

RESPONSE FORM

DISCUSSION PAPER ON HERITABLE SECURITIES: PRE-DEFAULT

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

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We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

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

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](http://www.scotlawcom.gov.uk/contact-us#sendcomments) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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**Summary of Proposals**

1. What information or data do consultees have on:

 (a) the economic impact of the current legislation on heritable securities in relation to pre-default issues, or

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

(Paragraph 1.34)

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| **Comments on Proposal 1**«InsertTextHere» |

2. The Conveyancing and Feudal Reform (Scotland) Act 1970 should be repealed and replaced with a new statute regulating heritable securities.

(Paragraph 3.2)

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| **Comments on Proposal 2**«InsertTextHere» |

3. The standard security should continue to be the only form of heritable security which can be granted.

(Paragraph 3.12)

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| **Comments on Proposal 3**«InsertTextHere» |

4. It should remain incompetent to transfer land in security.

(Paragraph 3.13)

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| **Comments on Proposal 4**«InsertTextHere» |

5. Should any transactions other than transfers in security be prohibited to ensure that a standard security is used instead?

(Paragraph 3.15)

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| **Comments on Proposal 5**«InsertTextHere» |

6. The term “standard security” should be retained.

(Paragraph 3.20)

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| **Comments on Proposal 6**«InsertTextHere» |

7. Should there be a non-accessory form of standard security?

(Paragraph 3.27)

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| **Comments on Proposal 7**«InsertTextHere» |

8. (a) The grantor of a standard security (and any successor) should not require to be the same person as the debtor in the secured obligation.

(b) The grantee of a standard security (and any successor) should not require to be the same person as the creditor in the secured obligation.

(Paragraph 3.40)

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| **Comments on Proposal 8**«InsertTextHere» |

9. Do consultees have any comments on the use of security trustee or nominee arrangements in relation to standard securities?

(Paragraph 3.41)

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| **Comments on Proposal 9**«InsertTextHere» |

10. (a) Do consultees agree that the parties to a standard security should continue to be referred to as the “debtor” and “creditor”?

(b) Do consultees agree that “grantor” and “grantee”, and “proprietor” should continue to be used where appropriate?

(Paragraph 3.42)

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| **Comments on Proposal 10**«InsertTextHere» |

11. Section 47 of the Conveyancing (Scotland) Act 1874 and section 15 of the Conveyancing (Scotland) Act 1924 should be repealed and not replaced.

(Paragraph 3.49)

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| **Comments on Proposal 11**«InsertTextHere» |

12. (a) It should be competent for a standard security to secure monetary obligations which are owed or which may become owed in the future.

(b) A standard security should also secure ancillary obligations, in particular obligations to pay interest, damages and expenses (subject to rules governing what expenses are allowable).

(Paragraph 4.33)

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| **Comments on Proposal 12**«InsertTextHere» |

13. Which of the following approaches do consultees prefer?

(a) Standard securities should not be able to secure non-monetary obligations (but they may secure a damages claim in respect of such an obligation).

(b) Standard securities should be able to secure non-monetary obligations, but in such case it would be the damages claim for breach of the obligation which would actually be secured.

(Paragraph 4.85)

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| **Comments on Proposal 13**«InsertTextHere» |

14. There should be a separate reform project in relation to making options and similar agreements enforceable against third parties by means of registration. That review should consider other models, such as a special form of standard security which could secure non-monetary obligations and which would have special ranking and enforcement rules.

(Paragraph 4.86)

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| **Comments on Proposal 14**«InsertTextHere» |

15. A standard security may only be granted over immoveable property.

(Paragraph 5.4)

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| **Comments on Proposal 15**«InsertTextHere» |

16. (a) The new legislation should use consistent terminology to refer to the property affected by a standard security.

(b) What term should be used?

(Paragraph 5.9)

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| **Comments on Proposal 16**«InsertTextHere» |

17. A standard security may not be granted over a real burden.

(Paragraph 5.15)

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| **Comments on Proposal 17**«InsertTextHere» |

18. A standard security may not be granted over a proper liferent.

(Paragraph 5.17)

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| **Comments on Proposal 18**«InsertTextHere» |

19. (a) A standard security may be granted over a lease, where that lease has been recorded in the Register of Sasines or registered in the Land Register as appropriate.

(b) A standard security may not be granted over any other lease.

(Paragraph 5.24)

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| **Comments on Proposal 19**«InsertTextHere» |

20. (a) Should it continue to be possible to create a standard security over a standard security or would it be preferable to allow a standard security to be assigned in security?

 (b) In either case what should be the rules on enforcement?

(Paragraph 5.30)

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| **Comments on Proposal 20**«InsertTextHere» |

21. Are there other types of immoveable property over which it should be possible to grant a standard security?

(Paragraph 5.31)

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| **Comments on Proposal 21**«InsertTextHere» |

22. (a) The secured obligation should be a matter for the parties to a standard security and no longer be the subject of default provisions.

(b) Form A should be abolished.

(Paragraph 6.30)

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| **Comments on Proposal 22**«InsertTextHere» |

23. There should no longer be a statutory form of standard security. Form B, like form A should be abolished. Instead, the constitutive document of a standard security should require to:

(a) be signed by the debtor;

(b) identify the property which is to be the encumbered property;

(c) identify the secured obligation; and

(d) use the words “standard security”.

(Paragraph 6.37)

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| **Comments on Proposal 23**«InsertTextHere» |

24. Should a non-obligatory model form of a standard security document be provided?

(Paragraph 6.38)

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| **Comments on Proposal 24**«InsertTextHere» |

25. What comments do consultees have in relation to identification of the encumbered property?

(Paragraph 6.42)

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| **Comments on Proposal 25**«InsertTextHere» |

26. What comments do consultees have in relation to identification of the secured obligation?

(Paragraph 6.43)

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| **Comments on Proposal 26**«InsertTextHere» |

27. Should it continue to be possible for unregistered holders to grant standard securities?

(Paragraph 6.47)

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| **Comments on Proposal 27**«InsertTextHere» |

28. A standard security should continue to be made real by registration.

(Paragraph 6.49)

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| **Comments on Proposal 28**«InsertTextHere» |

29. The power under section 893 of the Companies Act 2006 should be used so that standard securities granted by companies do not require to be registered twice.

(Paragraph 6.53)

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| **Comments on Proposal 29**«InsertTextHere» |

30. What comments do consultees have on whether it should be permissible to create a servitude in a standard security deed?

(Paragraph 6.56)

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| **Comments on Proposal 30**«InsertTextHere» |

31. Rules on enforcement (including the recovery of expenses by the creditor) and redemption in relation to a standard security should not be dealt with in standard conditions but in the substantive provisions of the new legislation.

(Paragraph 7.39)

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| **Comments on Proposal 31**«InsertTextHere» |

32. Statute should provide for a freely variable default set of standard conditions in relation to preservation of the value of the encumbered property and expenses (other than in relation to enforcement). If consultees agree:

(a) should these conditions be set out in primary or secondary legislation?

(b) what default conditions should be included?

(Paragraph 7.49)

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| **Comments on Proposal 32**«InsertTextHere» |

33. The standard conditions should be abolished, but statute should set out:

(a) a broad rule requiring the debtor to preserve the value of the encumbered property;

(b) a default rule that the debtor should be liable for the creditor’s reasonable expenses (with enforcement expenses being dealt with separately in terms of the rules on enforcement); and

(c) a default rule allowing the creditor either to (i) require the debtor to insure the property for reinstatement value or to (ii) insure the property directly.

Should there be any additional rules?

(Paragraph 7.49)

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| **Comments on Proposal 33**«InsertTextHere» |

34. Where property which is encumbered by a standard security has a lease granted over it without the creditor’s consent, the secured creditor should be entitled to remove the tenant if the security is enforced.

(Paragraph 8.37)

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| **Comments on Proposal 34**«InsertTextHere» |

35. Should the secured creditor be entitled to remove a tenant under a lease granted after a standard security prior to enforcement if express provision is made in the security documentation prohibiting the grant of a lease? Should that provision require to be on the face of the Land Register?

(Paragraph 8.40)

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| **Comments on Proposal 35**«InsertTextHere» |

36. What comments do consultees have on the rights of the secured creditor where the debtor carries out a juridical act in relation to an existing lease without the secured creditor’s consent?

(Paragraph 8.44)

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| **Comments on Proposal 36**«InsertTextHere» |

37. Should the Private Housing (Tenancies) (Scotland) Act 2016 be amended to make it clear that a heritable creditor cannot evict a tenant whose lease was granted prior to the creation of the security?

(Paragraph 8.52)

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| **Comments on Proposal 37**«InsertTextHere» |

38. What comments do consultees have on the situation where a heritable creditor is enforcing its security and there is a residential tenant whose lease was granted after the security?

(Paragraph 8.55)

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| **Comments on Proposal 38**«InsertTextHere» |

39. The holder of a private residential tenancy should prior to enforcement be unaffected by a prohibition on leasing in a standard security encumbering the property unless that person knows of the prohibition at the date of entry under the lease.

(Paragraph 8.57)

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| **Comments on Proposal 39**«InsertTextHere» |

40. Do consultees have any comments on the interaction of standard securities with agricultural leases?

(Paragraph 8.58)

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| **Comments on Proposal 40**«InsertTextHere» |

41. Where property is encumbered by a standard security and the debtor carries out a juridical act in relation to a right affecting that property without the creditor’s consent, the creditor should be entitled to reduce the debtor’s act if the security is enforced.

(Paragraph 8.64)

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| **Comments on Proposal 41**«InsertTextHere» |

42. Should the creditor prior to enforcement be entitled to reduce any juridical act by the debtor which is prohibited in the security documentation?

(Paragraph 8.65)

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| **Comments on Proposal 42**«InsertTextHere» |

43. It should continue to be possible to vary a standard security as under the 1970 Act, except that there should be no mandatory form of deed.

(Paragraph 9.14)

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| **Comments on Proposal 43**«InsertTextHere» |

44. It should continue to be impermissible to vary a standard security to increase the encumbered property.

(Paragraph 9.16)

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| **Comments on Proposal 44**«InsertTextHere» |

45. It should continue to be possible to restrict a standard security:

(a) as under the 1970 Act, except that there should be no mandatory form of deed; or

(b) by means of a consent *in gremio* in a disposition transferring the property.

(Paragraph 9.23)

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| **Comments on Proposal 45**«InsertTextHere» |

46. Should (a) the assignation of the secured debt alone be sufficient to transfer the standard security, or should (b) registration of a document assigning the standard security continue to be required?

(Paragraph 10.34)

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| **Comments on Proposal 46**«InsertTextHere» |

47. If registration should still be required, should the effect of registration be to transfer the debt (without intimation to the debtor)?

(Paragraph 10.34)

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| **Comments on Proposal 47**«InsertTextHere» |

48. (a) There should be no mandatory form of deed for the assignation of a standard security.

(b) The same deed may assign multiple standard securities.

(c) Upon registration the assignation should give the assignee the benefit of any corroborative and substitutional obligations, the right to recover expenses from the debtor and the right to rely on any notices sent or enforcement procedure started by the assignor.

(Paragraph 10.38)

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| **Comments on Proposal 48**«InsertTextHere» |

49. The effect of an assignation of a standard security should not be to limit the standard security to the amount due at the time of the assignation and future advances made by the assignee may be secured depending on the terms of the security contract.

(Paragraph 10.68)

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| **Comments on Proposal 49**«InsertTextHere» |

50. (a) Should there be any restrictions on what an all sums standard security may secure?

(b) In particular, should there be restrictions on

(i) pre-assignation debts owed to the assignee; and

(ii) debts originally owed to other parties

being secured?

(Paragraph 10.72)

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| **Comments on Proposal 50**«InsertTextHere» |

51. It should continue to be possible to discharge a standard security in whole:

(a) as under the 1970 Act, except that there should be no mandatory form of deed; or

(b) by means of a consent *in gremio* in a disposition transferring the property.

(Paragraph 11.9)

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| **Comments on Proposal 51**«InsertTextHere» |

52. (a) Do consultees consider that the law should require creditors to discharge standard securities where there is no outstanding debt?

(b) If so, should such a rule be restricted to residential cases and should there be exceptions? What should be the sanction for non-compliance?

(Paragraph 11.12)

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| **Comments on Proposal 52**«InsertTextHere» |

53. Section 41 of the 1970 Act should be restated and clarified by means of a new statutory provision.

(Paragraph 11.14)

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| **Comments on Proposal 53**«InsertTextHere» |

54. (a) Do consultees agree that the rules on redemption should be replaced with a general rule entitling the debtor to a discharge on the secured obligation being performed in terms of the contractual arrangements between the parties and a court procedure for discharge where the creditor has disappeared or refuses to grant a discharge?

(b) What comments do consultees have on the owner of the encumbered property (where that person is not the debtor) having the right to have the security discharged by paying the value of the property?

(Paragraph 11.39)

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| **Comments on Proposal 54**«InsertTextHere» |

55. Section 11 of the Land Tenure Reform (Scotland) Act 1974 should be repealed.

(Paragraph 11.43)

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| **Comments on Proposal 55**«InsertTextHere» |

56. The doctrine of *confusio* should not extinguish a standard security.

(Paragraph 11.49)

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| **Comments on Proposal 56**«InsertTextHere» |

57. Should there be a sunset rule for standard securities? If so, what should be the period be? If not, why not?

(Paragraph 11.52)

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| **Comments on Proposal 57**«InsertTextHere» |

58. The existing statutory provisions on the older forms of heritable security should be repealed. Where necessary, appropriate provision should be made in the new legislation.

(Paragraph 12.6)

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| **Comments on Proposal 58**«InsertTextHere» |

59. The rules in relation to transactions involving, and the enforcement of, a

(a) bond and disposition in security, or

(b) bond of cash credit and disposition in security,

should be the same as for the standard security with appropriate modifications. Any sunset rule for standard securities should also apply to these securities.

(Paragraph 12.12)

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| **Comments on Proposal 59**«InsertTextHere» |

60. Section 40 and Schedule 9 of the 1970 Act (which provide for a form of discharge for the *ex facie* absolute disposition) should be repealed and not replaced.

(Paragraph 12.18)

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| **Comments on Proposal 60**«InsertTextHere» |

61. Should the new legislation make provision to bring *ex facie* absolute disposition arrangements to an end? If so, how?

(Paragraph 12.25)

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| **Comments on Proposal 61**«InsertTextHere» |

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| **General Comments**«InsertTextHere» |

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