

29 June 2023



Our ref: L1/3/17

Dear Consultee

DISCUSSION PAPER ON HERITABLE SECURITIES: NON-MONETARY SECURITIES AND SUB-SECURITIES
SLC DP No 175

We invite comment on the above mentioned Discussion Paper which has been published today. The paper is available on our website at <https://www.scotlawcom.gov.uk/law-reform/consultations/> together with an Executive Summary and a news release.

The paper explores two complex issues arising in the law of heritable securities, namely heritable securities in respect of non-monetary obligations and sub-security arrangements.

In the context of heritable securities in Scotland, the term “non-monetary obligation” generally refers to an obligation to do something other than pay a debt. Granting a heritable security in respect of an obligation of this type is a common occurrence in particular types of property transaction, for example an obligation of a land owner to sell their land under an option agreement. Confusion arises as to how a heritable security in respect of a non-monetary obligation operates to enforce performance of that obligation when, in reality, the security can only be used as a means of extracting money from the secured asset.

A sub-security arrangement, in this context, describes the situation where a heritable security is taken over an existing heritable security. Unlike a more conventional security, where the security property will often be land, the security property in this arrangement is itself a security. The creation of such sub-securities is viewed as an important step in high-value securitisation and debt warehousing transactions in the commercial finance sector. While the current law permits the creation of these “secondary” or “piggyback” standard securities, questions arise over the conceptual soundness and practical utility of this approach.

This Discussion Paper looks at the use of heritable securities in both of these contexts, and seeks views on provisional proposals for reform to deal with difficulties in the current law.

The Discussion Paper considers in detail:

- the historical background to the law relating to non-monetary securities together with their use today;
- proposals for reform in relation to non-monetary securities to reflect the fact that they can, in reality, only be used to generate money for the security holder in the event of default;
- a new scheme for protecting contractual obligations to transfer land – referred to in the paper as the conditional advance notice scheme;



- the law relating to heritable sub-securities and their use in a typical securitisation arrangement;
- a proposal to make it incompetent in future to take a standard security over a standard security; and
- the law in relation to assignments in security of heritable securities.

We seek views from consultees on 19 questions, including:

- Whether a standard security should (i) no longer be capable of securing a non-monetary obligation, but may secure substitutionary monetary claims, or (ii) be capable of securing a non-monetary obligation, but with the security holder only entitled to damages on default?
- Whether the law should provide a means by which contractual obligations to transfer land can be protected beyond the usual contractual remedies?
- Whether the grant of a standard security over a standard security should cease to be competent?
- Whether it should be possible to assign in security a standard security?

Consultation is critical in all of our law reform projects to ensure that the final recommendations contained in our report would, if implemented, result in law which is just, principled, responsive and easy to understand. We would therefore be grateful to receive your views on any or all of the questions in this Discussion Paper. All views will be fully considered and analysed in the course of reaching our final conclusions. The consultation period ends on **29 September 2023**.

Where possible, we would prefer the electronic submission of comments. You can use the electronic response form for this Discussion Paper on our website at: <https://www.scotlawcom.gov.uk/publications/archive/discussion-papers-and-consultative-memoranda/>.

The form has a questionnaire format which allows you to comment (briefly or at length) on any of the paper's questions which interest you. The form can be downloaded and emailed to us at info@scotlawcom.gov.uk, as can comments in other electronic formats.

Alternatively, comments can be emailed to info@scotlawcom.gov.uk. As noted above, the consultation process concludes on 29 September 2023, accordingly, we would be grateful if comments were submitted by then.

Please note that information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may also (i) publish responses on our website (either in full or in some other way such as reformatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

More information on the work of the Commission can be found on our website at <https://www.scotlawcom.gov.uk/>. Finally, should you wish to offer any comments on the way in which we conduct our consultation exercises, we would be pleased to hear from you.

Yours faithfully

CHARLES GARLAND
Interim Chief Executive