufficient to establish that legitimacy without the need to further register in either the Register of Assignation or the Register of Statutory Pledges. As I have already mentioned above, entries will not be evidential of the capacity of a party identified in the register to enter into an assignation or statutory pledge, and the registers should not be used (such as by someone searching the register) to evidence anything other than the fact of registration/correction having taken place. This will be made clear to users with a statement in the online registration system and a link to the guidance.

Not-for-profit money advisers

On a point of clarification and correction, I would also like to address the question about the position of non-for-profit money advisers who undertake a search of either of the registers. Sections 33(4) and 104(4) of the Act enable such bodies to search the respective registers without incurring a fee. When individuals were removed from the Bill at Stage 2 we did consider removing this exemption too at Stage 3 but did not. I can confirm that the registers have been designed in such a way that non-for-profit money advisers will not be charged a fee when making a search. For information, the Act contains a provision at section 33(5) to enable us to use the Rules to define the meaning of not-for-profit money advisers. At this time we have opted not to do so on the basis, as I indicated at the meeting, that numbers relying on such provision will be negligible. At some point in the future, when we have the benefit of experiencing how this facility is being used we may consider adding a definition to the Rules. Please accept my apologies for the incorrect advice provided to the Committee that such bodies would be charged a fee as this will not be the case.

Other matters

For completeness I would also like to confirm, in response to a line of questioning on the insolvency definition, that we will publish the responses to the consultation relating to the insolvency definition.

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I can also confirm that in the example outlined of an individual consumer purchasing, in his example a combine harvester, which may have had a statutory pledge over it, that the individual would be protected and there is no requirement placed on them to search the RSP. The authority for this is set out at section 54 of the Act.

There was a question raised about the accessibility of the registers and their ease of use. Registers of Scotland adheres to the [Scottish Approach to Service Design](#) which sets out that 'the people of Scotland are supported and empowered to actively participate in the definition, design and delivery of their public services'.

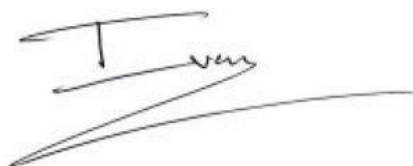
In developing these new registers, RoS have worked closely with a wide range key stakeholders from an early stage to ensure that user views are taken on board. Work is currently in the 'beta' testing phase, which involves 45 users across 12 firms being given access to a closed version of the register and feeding back to the development team.

As part of the user-centred design approach, the registers are built to ensure that they are accessible to all users such as those who may work with screen readers or other adaptive software. The registers are also built using existing components from RoS, GDS and SG pattern libraries, all of which be familiar to users of other government services and which have been subject to extensive testing to ensure compliance with a wide range of devices. RoS also comply with Web Content Accessibility Guidance (WCAG) 2.1 regulations and will publish an accessibility statement on our website when the registers go live.

Finally, the point was well made that we need to ensure that we promote awareness of the new legislation. There is already a good level of awareness amongst the legal practitioner and lending sectors who will we think, be the main users of the Registers. When the Bill was passing through Parliament, I know that the then Minister for Community Wealth and Public Finance met with consumer bodies and with the Federation of Small Businesses and listened carefully to what they had to say. It would be my intention to write to these bodies in the course of the next month or so to highlight that the changes in the law will be coming into force and that the Registers will be going live at the same time. That letter will also signpost the availability of guidance on the Registers of Scotland website. I would be happy to share the correspondence with the Committee.

I hope this additional information is of help to the Committee.

Yours sincerely,



Ivan McKee MSP

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