

Scottish Law Commission – Discussion Paper on Heritable Securities: Non-Monetary Securities and Sub-Securities (DP No. 175)

Response (September 2023)

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General

We welcome the opportunity to respond to the Discussion Paper (“DP”). The DP addresses a number of interesting and important issues, and we consider the proposals to have merit. Significant thought has clearly been given to the difficult matters covered in the DP. Our views on each of the proposals are outlined in response to the questions below.

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)

We do not have specific information in relation to these matters. However, the proposals to improve, clarify and simplify the law should, logically, have a positive economic impact overall.

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)

We consider approach (b) to be preferable. This was also our position in response to the equivalent question in the first Discussion Paper on Heritable Securities (<https://www.abdn.ac.uk/law/documents/Aberdeen%20Law%20School%20-%20Heritable%20Securities%20Pre-default%20-%20Response%20-%20Final%20for%20Submission.pdf>). Approach (b) is more aligned with current practice and law, and would deal suitably with issues regarding security over non-monetary obligations. A clear statement in legislation giving effect to approach (b) is desirable. We do not believe that the

proposed approach would or should impact on the availability of specific implement. However, if there are any concerns regarding this, it could be stated in the legislation that the use of a standard security to secure a non-monetary obligation, and the entitlement only to damages for non-performance of the obligation, are without prejudice to the availability of specific implement.

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)

In general terms, the ordinary ranking rules can apply in substantially the same way for security for damages, arising from the breach of non-monetary obligations, as they do for security for monetary obligations. The priority position should ordinarily be in accordance with *prior tempore potior jure*, so that where e.g. Standard Security 1, which secures debt, is created on day 1, it will rank ahead of Standard Security 2, a security created on day 2 and which secures damages arising from a non-monetary obligation. The monetary extent of the relevant parties' priority should also be straightforward where the amount of damages is confirmed at the time that security is being exercised and the proceeds of sale are to be distributed.

There is, however, an issue regarding the ranking of parties where one standard security holder is seeking to exercise their security and one or more other standard security holders (with security over the same property) has a security that is not (yet) enforceable, perhaps because the secured (monetary) obligation is contingent (and the contingency has not yet materialised) or is a non-monetary obligation and the amount of damages has not yet been determined. For instance, if the holder of Standard Security 1 sought to exercise their security in the example above and the property was sold and proceeds were to be distributed under s 27 of the Conveyancing and Feudal Reform (Scotland) Act 1970, presumably the holder of Standard Security 2 would have an entitlement to payment after the first-ranking security holder, but how much of the proceeds would need to be paid to them? The situation might be even more problematic where the holder of the prior-ranking security holds that security in relation to a contingent debt or a non-monetary obligation and the lower-ranking security holder is seeking to exercise remedies following default. Placing a value on a security holder's priority in such circumstances may be particularly difficult where the security is for non-monetary obligations, especially if they are conditional obligations. Perhaps the rules for determining the value of contingent debts in sequestration (see Bankruptcy (Scotland) Act 2016, Sch 2; D W McKenzie Skene, *Bankruptcy* (2018), para 16-47 onwards) could be of some assistance.

Given the potential uncertainty, standard security holders may seek to enter into a ranking agreement to specify the extent of their respective ranking priorities. However, other parties may object to the extent of the priority given to the party with security in relation to the contingent or non-monetary obligation, if they consider the obligation to be over-valued. In the event that a creditor exercises a power of sale under their security and there is no agreement regarding the allocation of proceeds or other parties have objected, a multipointing could ultimately be used, so that the court determines how proceeds should be distributed.

Similar issues to those noted above might also arise in insolvency procedures, such as liquidation, administration or sequestration, where the insolvency practitioner may need to determine the extent of the security holder's claim and priority (see e.g. McKenzie Skene, *Bankruptcy* (2018), paras 16-36-16-61). This determination may have an impact on insolvency expenses, payments to other secured creditors, particularly floating charge holders (in certain corporate insolvency procedures), and payments to preferential creditors and ordinary unsecured creditors. For some related enforcement and ranking issues involving floating charges and fixed securities (which may be more pronounced where there is security for non-monetary obligations), see ADJ MacPherson, *The Floating Charge* (2020), paras 6-09-6-36 (and see also J Hardman and ADJ MacPherson, "The Ranking of Floating Charges" in J Hardman and ADJ MacPherson (eds), *Floating Charges in Scotland: New Perspectives and Current Issues* (2022), pp 380-386).

We should also note that we are uncertain how likely it is, or will be, for the above issues to arise in practice.

For completeness, we are working on the assumption that if a party with a standard security in relation to a non-monetary obligation received notice in terms of s 13 of the 1970 Act, then this would not affect the extent of their priority, as the obligation has already been agreed upon, even though the damages may be presently indeterminate. Of course, if such a security was for both monetary *and* non-monetary obligations, then any notice under s 13 would only limit the priority in relation to the extent of the monetary obligations (as well as precluding priority for any new obligations of either type). If a standard security did secure both monetary and non-monetary obligations, then the points above would also be of relevance.

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)

Yes, the law should do this. It should give effect to the current practice in this regard but in a more appropriate way.

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)

Of these two choices, our preference is (b). However, an alternative approach would be to reform the law of standard securities to develop more suitable remedies for such obligations (discussed further below). In any event, there should not be reliance on the offside goals rule (under the common law) in relation to such matters.

A standard security is able to fulfil monetary obligations with the remedies that are made available. So, an obligation to receive a sum of money is fulfilled by remedies that give effect to that obligation by enabling payment of a sum of money to the creditor. With non-monetary obligations, the exercise of a standard security involves remedies other than what the creditor seeks. For instance, a standard security holder may wish for the fulfilment of a secured obligation to transfer land (or to have a subordinate real right granted in their favour). Instead of having to rely on remedies that will principally involve payment of a sum of money to the creditor, an amended regime for standard securities could be created, which might allow for a remedy to fulfil such an obligation, e.g. requiring the transfer of the land in question (or the grant of the relevant subordinate real right).

The current proposal is to use conditional advance notices to make it easier for a creditor to have the secured obligation fulfilled but it would still be necessary to, for example, seek specific implement, and this would be more complicated and arguably more costly. Given the weakness of conditional advance notices in terms of the creditor's position, especially the potential for them to be defeated by involuntary deeds, it would seem likely that many creditors will seek both a conditional advance notice and a standard security in relation to damages. This may make transactions more expensive and would involve multiple entries on the Land Register. A creditor would then need ultimately to decide whether to exercise remedies under the standard security or to use this for negotiation purposes to obtain the transfer of the land. In any event, the fulfilment of the relevant obligation will be indirect, as the conditional advance notice and the standard security will not achieve this directly.

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)

The suggested name is broadly suitable. Possible alternatives might include "provisional advance notice", "qualified advance notice", or "contingent advance notice". If, however, there is a desire to avoid potential confusion with existing advance notices, i.e. to avoid the impression that the new notice is just a conditional version of the existing type of advance notice, then "conditional notice" or "conditional real obligation" might be more suitable.

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)

For (a), our answer is yes, but it should also make clear on its face if it is conditional and what the nature of the condition is.

For (b), we agree.

We cannot think of any further information for (c), beyond what we have suggested should be added in response to (a).

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)

For (a), yes.

For (b), yes, the intended grantee of the deed should be able to apply to register the conditional advance notice (as it is in their interest to register it), but only with the consent of the owner. No other third parties should be able to do so, even with the consent of the owner.

Alternatively, if it were ultimately decided that certain other parties should have the ability to apply to register the conditional advance notice (despite the SLC's current position stated in the DP and our own view noted in the previous paragraph), an adapted form of the provision for the registration of company charges could be utilised. It states that the registrar of companies must register a charge where "the company or any person interested in the charge delivers to the registrar for registration" certain documentation (Companies Act 2006, s 859A(2)). It could be provided that a conditional advance notice application can only be made by the person with the power to validly grant the intended deed or any other person with an interest in the grant of the intended deed. This could, however, include a third party with whom the intended grantee has contracted, despite the present intention, noted in the DP, to exclude such a party.

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)

For (a), yes.

For (b), on balance we would prefer for a conditional advance notice to be noted in the securities section, as it is serving as a functional security. We did identify some advantages of including such a notice in the encumbrances section and even considered whether it would be worthwhile to have a separate section of the title sheet for these notices, but those approaches are less desirable overall.

For (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)

Regarding (a), based on the views expressed by practitioners, a 5-year period does not seem unreasonable. It would also be consistent with the time period for inhibitions.

If it were ultimately to be decided that conditional advance notices were to have priority even over involuntary deeds, there may be an argument for them to have a shorter period than 5 years to reflect this fact. Alternatively, it would be possible to have a system where, for example, the conditional advance notice lasts for 5 years but only for e.g. the first year does it provide priority over involuntary deeds. However, such an approach could be overly complicated.

With respect to (b), extensions should be possible. Even though we support the ability to extend the conditional advance notice period, we wonder whether there should be a maximum limit for the time period of conditional advance notices – e.g. a longstop period of, say, 50 years. If both parties wanted to continue with a conditional advance notice at this stage, they could both agree upon the creation of a new one, or perhaps both the intended grantor and intended grantee should have to agree a further extension at this stage. A shorter period of 20 years could be used to align with the position for long negative prescription but we acknowledge that this could create difficulties for e.g. long leases where there is an option to purchase, and it may not be a suitable parallel as one party at least will be exercising their right to extend the period on an ongoing basis. In any event, if the intended grantee of the deed is to have the ability to renew unilaterally, and on multiple occasions, it may be suitable to have a longstop period. This would prevent possible grantees from potentially exerting some control over property indefinitely or at least hinder sterilisation of the land.

The above suggestion may bear some resemblance to the discussion of a “sunset rule” for standard securities (of at least 50 years) in the first Discussion Paper. However, there are, of course, some differences, including the proposed requirement for the conditional advance notice to be renewed every 5 years.

An alternative approach to a specific period of time (of e.g. 5 years) and extensions, would be to allow for parties to provide for a bespoke duration for a conditional advance notice but without extensions and with a maximum limit, of e.g. 20 years. This would save parties having to extend every 5 years and would avoid the danger of parties overlooking such extensions. You could even have both possibilities available; however, with this approach there would be more complexity and parties may simply use both options, which would add to clutter on the register.

For (c), it should be possible for the person intending to grant the deed to extend the period and it should also be possible for the intended grantee to do so. This would also align with our support for the latter being able to apply for registration of the conditional advance notice in the first place (with consent).

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)

Yes for (a).

We broadly agree with (b), as we can see that it would support fulfilment of the obligation and an alternative approach would weaken the conditional advance notice mechanism. However, there may be some uncertainty about the extent to which a competing deed would “defeat or adversely affect” the performance of an obligation and this may lead to litigation. In any event, we do see merit in addressing the issue directly in legislation, as we think reliance on the offside goals rule (under the common law) should be avoided as far as possible.

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)

We have mixed views about this. While our general answer is no for both (a) and (b), for the reasons given in the DP (including to avoid prejudice to other creditors), the likelihood is that this will incentivise parties to seek not only a conditional advance notice, but also a standard security for non-monetary obligations (or a standard security instead of a conditional advance notice), in order to give priority to the extent of any damages in e.g. an insolvency procedure. This may increase the costs of transactions and lead to additional material on the Land Register. If there were a desire to replace standard securities with conditional advance notices in relation to e.g. a potential future obligation to transfer land, then the conditional advance notice would probably be expected to give some priority over involuntary deeds and inhibitions (due to the current legal position).

However, we understand that there is an acceptance that parties would continue to be able to obtain standard securities in addition to conditional advance notices, so our points noted above

will apply. If this is so, and there were to be any suggestion that conditional advance notices should nevertheless have priority over involuntary deeds, a period shorter than 5 years could be justified, e.g. 1 year. For example, the conditional advance notice could have priority over voluntary deeds for 5 years (with the possibility of extensions) but only a priority for 1 year in relation to involuntary deeds.

Regarding protection against “any involuntary competing deed”, care will be required in terms of capturing everything that is intended here. If the intention is to enable a liquidator and/or an administrator (and even a receiver) to deal with the property, despite the existence of the conditional advance notice, specific provision may be required for this. In sequestration (which could be initiated by the debtor or one or more creditors) there is automatic vesting of the property in a trustee in sequestration, and this may be followed by registration in the Land Register, which can be considered to involve a registered involuntary competing deed. However, the same is not true for liquidation or administration (or receivership). While a liquidator can have property vested in them and can register title to land, this is unusual. There is no automatic vesting in a liquidator or administrator (or receiver) and it may be questioned whether a subsequent sale by them in favour of a third party would involve registration of an involuntary deed, as the administrator or liquidator is technically acting as agent of the debtor, albeit that the fact the debtor has no control over the transaction may point to it being “involuntary”.

If there is the intention for a conditional advance notice not to have priority over a registered involuntary competing deed, and for corporate insolvency procedures such as administration and liquidation to be treated in a similar way to sequestration, it may be worthwhile (for certainty) to have a specific provision dealing with the matter. It could state that the exercise of the power of sale by a liquidator or administrator (or receiver) is not to be affected by the conditional advance notice, and that a subsequent registration of a disposition by a third party will be deemed to be registration of an involuntary competing deed (or is otherwise permissible and the conditional advance notice is to be removed). There is a similar provision in the Insolvency Act 1986, s 166(1A), for creditors’ voluntary liquidation, which provides that “[t]he exercise by the liquidator of the power specified in paragraph 6 of Schedule 4 to this Act (power to sell any of the company’s property) shall not be challengeable on the ground of any prior inhibition”.

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)

Yes, we agree with both of these. Specific provision to clarify when and how the conditional advance notice itself is transferred would be useful. For instance, would it only be formally transferred when the assignee is entered in the Land Register as the new holder of the notice? This would conform to the publicity principle and would help uphold the value of the Land Register for displaying who holds rights in relation to the land.

Another reason for making specific provision for this, is that although s 16 of the Moveable Transactions (Scotland) Act 2023 provides that security relating to the claim is also transferred when the claim is transferred (subject to any necessary formalities), “claim” as defined there “does not include a non-monetary right relating to land” (s 41(1)). As such, beyond the issue regarding whether a conditional advance notice would constitute a security in that context, the provision would need to be extended to capture various relevant non-monetary claims relating to land.

If there is to be specific provision regarding assignation of conditional advance notices, then consideration would need to be given as to how closely this would mirror s 16 of the 2023 Act. If so, there might be provision for the assignor to transfer the notice by performing any necessary act of transfer and doing so as soon as reasonably practicable after the transfer of the claim. However, there is some uncertainty regarding what is required in that regard and also with respect to other aspects of s 16 (see CJ Emedosi, *The Transfer of Security Rights in Securitisations in Scotland, England and France: A Law and Economics Analysis* (PhD Thesis, University of Aberdeen) (2021), pp 115-117). In most cases, these points might have limited impact; however, they could be more problematic if one or more of the parties became insolvent. If the assignor has transferred a claim but has not yet formally completed the transfer of the connected conditional advance notice when they enter an insolvency procedure, the insolvency practitioner could seek to resist taking any further step to complete the formalities of transfer of the notice to the assignee (unless there were specific provision compelling them to do so). While there may be little direct economic value in them holding security or the notice without the related claim, the ability to refuse to take such steps may enable them to negotiate a (further) payment by the assignee into the estate – i.e. this scenario could be considered to involve a form of “ransom right”. If there is a desire to avoid such a possibility, it could justify enabling the *assignee* to take steps to complete the formalities of transfer of the conditional advance notice after the transfer of the connected claim (at least in some circumstances).

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)**

Yes, we agree with all of these. A sensible approach has been outlined in the DP.

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)

We think that conditional advance notices should apply to purchase options held by tenants, for the sake of consistency and fairness to tenants, and on the assumption that there is a policy preference in favour of potentially binding subsequent acquirers of the ownership interest (held

by the landlord). It is not clear why a tenant in this situation should be treated differently from others who hold an option (notwithstanding the point about options not being *inter naturalia* of a lease under the current law). We appreciate that there is another SLC project dealing with leases but we do not believe that this should lead to the exclusion here of tenants' options to purchase in the meantime.

The approach adopted would form the background to commercial lease negotiations regarding, for example, whether or not the option should be granted in the first place and whether there ought to be a conditional advance notice. If the landlord were to sell the property and there was a desire for the option and conditional advance notice to no longer apply, the landlord, the potential purchaser, and the tenant could enter into an agreement to resolve the matter.

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)

Please see our answer to question 5 above. While we see some merit in the proposed scheme for conditional advance notices, if the intention is to protect the obligation to transfer land, and ultimately to enable the intended grantee to acquire ownership, then the best mechanism might be to adapt the standard securities regime to provide for the acquisition of land as a potential remedy for such a secured obligation. If the circumstances were such that the acquisition of the property would lead to some form of windfall to the intended grantee, then they could be required to utilise another remedy instead or to make a payment of the required amount to the obligor to receive the property (this would be equivalent to the position for expiry of the legal for adjudication for debt – see *Hull v Campbell* [2011] CSOH 24).

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

(Paragraph 6.27)

We understand that sub-security arrangements involving the taking of standard securities over standard securities sometimes exist in securitisation transactions, but this is already identified in the DP. As academics, we are not involved in practice in the area and do not know of any other circumstances in which a standard security is taken over a standard security.

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

(Paragraph 7.14)

On balance, and for the reasons given in the DP, we are supportive of the proposal that the grant of a standard security over a standard security should cease to be competent (on the assumption that assignation in security will be possible). If it is the case that there is no practice or demand for multiple standard securities to be created over a standard security, then this strengthens the view that a standard security over a standard should cease to be competent and instead there should be reliance on assignation in security. A right can only be assigned in security once, as the right itself

is transferred (albeit that retrocession rights can themselves then be assigned in security but with limited insolvency protection – see e.g. ADJ MacPherson, *The Floating Charge* (2020), para 9-53, fn 115); however, we see the logic in aligning the form of security for a standard security with the form applicable to the claim itself (i.e. an assignation in security).

As well as the enforcement issues discussed in the DP, there is currently a disconnect between the transfer of the claim, for security purposes, and the separate requirement for the creation of a different type of security (i.e. a standard security) over the standard security that secures the transferred claim. The accessoriness principle is also somewhat undermined by this, in comparison to a scenario in which the standard security is assigned in security with the secured claim, albeit that formalities for transfer of the standard security might also be required in such a scenario. The current law seems to preclude the possibility of a standard security being assigned in security (certainly separately and seemingly even together with the secured claim, which can be assigned in security). This is because assigning the standard security for security purposes would involve a deed which contains an assignation of a real right in land, and this would be void to the extent that it is for the purpose of security (1970 Act, s 9(4)). As such, if a standard security were to be used as collateral as part of an assignation in security transaction, it would seem to require the grant of a standard security over a standard security in favour of the assignee. While removing the possibility of a standard security over a standard security would mean that a standard security would no longer be the only form of voluntary fixed security over registrable real rights in land (in addition to other security rights that can cover heritable property), there would be consistency with the form of transfer for absolute assignations of standard securities and transfers of the primary claim (subject to (differing) formalities).

Except for the possibility of having multiple security rights over a standard security (which does not seem to be used), we see few benefits in continuing to allow a standard security over a standard security. In very limited circumstances the consequences may differ dependent upon whether the current law applies or an assignation in security is to be used instead. An example may assist. X obtains a loan from Y and grants a standard security in Y's favour. Y then assigns in security to Z the secured claim against X. If a standard security is granted over the standard security in the example, this can be referred to as Scenario A, while an alternative approach replacing this method of security with an assignation in security to Z (whether together with the secured claim or separately) can be referred to as Scenario B.

In either scenario, there is a risk of Z becoming insolvent (or alternatively, or in addition, Z's creditors may have sought to do diligence against property in Z's estate, and may have even relied on the register to some extent). If this were to happen, there is some uncertainty as to whether property that has been assigned to Z in security would be available to their creditors in its entirety (even beyond the amount of the secondary claim owed between Y and Z), or whether the assigned property (or what remains of it) might be considered to be held on trust for the cedent, Y (see e.g. *Purnell v Shannon* (1894) 22 R 74, discussed at MacPherson, *The Floating Charge* (2020), para 9-67). While a modern court might adopt the trust analysis, if it is instead determined that a trust is not in fact created then Scenario A may be preferable to Scenario B for Y. In Scenario A, if we assume that Y retains the original standard security, despite having assigned the primary secured claim (given the apparent inability to assign in security the original standard security and the need to complete formalities to transfer a standard security anyway), then they can use that security as leverage for the retrocession of the secured claim in Z's estate back to Y (this could be considered another example of a "ransom right", held by a party that may be considered deserving of such a right). The second-level standard security held by Z will have been extinguished or rendered

unenforceable by the payment of the claim owed by Y to Z, and so Z would not have a security for enforcement purposes. By contrast, in Scenario B, if both the secured claim and the standard security have been assigned in security (and formalities completed) to Z, then Y will only have a personal retrocession right, which may be of little assistance, and Z's insolvency practitioner could enforce against X using the security (as well as holding the claim). Therefore, Scenario A may provide somewhat more protection for Y than Scenario B in limited circumstances. Yet Y could have equivalent protection in Scenario B if the formalities for assigning the standard security had not been completed and Z (and their representative) did not have the ability to complete those formalities, i.e. if there was no formal assignation of the standard security allowing for registration in the Land Register. In any event, the outlined example, under whichever scenario, is unlikely (to say the least), involves various contingencies and is based on uncertain points of law. We do not think that by itself it would justify retaining the existing model. Nevertheless, we include it for completeness and to allow for it to be considered, if desired.

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)

We generally agree with the argument in the DP that a standard security should be viewed as accessory to the secured claim and that the transfer of the claim in security should entitle the assignee to an assignation of the standard security for security purposes (as an equivalent to the position for an absolute assignation). We note the reference to the Moveable Transactions (Scotland) Act 2023, s 16, in this regard and agree with its application in most cases involving secured claims relating to land, but consideration may need to be given to whether its scope should be extended to non-monetary rights relating to land. It may though be queried whether that Act is the most appropriate place for such provisions regarding land more broadly. While we do not favour detailed legislative provisions relating to assignation in security in this area, it would be worthwhile to amend s 9 of the 1970 Act to not only remove the possibility of a standard security over a standard security but to clearly state that a standard security can be assigned in security, whether as accessory to a secured claim or separately (upon the agreement of the parties).

We also support the possibility of a standard security and a secured claim being assigned in security separately from one another. As discussed in the first Discussion Paper (paras 3.28-3.40), security arrangements may involve three or four parties and the creditor and grantee of the security may be different parties, and there is apparently demand for this in practice. In turn, the creditor could assign the secured claim and/or the security holder could assign the standard security, again to different parties. Given that the property effects of an absolute assignation and an assignation in security are the same (i.e. full divestiture of the right(s) in question), it should be possible for a secured claim and a standard security to be assigned in security separately from one another, as is the case for absolute assignation. The fact that the purpose of one of these forms of assignation is for the property to be held in security should make no difference here. The parties should be able to stipulate that only the secured claim or standard security is to be transferred or that they are to be transferred to different parties. Such stipulation should be required to achieve an alternative outcome to the default position, which is that because of the standard security's accessory nature, the transfer of the secured claim in security would also entitle the assignee to seek the assignation of standard security for security purposes.

Another issue to consider here is the interaction between assignment in security and the registration of charges regime (under the Companies Act 2006, ss 859A-859Q). Under the current law it would seem that a company assigning a claim in security and creating a standard security over a standard security would necessitate the registration of two “charges” in the companies register (an assignment in security and a standard security), in order for the security to be fully effective (and assuming none of the exceptions applied). This would be in addition to the registration of the original standard security against the primary debtor in the companies register, if that debtor (grantor) were a company. The registration of charges regime requires documentation for relevant security rights to be sent for registration within 21 days from the day after their date of creation. As different security rights would be involved, there might be two different creation dates – with the assignment in security usually being “created” on the date when the assignment document is delivered to the assignee and the standard security being created on the date of its registration in the Land Register. (For discussion of this and some of the following issues, see ADJ MacPherson, “Registration of Company Charges Revisited: New and Familiar Problems” (2019) 23 EdinLR 153 at 163-165.)

If, instead, an assignment in security of a standard security were possible, alongside an assignment in security of a secured claim, it is not entirely clear if this would necessitate the registration of two charges in the companies register or one. Given that the same form of security is being used over both the secured claim and the accessory security, even though they are different types of asset, it may be contended that a single charge should suffice, particularly if there is a single charge instrument for the assignment of the secured claim and the standard security for security purposes. At present, a registered assignment in security, and a floating charge, can encompass multiple different claims or other property objects. In addition, the same creation date rule would apply in relation to the assignment in security of both the secured claim and the standard security, as the rule for assignment in security applies “even if further forms, notices, registrations or other actions or proceedings are necessary to make the charge valid or effective” (2006 Act, s 859E(3)). This would mean that the charge would be created even before the formalities of registration of the assignment (in security) of the claim and/or the standard security are completed. If the secured claim and the standard security were being assigned in security separately to different parties, there would be a stronger argument in favour of requiring the registration of two charges, particularly if two distinct charge documents are used.

It is also conceivable (but perhaps unlikely) for only the secured claim to be assigned in security and the standard security to be assigned absolutely, or vice versa. In such an instance, it is clear that only one charge would require to be registered in the companies register.