

ECONOMY, ENERGY AND FAIR WORK COMMITTEE

MOVEABLE TRANSACTIONS

SUBMISSION FROM

The Faculty of Advocates

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If you wish to request that your submission be published without your name, please contact the Clerks at the following email address: economyenergyandfairwork@parliament.scot

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Moveable Transactions

- 1. Have difficulties raising finance on moveable goods in Scotland affected your business or area of activity? If so, what practical impact has this had?**

The Faculty of Advocates has no comment on this. In its response to the Scottish Law Commission, the Faculty suggested that empirical evidence from the business community would be useful to determine whether there is a commercial need for reform.

- 2. The Committee understands that there are various work-arounds used by Scottish businesses to enable access to finance on moveable goods. Are these sufficient, or would the law benefit from being reformed?**

In principle, the Faculty of Advocates does consider the law would benefit from reform. The Faculty has previously praised the Scottish Law Commission's proposals as a significant and positive contribution to the law in this important field, and continues to agree with many of the proposals. The proposals the Faculty agrees with are set out in its response to the Scottish Law Commission's Discussion Paper, which is enclosed with this response.

In general, work-arounds to avoid legal rules which are not fit for purpose are not to be encouraged. First, the need for a work-around means that the law does not reflect reality. The law should reflect reality wherever possible. The law should be accessible and easy to understand. If it is not, it is more likely to be misunderstood or mis-applied, particularly by those who cannot afford specialist legal advice. Secondly, and related to this, the extent to which specialist legal advice is required to operate work-arounds must increase transaction costs, and therefore confer a benefit on those who can afford those increased costs at the expense of those who cannot. Thirdly, work-arounds inevitably create uncertainty and increase risk. Work-arounds by definition are ways of working around rules which are unsatisfactory. Work-arounds may not therefore achieve the desired result. This might only become apparent if the issue is tested in Court. Most transactions are not tested in Court, and so a

workaround might not be exposed as inadequate for quite a number of years until a case raising the issue comes to Court.

- 3. The Scottish Government will have to invest money in creating the two new registers recommended by the Scottish Law Commission. Do you think there is sufficient demand to justify this? Do you have any evidence to support this?**

The Faculty of Advocates is not able to comment on whether there is a sufficient commercial demand for the two new Registers. If there is to be reform however the Faculty does support the creation of the Registers.

- 4. The proposals in the Scottish Law Commission's draft bill would apply to consumers as well as businesses. Do you think there are enough protections in place for consumers?**

In its response to the Scottish Law Commission's Discussion Paper, the Faculty said:

The treatment of consumers is primarily a matter of social and legislative policy on which the Faculty as a body has no views, beyond noting that any encroachment on consumer protection in favour of promoting the interests of financial institutions would need persuasive justification.

This remains the Faculty's position.

- 5. Do you have comments on any of the other proposals contained in the draft bill?**

The Faculty's comments on the proposals in the draft Bill are set out first in the preamble to its response to the Scottish Law Commission, and in its response to the Bill (a copy of which is also enclosed).

- 6. Do you agree with the Scottish Law Commission's view that the law relating to moveable transactions should be changed?**

Reference is made to answer 2.

- 7. Do you have any other comments?**

The Faculty is happy to assist the Committee in any way which would be useful.