

# MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2 – Security over Moveable Property**

##### *Chapter 1 - Pledge*

#### **Pledge, secured obligation and encumbered property**

##### *Section 42 – Pledge*

189. A pledge is a type of right in security over moveable property.
190. This section sets out the main methods by which a pledge is created over corporeal and incorporeal moveable property respectively. However, subsection (5) confirms that any existing law on creating a possessory pledge over a negotiable instrument remains undisturbed.
191. Corporeal moveable property is property that has physical form, other than land or buildings (which are known as heritable property). It includes whisky, paintings, furniture, and motor vehicles. The Act defines corporeal moveable property, but only to confirm that it does not include money for the purposes of the Act (see section 113(1) which defines “money” by reference to section 175 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, with the effect that, broadly speaking, it means cash and banking instruments (such as cheques and postal orders, among other things)).
192. Incorporeal moveable property is property that does not have physical form, such as intellectual property or financial instruments.
193. A pledge over corporeal moveable property can continue to be created as a possessory pledge but will now also be able to be created as a statutory pledge through the mechanism of registration. A possessory pledge will normally be created by delivery of the property to the secured creditor (for which see section 44 of the Act). The exception to that is where the property is not the provider’s when delivered; then the pledge is created when the property becomes the provider’s.
194. A pledge over incorporeal moveable property, or over property which is a mixture of corporeal and incorporeal property, must be created by registration in the new Register of Statutory Pledges.
195. [Section 113](#) of the Act has the effect that a reference to registering a statutory pledge or an amendment to it (however expressed) is a reference to registration by the Keeper in the Register of Statutory Pledges under sections 87 and 89 of the Act.

### **Section 43 – Secured obligation and encumbered property**

196. Subsection (1)(a) sets out that the obligation secured by a pledge (the “secured obligation”) can cover both present and future obligations. This is also the case with a standard security over land or buildings (see section 9(8)(c) of the Conveyancing and Feudal Reform (Scotland) Act 1970 in respect of obligations that can be secured on such heritable property). The effect is that it is competent to grant a pledge securing all sums due and to become due to the creditor.
197. Subsection (1)(a) also provides that a pledge can secure third party debt. As such, the obligation need not be one owed to the secured creditor. This would be the case where, for example, the secured creditor is a security trustee. It also need not be an obligation owed by the provider.

#### *Example*

George has an overdraft with the Iron Bank, and the Bank is willing to accept a pledge as security for the debt. But George does not have moveable property of any value, so his friend Holly agrees to pledge her car. Holly is thus a third party providing security for the loan by the Bank to George.

198. Subsection (1)(b) provides that ancillary obligations are also secured by a pledge. The typical ancillary obligation is interest on a debt, but the pledge will cover other obligations such as any obligation to pay the creditor damages for a loss they have suffered (which is considered important where non-monetary obligations are secured). A pledge might also secure costs arising from the extra-judicial recovery of interest or damages, such as interest due for the late payment of debts for the purposes of Directive [2000/35/EC](#) on combating late payment in commercial transactions.
199. Subsection (2) gives statutory effect to a general rule of law. Unless agreed otherwise, the secured creditor is entitled to the natural fruits of the encumbered property (such as the young of animals), but not entitled to the civil fruits (such as dividends on shares, or rent payments). However, it should be noted that this default rule is only about what property is encumbered under the pledge. It does not affect the secured creditor’s right under the Act’s enforcement provisions to enforce the security by leasing or licensing the encumbered property and then apply the rents or royalty payments to the debt.
200. Subsection (3) provides that the encumbered property must be transferable. This reflects general security law, as a security over a non-transferable right has no practical value (as the property could not be sold to satisfy the secured obligation). However, sometimes – notably in the case of certain intellectual property licences – the property is transferable subject to restrictions, and it will be possible to take security over such property.

### **Possessory pledge**

#### **Section 44 – Delivery**

201. This section reforms and codifies the law on delivery of property to a secured creditor for the purpose of creating a possessory pledge.
202. Subsection (1) sets out four options for effecting delivery, at which time the pledge will be created (provided that the property is owned by the provider at the time of delivery). It makes clear, contrary to the decision in *Hamilton v Western Bank* (1856) 19 D 152, that delivery for the purpose of creating a pledge of corporeal moveable property is not restricted to physical delivery.
203. Subsection (1)(a) provides for physical delivery, either to the secured creditor or to their representative.

#### *Example*

Peter might decide to offer a watch as security for a loan from Renata, and will create the pledge by handing her the watch for that purpose.

204. Subsection (1)(b) provides for delivery by means of giving control of the premises in which the encumbered property is kept.

*Example*

Sean might decide to offer his yacht as security for a loan from Teddy, and will create the pledge by giving Teddy the only key to the boathouse in which it is stored.

205. Subsection (1)(c) provides for constructive delivery by means of an instruction to another person who is holding the property.

*Example*

Ulrike has stored whisky in a warehouse owned by Val. Ulrike decides to offer the whisky as security for a loan by Zebedee. Delivery is effected, and the pledge created, if Ulrike instructs Val to hold the whisky on behalf of Zebedee.

206. Subsection (1)(d) provides for symbolic delivery by means of delivery of a bill of lading for the property, such as cargo aboard a ship as represented by the bill of lading. A bill is a document of title, and will where necessary require to be endorsed in favour of the secured creditor.

207. Subsection (2) provides that delivery is not required if the property is already in the direct possession or custody of the prospective secured creditor. It is deemed to have been delivered as required.

*Example*

Joan has borrowed Karen's bicycle. Karen agrees that the bicycle can be pledged as regards a debt owed by her to Joan. The pledge is created when the agreement is made.

208. Subsection (4) confirms that section 2 of the Factors Act 1889 (which allows mercantile agents to pledge goods by means of handing over documents of title) continues to apply. A mercantile agent, as defined in section 1 of that Act, is an agent having in the customary course of business authority to sell goods, to consign goods for the purpose of sale, to buy goods, or to raise money on the security of goods.

## **Statutory pledge**

### ***Section 45 – Constitutive document***

209. This section is the first of a number of sections that make provision for a statutory pledge. This type of pledge does not require delivery of the encumbered property, and is therefore a non-possessory pledge.

210. Subsection (1) provides that a statutory pledge must have a constitutive document, so that it is not competent to grant an oral non-possessory pledge. There is no equivalent rule for a possessory pledge as a security of that type is created by delivery of the encumbered property.

211. Subsection (2)(a) requires that the constitutive document is subscribed by the provider using a physical signature (“executed”) or signed electronically (“authenticated”). Section 120(2) of the Act defines “executed” and “authenticated” for that purpose.

212. Subsection (2)(b) sets out that the document must also identify the encumbered property. As a result of subsection (3), this may be done by reference to an identifiable class of property (for example, “my computers”), or by reference to a description in another document.

213. Where property is identified by reference to a class of property, the Act's information rights will be particularly relevant. An entitled person, as defined in section 107(2) of the Act, is able to obtain from the secured creditor further information about the encumbered property by making a request to that effect under that section.
214. Subsection (2)(c) requires the secured obligation to be identified.
215. Subsection (4) makes it clear that a statutory pledge may be granted over property not owned by the provider at the time the property is identified in the document. This subsection should be read with section 48 of the Act which has the effect that the pledge is not created until (and if) the property becomes the provider's property.
216. Subsection (5) makes it clear that the rules about identifying encumbered property and secured obligations can be satisfied by cross-referring to another document (see paragraph 9 of these Notes for a discussion of the term "document").

### ***Section 46 – Competence of individual acting as provider of a statutory pledge***

217. This section generally (with some exceptions) prevents individuals – as opposed to corporate bodies – from granting a statutory pledge. Under subsections (1) and (2)(a), the situations where an individual is entitled to grant a statutory pledge are as follows—
- the individual is acting in the course of their business and the asset is used (or to be used) wholly or mainly for the purposes of that business,
  - the individual is acting in the course of the activities of a charity of which they are a charity trustee and the asset is an asset of the charity, or
  - the individual is acting in the course of the activities of an unincorporated association of which they are a member and the asset is owned on behalf of, or jointly with the other members of, that unincorporated association.
218. In addition, subsection (2)(b) provides that any corporeal property to be pledged must have a monetary value exceeding £3,000 immediately before the granting of the document under which it is to become encumbered property (though there is a power for the Scottish Ministers to adjust this sum by regulations – see subsection (3)(a)). The effect is that it will not be possible for an individual acting in the course of a business to grant a statutory pledge over low-value but essential items which are used primarily but not exclusively for business purposes (for example, a washing machine which is used for a laundry business but also occasionally for home purposes).
219. The Scottish Ministers also have a specific regulation-making power to exclude particular types of property from being pledged by those categories of individuals who are allowed to grant a statutory pledge (see subsection (3)(b)). For example, this could be used to exclude the pledging of a motor vehicle (or, using the power in section 118 to provide for different purposes, to exclude the pledging of a motor vehicle unless it is being pledged to secure its purchase).

### ***Section 47 – Competence of creating statutory pledge over certain kinds of property***

220. Subsection (1) sets out the types of moveable property in respect of which it is not competent to grant a statutory pledge. A statutory pledge is not competent in respect of property that is subject to the alternative security regimes specified in that subsection:
- for aircraft and for certain ships (and shares in ships) it is possible to create an aircraft or ship mortgage, and
  - for aircraft objects it is possible to create an international interest under the Cape Town Convention as implemented – following ratification by the United Kingdom on 27 July 2015 – by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912).

221. The Cape Town Convention is an international treaty intended to standardise security transactions involving certain types of moveable property, and it creates (in particular) international standards for security interests, and various legal remedies for default in financing agreements (including repossession).
222. Subsection (2) limits the scope of a statutory pledge over incorporeal moveable property to the types of property listed in that subsection. However, subsection (3) gives the Scottish Ministers a regulation-making power to expand the list.

### ***Section 48 – Creation of statutory pledge by registration: general***

223. This section has the effect that a statutory pledge is created by—
- registration of the constitutive document in the Register of Statutory Pledges (see section 113 of the Act for the meaning of references to “registering” or similar expressions),
  - the property being the provider’s property, and
  - the property being identifiable as property that is subject to the pledge.
224. The pledge is only created when each of the requirements is met, regardless of which occurs first. It follows for example that a pledge is not created at the time of registration if the property is not the provider’s at that time.

#### *Example*

Adam grants a pledge in June to the Haddington Bank over motor vehicles he has recently acquired, to be listed in a schedule to be given to the Bank. The Bank registers the pledge in the RSP in July. Adam sends the schedule to the Bank in August. The statutory pledge is created in August when all three conditions in subsection (2) are met.

225. Subsection (3) provides that subsection (2)(b) is subject to section 91 of the Act, with the effect that registration only counts if it is effective. It is ineffective if the entry in the statutory pledges record does not include a copy of the constitutive document, the document is invalid, or the entry has a seriously misleading inaccuracy.
226. Subsection (4) further qualifies the effect of this section by making it subject to section 50 of the Act. The effect of this is that a pledge over property yet to be acquired may be ineffective if the property is acquired after the provider becomes insolvent.

### ***Section 49 – Creation of statutory pledge over added property***

227. This section provides for the creation of the security over property added to a statutory pledge.
228. It has the same effect for property added to a pledge by an amendment document as section 48 has for property identified in the constitutive document. See paragraphs 223 and 224 of these Notes.
229. Subsection (3) sets out that subsection (2)(b) is subject to section 92 of the Act (dealing with ineffective registration). It has comparable effect to section 48(3) in that registration only counts if it is effective. However, in this case it is matters relating to the amendment which are relevant. As such, registration is ineffective if the entry in the statutory pledges record does not include a copy of the amendment document, the amendment document is invalid, or, as a result of the amendment, the entry has an inaccuracy which is seriously misleading.
230. Subsection (4) sets out that this section is subject to section 50 of the Act (dealing with insolvency). It has the same effect as section 48(4) of the Act (see paragraph 226 of these Notes).

### ***Section 50 – Creation of statutory pledge: insolvency***

231. Sections 45(4) and 58(5) of the Act set out that the property to be encumbered as described in the constitutive document of a statutory pledge, or an amendment document, may be property to be acquired by the provider of the pledge. This section provides for the effect of the intervening insolvency of the provider.
232. Subsection (2) provides that a statutory pledge will not be created over property acquired at a time when the provider is insolvent (as defined in subsection (3)). The effect is that the property in question is treated as an asset of the provider for the purposes of the insolvency. It may for example be sold or realised for the benefit of the creditors as a whole.
233. Subsection (4) confers a power on the Scottish Ministers to modify subsection (3) by regulations. That power could for example be used to add a further type of insolvency to the list in subsection (3).

### **Property encumbered by statutory pledge: effect of transfer by provider**

#### ***Section 51 – Property encumbered by statutory pledge: transfer by provider***

234. The creation of a statutory pledge will in all cases involve the registration of the pledge in the Register of Statutory Pledges. The result is that the provider of the pledge will usually keep possession of the encumbered property.
235. Subsection (1) therefore gives statutory effect to a general principle of the law of rights in security by providing that the statutory pledge will normally continue to encumber the property if it is transferred. However, there are some exceptions to this—
- where it is transferred with the explicit written consent of the secured creditor to the particular transfer in a way that meets the conditions of subsection (2),
  - where a third party acting in good faith acquires the property unencumbered under one of the Act's protections for innocent acquirers under section 53 to 55, or
  - where, in accordance with a provision of the Act, the pledge is otherwise extinguished by the provider's transfer to a third party.
236. The final of these – the pledge being otherwise extinguished by the transfer – covers it being extinguished under the following sections: section 52 (where the secured creditor has acquiesced in trying to circumvent the rules on statutory pledges); section 93 (where there is a supervening inaccuracy in the register) or section 108 (where property is erroneously stated not to be encumbered).
237. As far as the exception relating to obtaining the secured creditor's explicit written consent to the transfer is concerned, the secured creditor will not be able to agree in advance that the provider is free to deal with the encumbered property as they wish. That would enable the pledge to operate in the same manner as a floating charge. As such—
- Subsection (2) sets out that the consent of the secured creditor must be in writing, and must relate to the particular transfer. Thus the consent cannot be to a transfer to any unnamed person, or to a class of persons. It must be a consent to a transfer first to a specific person, and second to that person taking the property unencumbered by the pledge. Subsection (2) also requires that the consent must be given not more than 14 days before the transfer.
  - Subsection (3) sets out that the decision on whether or not to give consent must be at the discretion of the secured creditor. Thus a contractual provision under which the secured creditor must consent to any or all disposals would be ineffective.

238. Where the secured creditor acquiesces in the transfer but without the express consent regime provided for by this section, section 52 will apply and will result in the pledge being extinguished.
239. Subsection (4) gives the Scottish Ministers power to amend the consent provisions. This would for example enable Ministers to take account of possible future developments under English law, in relation for example to the fixed/floating characterisation of charges in an insolvency.
240. This section does not apply to possessory (common law) pledge, as the fact that the secured creditor holds the property limits the provider's ability to deal freely with the property.

***Section 52 – Extinction of statutory pledge where dealings inconsistent with a fixed security***

241. This section is an anti-avoidance provision. A statutory pledge could become tantamount to a floating charge if the secured creditor acquiesces in the provider dealing with property without following the narrow process for express written consent provided for in section 51. If this does happen, the effect of this section is to extinguish the statutory pledge.

***Section 53 – Acquisition in good faith from seller acting in ordinary course of business***

242. Sections 53 to 55 provide for circumstances in which a person who acquires corporeal property in good faith will acquire the property unencumbered by the statutory pledge, despite the consent mentioned in section 51(2) of the Act not having been obtained.
243. It is not likely to be efficient to grant a statutory pledge over stock-in-trade given that the secured creditor must expressly consent under section 51 of the Act to each intended transfer unless they want the security to be extinguished under section 52. Even so, encumbered property may become part of the inventory of a business. For example, Alistair might grant a statutory pledge over his piano to a bank, and then subsequently sell the instrument to a music shop. The effect of subsection (1) is that a good faith purchaser from the shop will be protected.
244. Encumbered property transferred without the consent of the secured creditor will be acquired unencumbered by a statutory pledge if two requirements are met—
- First, the transferor must have been acting in the ordinary course of that person's business. For example, a motor dealer which only sells vehicles would not on the face of it be acting in the ordinary course of business if it sold its office furniture.
  - Second, the acquirer must be in good faith at the time of the acquisition. The acquirer will not be protected if they know that the property is subject to a statutory pledge.
245. Subsection (2) makes it clear that the acquirer is not to be deemed to have constructive knowledge of a statutory pledge for the purposes of this section merely because it is registered.
246. Where the requirements of this section are not met (for example, because the property is acquired from a business acting other than in the usual course of its business), the person who acquires the property may benefit from other measures, in particular if it is acquired in good faith for personal or related purposes (see section 54 of the Act), or the property is a motor vehicle (see section 55 of the Act).

**Section 54 – Acquisition in good faith for personal, domestic or household purposes**

247. This section protects an individual who acquires corporeal property for private or related purposes.
248. Subsection (1) sets out that an individual who acquires encumbered property without the consent of the secured creditor having been obtained will acquire the property unencumbered if certain conditions are met:
- (a) the property must be wholly or mainly acquired for personal, domestic or household purposes (business purchasers are not protected),
  - (b) the person must give value for the property acquired, which will normally mean adequate monetary value (i.e. payment of a purchase price) but also covers by means, say, of exchanging other property, and
  - (c) the acquirer must be in good faith.
249. Subsection (2) makes it clear that the acquirer is not to be deemed to have constructive knowledge of a statutory pledge for the purposes of this section merely because it is registered. It follows that the individual does not need to search the Register of Statutory Pledges before acquiring the property.
250. Subsection (3) allows the Scottish Ministers to introduce a further rule into subsection (1) that the value of the property at the time of acquisition must not exceed a specified amount, and then to vary that amount from time to time.

**Section 55 – Acquisition in good faith of motor vehicles**

251. This section protects any person who acquires a motor vehicle that is encumbered property. It is similar in effect to the measures in section 27 of the Hire-Purchase Act 1964 in respect of motor vehicles hired under a hire-purchase contract, or purchased under a conditional sale agreement.

*Example*

D Ltd supplies a motor vehicle to Barry under a hire-purchase agreement with a three-year duration. Barry will not become the owner until he makes the final payment at the end of the three years. But after six months Barry sells the vehicle to Charlotte, who believes that Barry is the owner. Under section 27 of the 1964 Act, Charlotte will become owner of the vehicle if she is in good faith and is a private purchaser.

252. This section achieves the same result where Barry is the owner of the vehicle but grants a statutory pledge over it. Charlotte would take the vehicle unencumbered by the pledge if she is a good faith private purchaser from Barry.
253. Subsection (1) sets out four conditions which must be met if the property is to be acquired unencumbered, despite the consent of the secured creditor to the transfer not having been obtained:
- (a) The first condition is that there is a sale agreement (which could be a conditional sale agreement) or a hire-purchase agreement in respect of a motor vehicle.
  - (b) The second condition is that the motor vehicle must be encumbered property under a statutory pledge.
  - (c) The third condition is that the hirer or purchaser of the encumbered property cannot be carrying on a business described in section 29(2) of the 1964 Act, namely a business which consists wholly or partly of:
    - purchasing motor vehicles for the purpose of offering or exposing them for sale, or



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- providing finance for purchasing motor vehicles for the purpose of hiring them under hire-purchase agreements or selling them under conditional sale agreements.
- (d) The fourth condition is that the purchaser or acquirer must be in good faith. However, subsection (6) makes it clear that the purchaser or acquirer is not to be regarded as not being in good faith only because the pledge is registered. This means that they are not expected to check the register.
254. Where all of these conditions are met, subsection (2) provides that the property will be acquired unencumbered. Subsection (3) protects the purchaser or hirer by preventing enforcement of the statutory pledge prior to the property being transferred in implementation of an earlier hire or sale agreement.
255. Where a motor dealer transfers a vehicle in a way that results in it becoming unencumbered by the pledge, subsection (4) entitles the secured creditor to a limited right of recovery against the motor dealer rather than having to pursue the now unsecured debt against the provider. Subsection (5) provides that if this right is relied upon and the secured creditor receives a payment directly from the motor dealer, the provider's liability to the secured creditor is reduced accordingly, but instead the motor dealership can pursue the provider for the amount paid out.

*Example*

John grants a statutory pledge over his car to the Ayr bank. He then sells the car to a motor dealer without the consent of the Bank. The motor dealer is not protected by subsection (2) because it is a motor dealing business and so should have made a search in the Register of Statutory Pledges against John and/or the car. But if the motor dealer then sells the car to a private purchaser who is protected then the Bank is entitled to be compensated by the motor dealer. The motor dealer can in turn try to recover this money from John, whose debt to the Bank has been reduced.

256. The term “motor vehicle” is defined in section 29 of the 1964 Act as “any mechanically propelled vehicle intended or adapted for use on roads”, and that definition is adopted in subsection (7) for the purposes of this section. The definitions of “conditional sale agreement” and “hire-purchase agreement” are also given by reference to the 1964 Act.
257. Subsection (8) provides for the Scottish Ministers to be able to exclude by regulations certain classes of vehicle from the application of this section. Those regulations can also (but do not have to) exclude vehicles from other purchase protections.

*Example*

The Driver and Vehicle Licensing Agency requires UK registered vehicles to have a vehicle identification number (VIN). If RSP Rules make it compulsory for an entry in the RSP to include the VIN, making it easier to check whether a particular vehicle is subject to a pledge, then Ministers might consider that the protection should not apply (say) to commercial vehicles. They would then be able to either disapply just the protection in this section in relation to such vehicles or, if desired, to disapply the protection in other sections too so that the VIN is checked even when buying from a business seller.

## **Rights relating to matrimonial or family home where relevant to a statutory pledge**

### ***Section 56 – Occupancy and other rights in family home following grant of statutory pledge***

258. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives spouses who are not named in the title deeds or on the lease etc. (“non-entitled spouses”) occupancy

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rights in their matrimonial home, and in some circumstances the right to use furniture and plenishings in the home. Section 22 of the 1981 Act defines “matrimonial home” to include a caravan or houseboat. It defines “furniture and plenishings” to mean any article in the home that is owned or the subject of a hire-purchase arrangement and which is reasonably necessary to enable the home to be used as a family residence. Either of these types of moveable corporeal property could be encumbered property for the purposes of a statutory pledge.

259. The Civil Partnership Act 2004 makes the equivalent provision for civil partners as the 1981 Act does for spouses. In both cases, the measures in those Acts apply where one spouse or partner is entitled (or permitted by a third party) to occupy the home, and the other is not, provided that the property is not one which has been made available specifically for one spouse or partner to reside in separately from the other.
260. Section 2 of the 1981 Act and section 102 of the 2004 Act confer ancillary and consequential rights on non-entitled spouses and partners. Subsection (2) of section 56 extends this to include the right to make any payment due by the entitled spouse or partner in respect of a secured obligation relating to the family home, so that the non-entitled spouse or partner can continue to exercise occupancy rights without the secured creditor attempting to call in the security.
261. Under section 3 of the 1981 Act and section 103 of the 2004 Act, the non-entitled spouse or partner may apply to the court for possession or use of furniture and plenishings. Subject to certain provisos, such an order is not to prejudice the rights of a third party who has rights to performance of an obligation under an agreement such as a hire-purchase agreement. Subsection (3) of section 56 extends this so that such an order is also not to prejudice the rights of a secured creditor. Subsections (4) and (5) simply insert definitions for the purpose of subsection (3).
262. Section 6 of the 1981 Act and section 106 of the 2004 Act provide that the continued exercise of the rights conferred on a non-entitled spouse or partner by those Acts will (subject to certain exceptions) not be prejudiced by a dealing of the entitled spouse or partner relating to the home. The effect of subsection (6) is that a dealing will for that purpose include the grant of a statutory pledge over a moveable home, such as a caravan or houseboat.
263. Section 8 of the 1981 Act and section 108 of the 2004 Act provide that the rights of a third party with an interest in the home as a creditor under a secured loan will not be prejudiced by reason only of the rights of a non-entitled spouse or partner under those Acts, and allow the creditor to apply to the court for the occupying non-entitled spouse or partner to be required to make the payments that are due under the loan. However, this only applies where the creditor is in good faith and in each case had obtained either:
  - (a) a declaration from the entitled spouse or partner that there were no occupancy rights at the time the security was granted, or
  - (b) a renunciation of occupancy rights, or a consent to the granting of the security, by the non-entitled spouse or partner.
264. The effect of subsections (7) to (9) is to provide for how the application of those rules to the grant of a statutory pledge over a moveable home is to operate. Specifically, they make provision about what “the time of granting a security” means in the case of a statutory pledge. This is relevant because the explanation set out in the paragraph immediately above only applies to secured loans granted after 30 December 1985. While it should be self-evident that a statutory pledge could not have been granted before that date, defining the time of granting is consistent with the approach taken in those Acts in relation to heritable securities.

## **Assignment, amendment, restriction or extinction of statutory pledge**

### ***Section 57 – Assignment of statutory pledge***

265. Subsection (1) confirms that a statutory pledge may be assigned (unless the parties agree otherwise). A pledge is a security rather than a claim, so Part 1 of the Act does not apply to the assignment of a pledge. However, subsection (2) provides that assignment must be by means of a document duly executed or authenticated by the secured creditor.
266. The effect is that it is not competent to register an assignment of a pledge in the new Register of Assignations. The pledge will therefore only transfer if the other requirements of the general law on assignment of rights are met, including, where required, delivery of the document to the assignee. It would, however, be possible to correct the RSP to show the assignee as the secured creditor (see sections 96 to 99 of the Act).
267. Subsection (3) makes it clear that the default position is that a statutory pledge which is being enforced can be assigned by the secured creditor, and that the assignee can continue with the enforcement rather than having to re-commence the enforcement procedure or re-serve any notice.

### ***Section 58 – Amendment of statutory pledge***

268. This section provides for the amendment of a statutory pledge by an amendment document.
269. Subsection (1) provides that a statutory pledge may only be amended by an amendment document executed or authenticated by the secured creditor and the provider. This is subject to two exceptions. Firstly, this is subject to section 59(a): as such, the restriction of a pledge to only part of the encumbered property, or its complete discharge, may be effected by means of a written statement by the secured creditor. Secondly, subsection (2) provides that an amendment document that only adds property to the encumbered property need not be executed by the secured creditor (because it is treated much the same as the granting of a pledge under a constitutive document).
270. Added property must be identified in the amendment document (subsection (3)) and this must be done in the usual way whereby items may be identified by reference to a class (subsection (4)). As is the case for the constitutive document for a statutory pledge, added property may be property to be acquired by the provider (subsection (5)).
271. Subsections (6)(a) and (7) have the effect that an amendment document that relates to the addition of property to the encumbered property, or to a variation that increases the extent of the secured obligation where that is determinable from the statutory pledges record, is amended only on registration of the amendment document. For these purposes, “registration” means effective registration (as to which, see section 92 of the Act).
272. Under section 88, an amendment document may only be registered where registration is *required* in order to effect the change; a document which effects a change off-register could only be registered by means of a correction. However, subsection (6)(b) of section 58 recognises that an amendment document which requires to be registered in order to effect the change may also be making other amendments. For example, an amendment document could remove property A from the pledge and replace it with property B. The removal of property A would not ordinarily need to be registered to take effect, but the addition of property B would. Section 58(6) sets out a default rule which ensures that both changes take effect at the same time, to avoid creating a gap during which the creditor has no security. However, the parties would be free to contract out of this rule if they wished, meaning that the removal of property A could take effect off-register earlier if wanted.

273. Subsection (8) clarifies that the requirement to identify property in an amendment document can be satisfied by cross-referring to another document (see paragraph 9 of these Notes for a discussion of the term “document”).

### **Section 59 – Restriction or discharge of statutory pledge**

274. This section provides for the secured creditor to be able to either restrict or discharge a statutory pledge by way of a written statement. This can be registered as a correction, if desired, but does not need to be. See paragraphs 369 and 433 of these Notes for further details.

### **Ranking of pledges etc.**

#### **Section 60 – Ranking**

275. This section provides for the priority of payment of secured obligations in a competition between creditors. It applies to both possessory (common law) pledges and statutory pledges, as well as rights in security other than a pledge.
276. Subsection (1) sets out the general rule that a pledge will rank against another security according to when the right is created, and reflects the fundamental principle of property law *prior tempore potior jure* (earlier by time, stronger by right).

#### *Example*

Patrick grants a statutory pledge over his painting to Quentin on day one. On day two, Quentin registers the pledge in the Register of Statutory Pledges and this is the final step in creating the pledge. On day three Patrick creates a possessory pledge over the same painting by delivering it to Robert. The statutory pledge ranks before the possessory pledge because the former was created first.

277. Subsection (2) deals with the case of competing statutory pledges where the property was not the provider’s at the time of the pledge being granted. In such cases, registration may not be the final step which creates the pledge – the final piece of the puzzle may be the property becoming the provider’s (see paragraph 224 of these Notes). A system which ranked pledges only according to when they are created would result in them being ranked equally despite one being registered before the other. As such, subsection (2) provides that the key factor in this instance is to be which pledge was registered earlier. For these purposes, only effective registration counts. This provision would apply equally to a statutory pledge created by means of a constitutive document and to one created by means of an amendment document.
278. Subsection (3) regulates the ranking of pledges and of rights in security arising by operation of law (such as the right of a repairer to retain property submitted for repair as security for payment of the bill) so that the right in security has priority. This mirrors the rule between such rights in security and floating charges, as set out in section 464(2) of the Companies Act 1985.
279. Subsection (4) gives a pledge priority for the entirety of the sums secured, both current and future. It follows that there is no procedure under which a party can limit the priority of the secured creditor in a higher ranking pledge by serving a notice to that effect on the creditor (as is the case for standard securities over land under section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970)). The effect is that a party seeking a higher ranking security than is otherwise available for sums not yet due under an earlier pledge will have to negotiate a ranking agreement with the creditor in that pledge.
280. Subsections (5) and (6) provide for it to be possible to have a ranking agreement in respect of a pledge and another security right (including another pledge), but it needs to be in writing. Any such agreement will only have contractual effect, and cannot be registered in the Register of Statutory Pledges.

### **Section 61 – Amendment of Companies Act 1985 and of Insolvency Act 1986**

281. This section amends the Companies Act 1985 and the Insolvency Act 1986 to give effect for statutory pledges to the general rule that a real right in security (broadly, a ‘fixed charge’ for insolvency purposes) will, if created prior to the attachment of a floating charge, rank above the floating charge. It does so in each case by amending the relevant definitions of “fixed security” in those Acts, with the effect that a fixed security includes a statutory pledge.

### **Section 62 – Effect of diligence on pledge**

282. This section governs the priority of a pledge as regards a diligence executed against the encumbered property. Diligence is the term for various processes of debt enforcement in Scottish law and includes things such as arrestment or attachment of a debtor’s moveable property (both of which are effectively seizure mechanisms). The basic rule is *prior tempore potior jure* (earlier by time, stronger by right). If the diligence is executed first then it has priority, and if the statutory pledge is created first then it prevails.
283. Subsection (2) provides for a special rule relating to further voluntary advances made by the secured creditor after diligence has been executed. It has the effect that an advance made under a pledge after the diligence is executed does not have priority over the sum attached by the diligence unless there is a prior contractual obligation or undertaking to make the advance.

#### *Example*

Acme Ltd grants a statutory pledge over machinery for all sums due and become due to the Oban Bank, and the Bank advances £20,000 in reliance on the pledge. Louise, an unsecured creditor of Acme Ltd, then attaches the machinery for a £5,000 debt. The next day the Bank advances another £8,000 to Acme Ltd. The Bank’s priority over Louise in respect of the value of the pledged property is limited to the initial £20,000, unless it was contractually bound to lend the further £8,000.

## **Enforcement of pledge**

### **Section 63 – The expression “pledge” in sections 64 to 77**

284. Sections 64 to 77 set out a statutory framework for the enforcement of both possessory and statutory pledges.
285. This section provides that the expression “pledge” for the purposes of those sections does not include a pledge as defined in section 189(1) of the Consumer Credit Act 1974. The effect is that a 1974 Act pledge (described in that Act as a ‘pawn’) falls to be enforced under the enforcement regime in respect of loans by pawnbrokers in that Act.

### **Section 64 – Enforcement of pledge: general**

286. This section sets out, as a general rule, that a pledge can only be enforced using the methods provided for by the Act.

#### *Example*

Barry lends David £1,000, and in exchange David grants a statutory pledge over a vintage car worth £100,000. The Act does not permit the forfeiture of encumbered property, and it is therefore unlawful for Barry to require in the event of a default that the car is forfeited to him so that he receives a windfall worth £99,000.

287. Subsections (2) and (3) have the effect that a pledge may be enforced in any lawful manner where the secured obligation is defaulted upon, or in such circumstances are as agreed in writing by the provider and the secured creditor. For example, the parties

might agree in writing that the pledge will be enforced only if a certain number of days have elapsed without the default being remedied.

288. Subsection (4) requires the secured creditor to conform to reasonable standards of commercial practice. Similar provision can be found in regulation 24 of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912). What is unreasonable for the purposes of subsection (4) will differ from case to case, but might include taking an excessively long period to complete an enforcement procedure.
289. Subsection (4) does not, however, specify to whom the duty to conform to reasonable standards is owed, and so the general law will apply. The duty might for example be owed to any of the provider, the debtor (if different), another creditor, or an office-holder such as the liquidator of a limited company. See also the analogous duties in sections 68(2), 70(2) and 71(2) on the enforcing creditor to obtain the best reasonably attainable value where encumbered property is sold, let or licensed.
290. Subsection (5) provides that the ability to enforce a pledge is subject to section 55(3) (the prohibition on enforcing a pledge against a motor vehicle before it is transferred to a purchaser or hirer), section 65 (the requirement to serve a pledge enforcement notice) and section 66 (the requirement for a court order in certain cases).

### ***Section 65 – Pledge enforcement notice***

291. Subsection (1) provides for a pledge enforcement notice to be served on the provider and other specified interested persons (if any). This must be done before any enforcement action can be taken by the secured creditor. A notice would, for example, require to be served on any person occupying a motorhome or houseboat encumbered by a statutory pledge. However, subsection (2) provides some exceptions for cases where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of certain persons with a right to receive a notice.
292. The form of the notice will be set out in regulations made by the Scottish Ministers (see section 120 for the meaning of “prescribed”). Ministers are able to prescribe different forms of notice for different categories of provider or occupier (see section 118(1)(b) which allows the regulation-making power to be exercised in a way that makes different provision for different purposes). For example, a form for individual providers who are able to grant a pledge under section 46 might contain information on how to obtain legal advice and the information that the creditor will need to obtain a court order before the pledge can be enforced. If the form used is not quite the same as the prescribed form, it may still satisfy the requirement to serve the notice but it is likely that any divergence would have to be trivial.
293. Subsection (3) makes it clear that the requirement to serve a pledge enforcement notice is subject to section 88 of the Consumer Credit Act 1974, which requires a 14-day default notice (as defined in section 87 of that Act) to be served before the enforcement of any right in security which is subject to that Act. As such, if the 1974 Act applies then a default notice under that Act will have to be served 14 days before the pledge enforcement notice can be served.
294. The Scottish Ministers are also able by regulations under subsection (4) to require that, in addition, a pledge enforcement notice must be given to specified persons who have statutory duties in relation to the provider’s property (as is the case, for example, in an insolvency). Exceptions to this may also be provided for (for example, where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of the person).

***Section 66 – Whether court order required for enforcement***

295. Subsection (1) confirms that a court order is only required for enforcement in the circumstances set out.
296. Under subsection (2), a court order is required before a pledge is enforced against an individual where the individual is a sole trader and the enforcement is against business assets.
297. Subsection (3) deals with property subject to a statutory pledge which is the sole or main residence of an individual, although that will be unusual as a pledge can only be granted over moveable property. It may, however, be relevant on occasion in relation to, say, a caravan or a houseboat. A court order is required unless there is a written agreement to enforcement, after the pledge becomes enforceable, between the person in residence, the provider (if a different person) and the secured creditor. If such an order is sought, it cannot be granted unless it is reasonable to do so (see subsection (4)), and subsection (5) sets out some of the factors which may require to be considered by the court.

***Section 67 – Secured creditor’s right to take possession of, or steps in relation to, corporeal property***

298. This section provides for the enforcement of a statutory pledge by the secured creditor following service of a pledge enforcement notice and, where appropriate, following the obtaining of a court order. It enables the secured creditor to take possession of the encumbered property from, typically, the provider.
299. As well as the taking of possession being enabled under subsection (2)(a), subsection (2) (b) enables the creditor to take any reasonable steps necessary to ensure that the property is not disposed of or used in any unauthorised way. This is aimed at larger assets such as machinery where it might be more convenient to sell them on site. The secured creditor may simply want to immobilise the asset, so that it cannot be removed before any planned sale.
300. Possession may only be lawfully taken using one of three methods. First, it may be taken where consent has been obtained from certain persons. Second, it may be taken by an authorised person under subsection (7), such as a sheriff officer. This may or may not require the consent of the court depending on who holds the property. Third, it may be taken by the secured creditor personally if authorised by the court.
301. Subsection (3) deals with the situation where the property is in the possession of an equal or higher ranking secured creditor, or a creditor who has executed higher or equivalently ranking diligence against the property. In such cases, that person is the person whose consent is relevant if opting for the first method of taking possession. For example, it may be that the higher ranking creditor does not wish to enforce its security and so is willing to give consent.
302. Subsection (4) deals with the situation where the property is in the possession of anyone else. This will usually be the provider, but could be a third party. In such cases, the provider’s consent is required if opting for the first method of taking possession. Where the property is held by a third party then that person’s consent is needed as well.
303. Subsection (6) enables the secured creditor, acting through an authorised person, to remove any individual from the encumbered property. This might be necessary where the encumbered property is, for example, a motorhome or houseboat.
304. Subsection (7) defines “authorised person” for the purposes of this section, but this is subject to subsection (8) which enables the Scottish Ministers to, by regulations, specify other persons as authorised persons.

***Section 68 – Secured creditor’s right to sell***

305. This section sets out the standard remedy for the secured creditor following service of a pledge enforcement notice (and where appropriate the obtaining of a court order): a right to sell the property at the best reasonably attainable price (subsections (1) and (2)). The secured creditor will need to be able to convey the encumbered property to the purchaser, and may first require to take possession of the property under section 67 of the Act.
306. The secured creditor may also purchase the encumbered property themselves, but only in the limited circumstances set out in subsection (3).
307. Subsection (4) requires that the secured creditor holds the proceeds of sale in trust until they are distributed under section 77 of the Act. It is similar in effect to section 27 of the Conveyancing and Feudal Reform (Scotland) Act 1970, which provides for the proceeds of sale under a standard security over land. A standard security is another form of subordinate real right in security.

***Section 69 – Sale: unencumbered acquisition***

308. This section provides for the effect of a sale of the encumbered property under section 68 on the rights of:
- (a) any creditor under another security that encumbers the property, and
  - (b) any unsecured creditor who has attached or arrested the property in connection with enforcing a court order for payment (diligence).
309. It provides that the purchaser acquires the property free of the pledge that is being enforced, and of any rights in security or diligence which rank equally with or after the pledge.
310. It provides a separate rule for higher ranking rights in security or diligence. These continue to encumber the property unless the relevant creditor consented to the sale.

***Section 70 – Secured creditor’s right to let***

311. This section has the effect that where it is lawful to sell encumbered property under section 68 of the Act, it is also lawful to lease the property provided it is done for the best reasonably obtainable income. Just as with a sale, the income is to be held in trust until distributed under section 77.
312. Subsections (4) and (5) provide for the parties to be able to agree in writing at any time to exclude leasing as a remedy available to the secured creditor on enforcement. For example, the provider may wish to have sale as the sole remedy on the basis that this would pay off the secured debt more quickly (and the creditor may also favour speed).

***Section 71 – Secured creditor’s right to grant license over intellectual property***

313. A licence of intellectual property is effectively a lease of that type of property (although it is not necessarily exclusive), and this section has therefore a similar purpose and effect for such property as section 70 does for property that can be leased – see paragraphs 311 and 312 of these Notes. However, the right to grant a licence over intellectual property only applies to the extent that the provider themselves would be entitled to do so.

***Section 72 – Secured creditor’s right to protect and manage the property***

314. This section provides for a secured creditor who is entitled to sell encumbered property under section 68 to be able to take additional measures to protect *etcetera* the property as specified in the section, and to preserve its value. These rights operate in addition to the rights under section 67(2)(b) to take reasonable steps to ensure that property is



not disposed of or used in an unauthorised way (which might also be characterised as a right to protect the property and therefore be covered by subsection (1)).

### ***Section 73 – Secured creditor’s right to appropriate***

315. Sections 73 to 76 of the Act provide for a secured creditor who has served a pledge enforcement notice to be able, in specified circumstances, to appropriate the encumbered property themselves as the means of enforcement of the pledge. This is not the same as forfeiture of the property, which is not permitted. Forfeiture is where ownership of an asset is simply forfeited altogether, regardless of its value, meaning in this context that if the value of the item exceeded the debt then the surplus would not be returned to the debtor. In contrast, appropriation allows ownership to transfer to the creditor (subject to all interested parties agreeing) but, to the extent that the value of the item exceeds the debt and costs of enforcement, the creditor is required to return the surplus to the debtor.
316. This section provides in subsection (1) for the general right to appropriate. A creditor who appropriates property becomes the owner of the property.
317. Subsection (2) excludes appropriation in specified cases. In particular, it prohibits the appropriation of:
- corporeal property that is not possessed by the creditor (for practical reasons), and
  - property where the value is greater than the amount remaining due under the secured obligation (including reasonable expenses) without reimbursing the excess.
318. There is the potential for abuse of a right to appropriate encumbered property, as the value of the property could greatly exceed the sum due to the secured creditor. Subsection (2)(b) therefore safeguards the interests of the provider of the pledge by providing for the secured creditor to be able to appropriate property with a value greater than the sum due to the creditor, but only if the creditor holds a sum representing the excess value in trust pending distribution under section 77 of the Act.
319. Sections 74 and 75 provide for, respectively, appropriation with, and without, a prior agreement to the use of appropriation by the secured creditor as a remedy on enforcement.

### ***Section 74 – Appropriation with prior agreement***

320. Subsections (1) and (2) allow the provider and the secured creditor to agree in writing, in advance of any enforcement of the secured obligation, that the creditor may appropriate the encumbered property (subject to certain conditions).
321. An agreement to appropriate may only have effect as respects property in respect of which the agreement sets out a method of easily determining a reasonable market price (see subsection (3)). That might include, for example, an agreement in relation to appropriation of used cars which states that an average of the prices listed in a specified used car guide is to be used to determine the value on appropriation.
322. Under subsection (4), appropriation occurs only at the market value, as determined in accordance with that agreement, on the date of appropriation. If the value of the item is more than the secured debt, section 73(2)(b) will apply and the balance must be held in trust and applied in accordance with the provisions of the Act.
323. Subsection (5) requires notice of the intended appropriation to be given to the parties it will affect. The list is self-explanatory, though it should be noted that it may be expanded by regulations under subsection (9)(a)(i). There are also exemptions under subsection (6) where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of certain persons. These can be expanded by

*These notes relate to the Moveable Transactions (Scotland)  
Act 2023 (asp 3) which received Royal Assent on 13 June 2023*

regulations under subsection (9)(a)(ii) where a similar exemption is appropriate in respect of someone added to the list by regulations under subsection (9)(a)(i).

324. Subsection (7) sets out that the notice of intended appropriation must identify the property to be appropriated, and specify both the amount owing to the secured creditor and the amount expected to be obtained by the appropriation. It is recognised that in cases where the asset is insufficient to meet the full value of the debt, the exact amount to be obtained by the appropriation may not be known in advance since the asset's value is to be based on the date of appropriation. The notice must also give the parties notice of their right to object (where applicable) and explain the consequences of such an objection being received within the relevant time limit.
325. Subsection (8) gives a number of the parties on whom the notice is served a right to veto the appropriation, provided that their objection is received by the secured creditor within 14 days beginning with the day of receipt of the notice of the intended appropriation. However, the provider and the debtor are excluded from having a right of veto because the section is concerned with cases where the provider has expressly entered into a prior agreement allowing appropriation. Where the appropriation is vetoed, the secured creditor must inform the other recipients of the notice of the intended appropriation that it is no longer going ahead.
326. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides for a number of assumptions as to when documents will be received if they are sent in certain ways. While these presumptions can be rebutted by evidence to the contrary, they are likely to be relevant to a party objecting when calculating if it is likely that the objection will be received in sufficient time.
327. Subsection (9)(b) allows the Scottish Ministers by regulations to modify this section so as to replace the requirements as to what the notice must contain with a requirement to instead use a form laid out by Ministers in regulations. It also allows them to modify any such form from time to time.

***Section 75 – Appropriation without prior agreement***

328. This section is similar to section 74 but deals with the situation where there is no prior agreement to appropriation. Given that there is no agreement, the provider is entitled to object in principle to the use of appropriation in respect of the particular encumbered property, as is the debtor (who will often, but not always, also be the provider).
329. Under subsection (2), any appropriation must be for an amount which bears a reasonable relationship to the market value of the property on the date of the appropriation. Thus machinery worth £10,000 cannot be appropriated as being worth £1,000. However, where the value is greater, this is not a complete bar to appropriation: instead, the balance must be held in trust as envisaged by section 73(2)(b).
330. Subsection (3) requires notice of the intended appropriation to be given to the parties it will affect. The list, the exemptions in subsection (4), and the powers in subsection (7) (a) to expand each of those, are the same as in section 74 (see paragraph 323 of these Notes).
331. Subsection (5) sets out the requirements in relation to the notice. These are the same as section 74 (see paragraph 324 of these Notes) with the only difference being that, as noted above, every recipient of the notice has a right to object under this section given that there is no prior agreement. Subsection (7)(b) provides the same ability as in section 74(9)(b) for the Scottish Ministers to provide that a prescribed form is to be used instead (see paragraph 327 of these Notes).
332. Subsection (6) applies the rules about the right of veto. This operates in the same way as in section 74 (see paragraphs 325 and 326 of these Notes) other than that, as noted above, every recipient of the notice can exercise the veto under this section.

**Section 76 – Appropriation: unencumbered acquisition**

333. This section provides that any other right in security over, or diligence in respect of, the encumbered property is extinguished by an appropriation by virtue of section 73 of the Act. This covers both appropriations with and without prior agreement.
334. Any other secured creditor or a creditor who has executed diligence will have been given notice of the intended appropriation under section 74 or 75 of the Act (unless the creditor did not know – or could not reasonably be expected to know – of the security or diligence). A creditor who is given notice has the right to object and the ability to veto the appropriation. Failure to do so will result in their security or diligence being extinguished.

**Section 77 – Application of proceeds from enforcement of pledge**

335. This section provides for the distribution of any proceeds received by the secured creditor as a result of enforcing a possessory or statutory pledge.
336. Subsection (1) provides that the secured creditor must first pay the expenses of the enforcement, and then pay the sums due to secured creditors or creditors who have executed diligence (with subsection (2) providing that payments are to be made in accordance with the priority of their claims). Any residue is paid to the provider (see in that respect paragraph (b) of the definition of “provider” in section 113(1) of the Act).
337. Payments are to be abated in equal proportions where full payment is not possible (see subsection (4)).

*Example*

The encumbered property is sold for £100,000. There are two equal ranking rights in security. Jack is owed £200,000. Jill is owed £50,000. Jack is paid £80,000 and Jill £20,000, which is 40% of what is due to each of them.

338. Subsection (3), however, provides that no payment is to be made to creditors with a higher ranking security or diligence than the pledge being enforced unless they have consented to the enforcement. If they have not consented then their right still subsists, and that will affect the marketability of the encumbered property (see section 69(3) in that respect). It might mean, for example, that is only practicable for the secured creditor to lease the encumbered property.
339. Subsections (5) and (6) provide for the situation, likely to be uncommon, where it is unclear who is to be paid. The effect is that the secured creditor must consign an amount in court for the benefit of the person who appears to have the best right to the payment.
340. Subsections (7) and (8) provide for statements to be given to relevant parties as to how the proceeds as a whole have been distributed. Under subsection (10), the Scottish Ministers have a power to expand this list to include specified persons who have statutory duties in relation to the provider’s property (as is the case, for example, in an insolvency).
341. Subsection (9) applies the rule about statements to let or licenced property. In those cases, it will not just be a one-off statement that is required. As such, the rule is that a statement must be given every month, beginning with the month after the first enforcement proceeds are received.

**Section 78 – Mandatory application for removal of an entry from the statutory pledges record**

342. This section imposes a duty on the secured creditor of a statutory pledge to apply under section 96 of the Act for the correction of the RSP where the pledge is extinguished by any of the enforcement of the pledge, enforcement of any other secured right, or the enforcement of diligence.

*Example*

Adam grants a statutory pledge for a debt of £10,000 to Eve over machinery. Adam then grants a second-ranking statutory pledge to Cain for a debt of £5,000 over the same machinery. Adam subsequently defaults on his secured obligation to Cain.

Eve consents to Cain enforcing the second pledge subject to Eve, as higher ranking creditor, being paid from the proceeds. The plant and machinery is sold for £20,000. Cain divides the proceeds so that Eve is paid £10,000, Cain keeps £5,000, and the remaining £5,000 is paid to Adam.

Eve and Cain are both subject to a duty to remove their pledges from the statutory pledges record.

## **Liability for loss due to enforcement**

### ***Section 79 – Liability for loss suffered by virtue of enforcement***

343. This section imposes liability on the secured creditor for failing in any duty imposed by the Act on the creditor in relation to the enforcement of a possessory or statutory pledge.
344. Subsection (2) restricts liability in the specified cases, but does not exclude liability for non-patrimonial loss. The effect is that there may be circumstances where compensation for pain and suffering (solatium) could be claimed (for example, by the provider following the taking of possession of a houseboat which constituted the family home in an unlawful manner).

## **Service of documents for purposes of this Chapter**

### ***Section 80 – Service of documents for purposes of this Chapter***

345. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out some rules about service of documents which can be relied upon when authorised or required to send something in or under an Act of the Scottish Parliament, unless the Act or the context requires otherwise.
346. **Section 80** of the Act provides that the provider and the secured creditor can agree that service may or must be in accordance with this section instead, provided that they do so in writing. Thus, for example, the parties might provide that an enforcement notice may only be sent by registered delivery. An agreement under this section could be (for example) included in the constitutive document for the statutory pledge.
347. Subsection (4) has the effect that where service cannot be effected in accordance with the agreement then the default rules in the 2010 Act will apply. The provisions in that Act about how things may be sent are not stated to be exhaustive, but the deeming rules about when things will be taken to be received apply only where a method specified in that section is used.

## ***Chapter 2 – Register of Statutory Pledges***

### **Register of Statutory Pledges**

#### ***Section 81 – The Register of Statutory Pledges***

348. Subsection (1) establishes the new register in which statutory pledges are to be registered. The register is to be known as the Register of Statutory Pledges (“RSP”).
349. Subsection (2) provides that the register is to be under the management of the Keeper of the Registers of Scotland. Various provisions in this Chapter also require payment of a fee to the Keeper for certain things. The Keeper has powers under section 110

of the Land Registration etc. (Scotland) Act 2012 to set the level of fees payable in relation to any register under the Keeper's management and control. As such, the effect of subsection (2) is also that these powers apply automatically to the RSP.

350. Subsection (3) states that, subject to the requirements laid down by the Act, the Keeper has discretion as to the form in which the register is kept. That would include the RSP being kept in a wholly electronic form.
351. The RSP, as with the other registers under the Keeper's control, is a public asset. Subsection (4) therefore provides that the Keeper is to take such steps as appear reasonable to protect the RSP from interference, unauthorised access, or damage (for example by hacking).
352. See also section 111 of the Act, which provides for the Scottish Ministers by regulations to be able to make rules ("RSP Rules") as to the keeping of the RSP and related matters.

## **Structure and contents of the register**

### ***Section 82 – The parts of the register***

353. This section provides that the Keeper must make up and maintain, as parts of the register, the statutory pledges record and the archive record (see sections 83 and 84).

### ***Section 81 – The statutory pledges record***

354. This section sets out the information which must be included in an entry in the statutory pledges record, and provides that the statutory pledges record is the totality of such entries. The information which must be included is largely self-explanatory.
355. The details of the secured creditor will be included in an entry in the statutory pledges record, but a search against the secured creditor is not permitted under section 104 of the Act (unless the Scottish Ministers specify in RSP Rules made under section 111 of the Act that such a search is permitted). It will, however, be possible for an entitled person (within the meaning given in section 107 of the Act) to request certain information about the pledge from the secured creditor.
356. A provider or secured creditor may be a legal person with an identifying number, such as a UK limited company or limited liability partnership. The Scottish Ministers will be able to specify that these identifying numbers are to be included in the entry in the statutory pledges record: see section 111(2)(a)(ii) of the Act.
357. This section provides that an entry in the statutory pledges record must include a copy of the constitutive document of the statutory pledge. The Scottish Ministers may, however, specify in RSP Rules that information in the record, including information in the constitutive document, will not be disclosed in a search of the RSP in order to protect confidential information of the parties (see section 111(2)(f)). Rules can also be made about information which can be redacted in the copy of the document which is submitted (see section 111(2)(d) and (e)).

### ***Section 84 – The archive record***

358. This section sets out that the archive record consists of—
  - first, all entries and copy documents which have been transferred to that record from the statutory pledges record as a result of the correction of the statutory pledges record or as a result of a statutory pledge being extinguished by virtue of regulations made by the Scottish Ministers under section 95,
  - second, copies of any document which discloses, or contributes to disclosing an inaccuracy in respect of which a correction has been made,
  - third, any other documents as the Keeper considers it appropriate to include and,

- fourth, any other information required to be entered in the record by RSP Rules.
359. Entries will not automatically move from the statutory pledges record to the archive record when a pledge is discharged. However, an application for a correction can be made in such cases if desired (the term “inaccuracy” is defined in section 101(2)(a)(ii) to include the record becoming inaccurate because of supervening events, which would include the pledge having been discharged). See paragraphs 369 and 433 of these Notes for further details. While it will normally be a choice whether to seek a correction, it is compulsory where the pledge is extinguished by enforcement (see section 78 and paragraph 342 of these Notes).
360. In addition, as noted above, it is possible for a duration period for a pledge to be introduced under section 95, in which case entries that were not renewed would be extinguished and moved to the archive record (see paragraphs 399 to 401 of these Notes).

## **Registration process**

### ***Section 85 – Order in which applications are to be dealt with***

361. This section provides that the Keeper must deal with applications for registration of a statutory pledge, and applications for registration of an amendment to a statutory pledge, in the order in which they are received. The effect is to protect the priority of registration of, or amendments to, statutory pledges (and therefore the ranking rights in security as regards the encumbered property).

### ***Section 86 – Application for registration of statutory pledge***

362. Subsection (1) enables the secured creditor, and only the secured creditor (or the secured creditor’s agent – see section 120(4)), to apply to the Keeper for registration of a statutory pledge in the RSP.
363. Subsection (2) sets out that the Keeper must accept the application if it is submitted with a copy of the constitutive document, contains all the information the Keeper requires to make up an entry, conforms to RSP Rules, and the fee due to the Keeper is – or will be – paid. Rules can be made about information which can be redacted in the copy of the constitutive document which is submitted (see section 111(2)(d) and (e)).
364. Subsection (3) provides that the Keeper must reject an application if any of the requirements mentioned in subsection (2) are not satisfied.

### ***Section 87 – Registration of statutory pledge***

365. Subsection (1) provides that the Keeper must, on accepting an application, make up and maintain the appropriate entry in the RSP, which includes allocating a registration number (as defined in section 120(1) of the Act).
366. Subsection (2) provides that the statutory pledge is taken to be registered on the date and at the time originally entered for it. In other words, even if the registration of a statutory pledge is ineffective and becomes effective only once it is corrected (see section 91(3)), the date and time of registration of the statutory pledge will still be the date and time of the initial (i.e. ineffective) registration. However, it is the time of effective registration that is critical for matters such as creation or ranking (see sections 48 and 60).

### ***Section 88 – Application for registration of amendment***

367. This section makes the same provision in respect of an application for registration of an amendment of a statutory pledge as section 86 of the Act makes in respect of the application for registration of the pledge itself (the only change being that the

relevant document is an amendment document rather than a constitutive document). See paragraphs 362 to 364 of these Notes.

368. An amendment to a statutory pledge may only be registered under this section where it is an amendment to add property to the encumbered property, or to increase the extent of the secured obligation in a case where the extent is clear in the original entry (see also the discussion at paragraph 272 of these Notes). As set out in more detail at section 58(6) and (7), an amendment which can be (and which requires to be) registered under this section takes effect only when registered effectively.
369. Although these are the only changes which can be registered as “amendments”, a pledge may be assigned in accordance with section 57 or restricted or discharged off-register by way of a written statement under section 59 of the Act. Other events may also lead to the pledge being extinguished off-register – for example, due to the encumbered property being destroyed, due to the property being acquired unencumbered under one of the Act’s good faith acquisition rules, due to the pledge being enforced, or due to the operation of the anti-avoidance rule under section 52. The RSP may be corrected for any such change by an application for a correction, if desired (see sections 96 to 99). The Keeper also has an obligation to correct the RSP in certain circumstances under section 100 upon becoming aware of a manifest inaccuracy in the RSP (and see section 101(1) of the Act for the meaning of “inaccuracy”).

### ***Section 89 – Registration of amendment***

370. Subsection (1) provides that the Keeper must, on accepting an application, revise the entry for the statutory pledge to which the application relates.
371. Subsection (2) has the same effect with regard to the timing of the registration of the amendment as section 87(2) has with regard to the pledge itself. See paragraph 366 of these Notes (but for cross-reference purposes, the relevant sections here are 92(3), 49 and 60).

### ***Section 90 – Verification statement as to registration of statutory pledge or amendment***

372. Subsection (1) provides that the Keeper must, after registering a statutory pledge or amending it, send a statement to the secured creditor (i.e. the applicant) and the provider verifying what has been done – but only if the application contains email addresses for them. If an email address has not been included for either the secured creditor or the provider then there is no obligation on the Keeper to send that person a statement. Subsection (2) makes provision about the content of the statement.
373. As the application will have been made by the secured creditor, it can be assumed that they will provide their correct email address. However, the correct email address may not be given for the provider. In circumstances where the provider does not receive a verification statement from the Keeper (for example, because no email address was provided by the secured creditor or the email address provided was incorrect), the provider may, under subsection (3), request a copy of the verification statement from the secured creditor. Under subsection (4), the secured creditor must supply the copy within 21 days.

## **Effective registration**

### ***Section 91 – Effective registration of statutory pledge***

374. Subsection (1) sets out three cases in which a purported registration of a statutory pledge in the statutory pledges record is ineffective, with the result that the statutory pledge is not created—
- The first case is that the entry does not include a copy of the constitutive document.

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- The second case is that the entry contains an inaccuracy which, as at the time of registration is “seriously misleading” (for which see section 94(1)).
  - The third case is that the constitutive document is invalid, for example because it is a forgery.
375. As such, it is crucial that the constitutive document is included in the entry (and is valid). If anything else is missing from the entry, the registration will still be effective unless the entry is considered seriously misleading by reason of the omission (i.e. the second case cited above applies, under which missing or incorrect text can lead to the entry being considered seriously misleading).
376. The effect of determining whether or not an entry is seriously misleading as at the time of registration is that a supervening inaccuracy will not render ineffective the creation of the pledge which took place by reason of the registration (although see section 93 of the Act as to other consequences).
377. Subsection (2) makes subsection (1) subject to section 94(1)(c) and (d), with the effect that a registration may be partially effective as regards the encumbered property or as regards co-providers or co-secured creditors.
378. Subsection (3) enables an ineffective registration to become effective by means of a correction. The effect of this provision, when read with section 101(3) of the Act, is that the registration becomes effective (and the pledge is created) on the date of the correction.

***Section 92 – Effective registration of amendment to statutory pledge***

379. This section makes the same provision for the registration of an amendment of a statutory pledge as section 91 of the Act makes for the registration of the pledge. See paragraphs 374 to 378 of these Notes.
380. See also section 88 (in relation to when an amendment, as opposed to a correction, may be registered) and section 58(6) and (7) (in relation to when such amendments take effect).

***Section 93 – Supervening inaccuracies: protection of third parties***

381. This section protects a person who for value, in good faith and exercising reasonable care acquires encumbered property, or a right in encumbered property, in circumstances where there was previously an effective registration under which the pledge was created but, at the time of acquisition:
- (a) the entry has been incorrectly removed from the record,
  - (b) in a case where the acquired property does not have an identifying number which must be used, the entry has become seriously misleading in respect of the acquired property, or
  - (c) in a case where the acquired property does have an identifying number which must be used, a search of the record for that number would not produce the entry.
382. This provision could therefore cover register malfunctions under which entries were incorrectly removed or search results were not producing the correct results. It could also apply where, for example, the provider marries after the pledge is registered and changes their name.
383. The effect of this section is that the pledge will be extinguished as regards the acquired property.

*Example*



In year 1, Rachel Smith grants a statutory pledge to Mark over her piano. Mark registers the pledge and the piano becomes encumbered property. In year 2, Rachel marries and changes her name to Rachel Jones. In year 3, Rachel sells the piano to Luke without obtaining Mark's permission under section 51. However, Luke is in good faith, and does not know that Rachel Jones was once known as Rachel Smith. A search against Rachel Jones will not reveal the pledge, and so he will acquire the piano unencumbered by the pledge.

In contrast, if Rachel had chosen not to change her name upon marrying, a search against her would continue to reveal the pledge. There would be no supervening inaccuracy so this section would not be relevant because there would be no error to mislead Luke. However, if Luke did not search the register, he might still benefit from protection under section 53 (if Rachel is a sole trader whose business is selling musical instruments) or section 54 (if he is buying the piano in good faith for personal purposes and the value is below any cap introduced under that section).

384. The protection offered by section 93 makes different provision in respect of encumbered property that is required by RSP Rules to be identified by an identifying number, such as a vehicle identity number (VIN). Any person intending to acquire such an asset could readily obtain information about the pledge by searching the statutory pledges record against the VIN. The expectation is that where the use of such numbers is mandated, they should be the primary means of searching as they ought to be the most reliable. As such a number would not change, it would not be the subject of a supervening inaccuracy unless the register malfunctioned (and any initial inaccuracy would be seriously misleading under section 94, meaning that no pledge was created over it).
385. There are a number of things a person could do to satisfy the section's requirements to be in good faith and to take reasonable care. However, if they have failed to carry out a search of the register in respect of their purchase then they will not meet this test. The inaccuracy will have been irrelevant to their decision to purchase if they did not consult the register. This does not mean, though, that consulting the register will always be enough on its own. If the person has reason to be suspicious of the information on the register, they might be expected to make further enquiries.

#### ***Section 94 – Seriously misleading inaccuracies in the statutory pledges record***

386. This section makes provision as to whether an entry in the statutory pledges record is seriously misleading as a result of an inaccuracy or inaccuracies in it. This applies for determining whether a registration is an effective registration for the purposes of sections 91, 92 and 93 of the Act. Section 101(1) of the Act provides for the meaning of "inaccuracy" in the statutory pledges record.
387. Subsection (1)(a) of section 94 provides that an inaccuracy will be seriously misleading if any of subsections (2) to (6) apply or if, despite none of them applying, the inaccuracy or inaccuracies are such that a reasonable person would be seriously misled by the entry. In other words, if any of the examples in subsections (2) to (6) apply then the inaccuracy will be seriously misleading (whether or not any person was actually misled), but those examples are not exhaustive and there may be other inaccuracies that are found by the courts to be seriously misleading. Whether such an inaccuracy is seriously misleading or not is to be determined objectively.
388. Subsection (1)(b) provides that any inaccuracy is to be disregarded to the extent that it appears in the constitutive or amendment document but is not replicated elsewhere in the entry. The effect is that the person searching the record does not have to look at the document to determine whether the details in the record are seriously misleading (although a copy of the constitutive document – and, if applicable, any amendment document – must still be part of the entry in the statutory pledges record and can, for instance, be used as evidence to show that the entry itself was inaccurate).

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389. Subsections (1)(c) and (d) deal with an inaccuracy that relates only to part of the encumbered property, or to one co-provider or co-secured creditor. These provisions have the effect that an inaccuracy in the statutory pledges record may be seriously misleading in that respect only, and therefore the registration of the statutory pledge, or amendment to the statutory pledge, will be partly effective.
390. Subsections (2) and (3) focus on whether an entry contains an inaccuracy that prevents it being disclosed by a properly formatted search. Such an inaccuracy will generally be regarded as being seriously misleading.
391. Subsection (2) has the effect that an entry is seriously misleading where the provider (or co-provider) is a person required by RSP rules to be identified in the statutory pledges record by an identifying number (e.g. a company is likely to be required to be identified by their company number) and where, if a search of the record were to be carried out for that number using the search facility provided under section 104 of the Act, it would not disclose the entry. However, it does not matter if the company's name is wrong as the expectation is that it should be searched for by reference to its number (which will not change in the way that its name might).
392. Subsection (3) has the effect that an entry is seriously misleading where the provider (or co-provider) is not a person required by RSP rules to be identified in the statutory pledges record by an identifying number and where, if a search of the record were to be carried out for the provider's proper name, or their name together with their month and year of birth it would not disclose the entry. This means that even if the search function is programmed to be more forgiving of errors in names if the month and year of birth are also included in the search (and are correct), the entry will still be seriously misleading because it ought to be possible to find the entry by the name alone. However, it is not enough for the name to be correct; if it is correct but the month/year of birth is wrong, this will also be seriously misleading.
393. Subsection (4) has the effect that an entry is seriously misleading for the purposes of an initial registration (whether of a pledge or an amendment) where the name of the secured creditor (or co-secured creditor) at the date of application is incorrectly reflected in such a way that a reasonable person would be seriously misled. Because it will not be possible to search by secured creditor under section 104 (unless RSP Rules alter the position), the position is not determined by reference to whether a search result would return the entry. The application of the reasonable person test means that minor errors such as typos might be disregarded, particularly if other information is correct, but the position will be viewed as a whole in the circumstances of each case. In light of the fact that it is permissible for assignments to take place off-register and given that for the purpose of section 93 what will be of interest to a purchaser is simply whether the property is secured, not who benefits from the security, this provision is limited so as to not cover supervening inaccuracies.
394. Subsection (5) applies where the encumbered property is or includes property required by RSP rules to be identified in the statutory pledges record by an identifying number and where, if a search of the record were to be carried out for that number, it would not disclose the entry.
395. Subsection (6) applies where there is a requirement, by virtue of section 83(1)(g), for an entry in the statutory pledges record to specify the type of property encumbered and where the entry does not describes the claim as being of a type that it is or fails to allocate a type to the property.
396. Subsection (7) applies the rules in this section to circumstances where there are co-providers and co-secured creditors.
397. Subsection (8) enables the Scottish Ministers to modify this section to make provision about what does, and what does not, make an entry seriously misleading and how that is to be determined.

398. Subsection (9) provides that the proper name of a person means the person's name in the form by RSP Rules, which might also prescribe a hierarchy of document that could be used to evidence a proper name: for example, a passport, driving licence, or a birth certificate.

## **Duration**

### ***Section 95 – Power of Scottish Ministers as regards duration of statutory pledge***

399. This section provides for the Scottish Ministers, in consultation with the Keeper of the Registers of Scotland, to be able (by regulations) to specify a period at the end of which an entry in the statutory pledges record will be deleted and the statutory pledge extinguished. This power could be used, for example, in the event that a large number of pledges continue to appear in the record many years after registration but are believed to have been extinguished or restricted off-register.
400. However, the power would also allow for the creation of an application route which would allow the secured creditor to renew the pledge, to avoid its removal if the entry continues to be relevant. The concept of renewal would include renewal on more than one occasion.
401. The section relates only to removal of entries from the statutory pledges record. Nothing would be removed from the archive record under this section. The archive record would be affected only insofar as the any entries removed from the statutory pledges record would be placed on the archive record (see section 84(a) which requires the archive record to include all entries and copy documents transferred from the statutory pledges record by virtue of this section).

## **Corrections**

### ***Section 96 – Application by secured creditor for correction of statutory pledges record***

402. There are many ways in which the register could become inaccurate – see paragraphs 369 and 433 of these Notes for discussion of some of them.
403. Subsection (1) enables a relevant person to apply to the Keeper for correction of an entry for a statutory pledge in the statutory pledges record. A “relevant person” means, in broad terms, the secured creditor (see subsection (4)).
404. The secured creditor does not for that purpose need to be identified as such in the entry in the statutory pledges record. There are a number of reasons why the creditor might not be so identified, including an error at the time of registration, a change of name, or an assignation of the pledge (see section 57 of the Act). So, for example, an assignee as a successor in title to the right of the secured creditor (see section 113(1) of the Act) may apply for correction. Alternatively, subsection (4)(b) has the effect that the assignor of a pledge (i.e. the previous secured creditor) can also apply for a correction.
405. The Keeper must accept an application that meets the requirements of paragraphs (a) and (b) of subsection (2), and, under subsection (3), must reject one that does not.

### ***Section 97 – Correction of record in response to application under section 96***

406. This section deals with what happens once an application for a correction is accepted under section 96.
407. Subsection (1) provides that the Keeper must, on accepting an application, correct the entry. See also section 102(2) and (3), which sets out the procedure that the Keeper must follow depending upon the nature of the correction (but, for example, in every case the Keeper must note in the register that a correction has been made). However,

subsection 102(4) does not apply here, as notification requirements are dealt with by means of the issue of a verification statement.

408. Under subsection (2), the Keeper must issue both the applicant and provider with a verification statement, but only if their email addresses have been provided in the application. Subsection (3) makes provision about the content of the verification statement. Under subsections (4) and (5), there is an ability for the provider to obtain a copy of the verification statement from the applicant (i.e. the secured creditor) if the statement is not received by provider but is received by the secured creditor. Given that the secured creditor will be the one submitting the application, it is to be expected that they will supply their own email address correctly and will therefore receive the statement, but if they make a mistake in supplying the provider's email address then this will allow the provider a means of obtaining a copy.

### ***Section 98 – Demand that application for correction be made under section 96***

409. This section enables a person with a specified interest in the accuracy of the statutory pledges record, and who maintains that the record is inaccurate, to be able to:
- (a) demand that the person showing on the register as being the secured creditor in respect of a pledge apply to the Keeper for a correction of the record under section 96 of the Act, and
  - (b) if no such application is made, apply for the correction themselves.
410. Subsection (1), read with subsections (2) and (3), has the effect that a person identified in the record as the provider or a co- -provider can make a demand on the registered secured creditor if the person making the demand asserts either that they are not in fact a provider despite being identified as such, or that property identified as being the subject of the pledge is not in fact encumbered property. In addition, a person with a right in property which is identified as the encumbered property can make a demand on the registered secured creditor if the person making the demand believes that the property is not in fact encumbered property.
411. In both cases, it may be that the record was once accurate but has become inaccurate due to supervening events (e.g. the pledge has been restricted or discharged off-register), or it may be that the entry in the record has had incorrect information in it from the moment it was created.

#### *Example 1*

An entry states that a statutory pledge has been created over the car with VIN 12345. In fact, the statutory pledge was created over the car with VIN 12335. The owner of the car with VIN 12345 can demand a correction.

#### *Example 2*

An entry states that a statutory pledge has been created over a car with VIN 12335. This was accurate as at the date of registration, but the secured creditor has subsequently been discharged off-register. The provider can demand correction.

412. Subsection (4) sets out how a demand can be made. It must be in the form prescribed by the Scottish Ministers in regulations. In addition, it must specify a period within which an application is sought, and that period must be at least 21 days from the date of receipt.
413. Subsection (5) provides that no fee can be charged by the person registered as the secured creditor for complying with a demand.
414. In the event that the demand is not complied with within the period specified, the person becomes entitled to make an application themselves under subsection (6).

415. The person identified as the secured creditor in the entry in the statutory pledges record may no longer be the creditor because the pledge has been assigned. However, if they were once the secured creditor but subsequently assigned their interest, they would remain entitled to request a correction by virtue of section 96(4)(b). Alternatively, they could ask the new secured creditor to apply for a correction (by virtue of section 96(4)(a)) both in respect of the identity of the secured creditor and in respect of the change requested by the provider. The assignation document under which the identity of the secured creditor changed may well also make provision as to what the previous secured creditor is obliged to do in these circumstances.

***Section 99 – Response to application for correction under section 98(6)***

416. This section makes provision about what happens where an application is made to the Keeper for a correction under section 98(6) (i.e. following a failure by the registered secured creditor to comply with a demand under section 98(1)).
417. The Keeper must accept an application that meets the requirements of paragraphs (a) and (b) of subsection (1), and, under subsection (2), must reject one that does not.
418. On accepting an application, subsection (3) requires the Keeper to serve a notice on the registered secured creditor intimating that the record will be corrected on a specified date (at least 21 days from the date of the notice) unless action is taken by them. The Keeper must also note on the entry the details of the pending application, acknowledge receipt of the application and, in the event that the person showing on the entry as the provider is not the applicant, notify that person that notice of intention to correct the register has been served on the registered secured creditor.
419. Under subsection (4), the registered secured creditor may apply to the court before the date specified by the Keeper, opposing the making of the correction. They must notify the Keeper if they make any such application (so that the Keeper knows not to proceed with making the correction when the deadline passes).
420. Subsection (5) provides that where the registered creditor is not the secured creditor, the registered creditor must (to the extent that it is reasonable and practicable to do so) promptly notify the secured creditor of receipt of a notice from the Keeper under subsection (3). Subsection (4) will also apply to the secured creditor as it applies to the registered creditor – meaning that the secured creditor may apply to the court objecting to the making of the correction.
421. Where an application is made to the court, subsection (6) provides for the court to determine matters. However, subsection (7) recognises that if the Keeper was not told about the court action then the correction may already legitimately have been made. As such, no direction is to be made unless the court is satisfied that, before the date the Keeper had said was the intended date for making the correction, the Keeper received notice from the registered secured creditor of the court application. In establishing the date on which the Keeper received any such notice, the (rebuttable) presumptions as to service provided for in section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 may be relied upon. The Keeper can, if desired, enter the court process (see section 103 of the Act).
422. If the Keeper does not receive any notification of a court application before the date that the Keeper had said was the intended date for making the correction, the Keeper is required to make the correction on that date arriving (subsection (8)).
423. See also section 102, which sets out the procedure that the Keeper must follow, depending upon the nature of the correction being made (though in every case, the Keeper must note in the register that a correction has been made). That section also provides for notification to be given to interested parties of the entry having been corrected.

**Section 100 – Correction of the statutory pledges record at instance of the court or the Keeper**

424. This section deals with corrections which do not emanate from an application for a correction.
425. Subsection (1) ensures that the courts can (where appropriate) direct the Keeper to correct an entry in the RSP. The Keeper would be required to comply with any direction, as to do otherwise would risk the Keeper being found to be in contempt of court.
426. Court proceedings might arise in a number of ways. The Act does not provide for an express right of appeal against, or review of, any decision by the Keeper. However, an issue relating to the accuracy of the register might be raised in other proceedings, such as a judicial review of a decision by the Keeper, or proceedings in which it is alleged that a constitutive document is a forgery. The Keeper can, if desired, enter the court process (see section 103 of the Act).

*Example 1*

A constitutive document is reduced by the court because it has been forged by one of the apparent parties. The court can direct the Keeper to correct the entry in the statutory pledges record.

*Example 2*

An entry has been created in the statutory pledges record for a security by Andrew in favour of Bruce. But in the application form for registration of the assignation, Bruce erroneously states that Carol is the creditor. Carol could seek removal of the entry by the court (as an alternative to a demand for a correction).

427. Subsection (2) of this section sets out circumstances in which the Keeper will (under subsection (3)) be required to take action upon becoming aware of a manifest inaccuracy in the statutory pledges record. Subsection (3) will not apply where—
- that awareness comes from a court direction (as the matter will be dealt with under subsection (1))
  - that awareness comes from an application having been made (as the matter will be dealt with under the application process), or
  - the Keeper considers that the appropriate way of addressing the inaccuracy is to make an application (as the matter would then be dealt with under the application process) – but only where the inaccuracy is not the Keeper’s fault.
428. As such, if the inaccuracy is something that has been introduced by the Keeper then it is not open to the Keeper to redirect parties to the application route. However, an inaccuracy would not be attributable to the Keeper simply because the Keeper has taken information from an application and entered it on the register.
429. Where the Keeper becomes aware of such an inaccuracy, other than in the cases set out above, subsection (3) requires the Keeper to correct the manifest inaccuracy where what is needed to correct the inaccuracy is also manifest and to note any inaccuracy that cannot be corrected.
430. See also section 102, which sets out the procedure that the Keeper must follow, depending upon the nature of the correction being made (though in every case, the Keeper must note in the register that a correction has been made). That section also provides for notification to be given to interested parties of the entry having been corrected.

***Section 101 – Meaning of “inaccuracy” and how a correction is made***

431. This section sets out the meaning of “inaccuracy”, as well as providing more information about corrections.
432. There is an “inaccuracy” in the statutory pledges record whenever the record mistakes the true position (in law or in fact) in relation to a pledge.
433. Where there is an inaccuracy, a correction can be sought. Subsection (2)(a) clarifies that a need for a correction may arise because the record has always been wrong, or because supervening facts have meant that it has become wrong. For example, legally there is no requirement to register restrictions or discharges of statutory pledges. These can take effect without any requirement as to registration. However, if a pledge is discharged, it would then be the case that the record misstated the position as regards that pledge, so a correction could be sought if desired. There are a number of other reasons why the record could become incorrect, including the pledge being extinguished by the encumbered property being destroyed or as a result of one of the good faith protections in the Act.
434. Subsection (2)(b) sets out what the correction of the statutory pledges record may involve (which will depend on the nature of the correction).
435. Subsection (3) makes provision about the date and time of a correction. This is particularly important as regards sections 91 and 92 of the Act, under which an ineffective registration may be made effective by correction (thereby creating the pledge).

***Section 102 – Correction of statutory pledges record: procedure***

436. This section applies where the Keeper corrects the statutory pledges record by virtue of any of the provisions of the Act under which it can be corrected.
437. Subsection (2) provides that where the Keeper corrects the statutory pledges record by removing an entry, the Keeper must transfer the entry to the archive record. The Keeper must also note on the transferred entry the section by virtue of which the transfer is made.
438. Subsection (3) provides that where the Keeper corrects the statutory pledges record by restoring, removing or amending information included in an entry, the Keeper must note on the entry that it has been corrected. In the case of the replacement of a copy document, the Keeper must also transfer the replaced copy to the archive record.
439. In both instances, the Keeper must give details of the correction including the date and time of the removal or (as the case may be) the correction of the entry. The Keeper must also include in the archive record a copy of any document which discloses or contributes to disclosing the inaccuracy which is the subject of the correction.
440. Subsection (4) provides that once the record has been corrected the Keeper must, to the extent that it is reasonable and practicable to do so, notify every person required by RSP rules and any other person who appears to the Keeper to be affected by it materially that a correction has been made. This is not an objective test and will be confined to facts within the Keeper’s knowledge. This section does not apply to corrections under section 97(1), as in such cases a verification statement will instead have been issued.
441. Subsection (5) provides that the validity of a correction of the record will not be affected if the Keeper fails to include in the archive record a copy of any document which contributes to disclosing the correction or fails to notify any person of the correction.

### ***Section 103 – Proceedings involving the accuracy of the statutory pledges record***

442. This section provides that the Keeper is entitled to appear and be heard in any civil proceedings where a question arises regarding the accuracy of the statutory pledges record, or what is needed to correct it.

### **Searches and extracts**

#### ***Section 104 – Searching the statutory pledges record***

443. The RSP is a public register (see section 81(1) of the Act). Subsection (1) of this section provides that the Keeper must provide a search facility by which the statutory pledges record may be searched.
444. Subsection (2) sets out that only such searches in the statutory pledges record as are specified in this subsection, or as are specified under RSP Rules, are permitted. This restriction on searches has two effects:
- First, it reduces the risk of identity theft by ensuring that it will not be possible to search against date of birth, or against the month and year of birth alone. The Scottish Ministers will also be able (through RSP Rules) to prevent dates of birth from being disclosed on the face of the Register, or to limit the number of searches by reference to the same name and different months and years of birth that can be made in a particular time period.
  - Second, it reduces the risk of unfair commercial practices by not permitting a search against the secured creditor (typically, a bank or finance company) which might enable a competitor to obtain a list of customers.
445. Subsection (3) provides that any person may search the statutory pledges record on payment of any fee (or making an arrangement to pay).
446. Subsection (4) provides that no fee is payable for a search of the statutory pledges record carried out by a not-for-profit money adviser who does not charge individuals for the services that they provide and who is acting on behalf of an individual in carrying out the search. Under subsection (5), the Scottish Ministers are given the power by regulations (subject to the negative procedure) to make further provision about what “not-for-profit money adviser” means for these purposes.
447. The Act does not make provision for the Keeper to provide a search mechanism for the archive record, nor for a person to be entitled to use that mechanism. The Scottish Ministers may, however, make provision to that effect in RSP Rules made under section 111(1)(c) of the Act. It is also open to any person to obtain from the Keeper an extract of an entry in either the statutory pledges record or archive record under section 106 of the Act.
448. Sections 91 to 93 of the Act have the effect that it must be possible to carry out searches for the purposes of the “seriously misleading” test. It will therefore be for the Scottish Ministers to make such RSP Rules as are needed under this section for those purposes. RSP Rules will, amongst other matters, be able to determine whether the search criteria will provide for an exact match or a close match search.

#### ***Section 105 – Admissibility and evidential status of search results***

449. This section provides that a copy of a search result, relating to a search carried out by means of a search facility provided by the Keeper, may be used as evidence of certain matters and, moreover, to prove certain matters unless there is evidence to the contrary. A search result may be in printed or electronic form.
450. This section should be read with section 106, which provides that an extract from the RSP will provide evidence of the contents of the relevant entry at the relevant date.



It cannot be rebutted by other evidence (though liability is imposed on the Keeper for errors in extracts under section 109(1)(e) of the Act). It should also be noted that RSP Rules may prescribe by virtue of section 111(2)(f) that certain information on the register (for example, a precise date of birth) is not to be included in search results.

### ***Section 106 – Extracts and their evidential status***

451. This section enables any person to obtain from the Keeper an extract of any entry or part of an entry in the RSP, on payment of any fee (or making an arrangement to pay). An extract is (irrebuttable) evidence of the contents of an entry at the relevant time (which is either the time the extract is issued or, in the case of a point-in-time extract requested by virtue of subsection (3), the time to which the extract relates), and can be used for the purpose of proving a fact in any court or tribunal proceedings. Liability is imposed on the Keeper for errors in extracts under section 109(1)(e) of the Act. It should also be noted that the ability to obtain an extract is subject to the ability by virtue of section 111(2)(f) for RSP Rules to prescribe that certain information on the register (for example, a precise date of birth) is not to be included in an extract.

### **Request for information**

#### ***Section 107 – Secured creditor’s duty to respond to request for information***

452. This section provides for an entitled person (as defined) to be able to request information about a statutory pledge from the person identified as the secured creditor in the statutory pledges record.
453. Subsection (1) sets out that the information to be provided in response to a request will vary depending on the facts. If the person is the secured creditor, they can be asked to specify, whether property specified in the request is encumbered property. If the person is no longer the secured creditor, or has never been the secured creditor, they must provide information to that effect and, if relevant, details of the person to whom they assigned the pledge and any further known details of subsequent assignees. The request does not require to be in writing, but the response does.
454. Subject to subsection (8) (which enables the Scottish Ministers to modify this section so as to specify further entitled persons), by virtue of subsection (2), an entitled person is:
- (a) a person who has a right in the specified property,
  - (b) a person who has a right to execute diligence against the property (including, in the case of a charge for payment, where that right will only arise once the days of charge expire without payment), or
  - (c) a person who has the consent of the registered provider to make the request.
455. Subsection (3) gives the person named as secured creditor in the statutory pledges record 21 days to respond. An exception to the obligation to respond applies where—
- it is clear that the registration is ineffective in relation to the statutory pledge being enquired about,
  - it is clear from the entry that the property is not encumbered, or
  - the information has been given to the person within the last three months and it has not changed.

#### ***Example***

Adam grants a statutory pledge over his Rolls Royce. A search in the RSP against Adam reveals only the entry for that pledge. A request to the person named as secured creditor as to whether the pledge covers Adam’s yacht is exempt, as it will be clear from the register that it does not.

456. Subsection (4) allows the reasonable costs of responding to the request to be charged to the person making the request.
457. If the person of whom the request is made wishes to, they can apply to the court for either an exemption from complying (in whole or in part) or an extension. Subsection (5) gives the court power to grant either of these things. For example, depending on the circumstances, 21 days may be too short a period to assemble the necessary information.
458. If the entitled person does not receive a response, they can apply to the court in respect of that failure. Subsection (6) enables the court to order the registered creditor to comply with the request for information within 14 days or such other period as the court specifies. Failure to comply with such an order would risk the person being held to be in contempt of court.
459. Subsection (7) allows for the information request mechanism to be applied against anyone whose name is provided to the entitled person by the registered secured creditor as being the person to whom they assigned the pledge or, where applicable and known, any subsequent assignees. Such persons can be treated as being the registered creditor for the purposes of a further request under this section.
460. Where incorrect information is supplied under this section, there may be consequences under either section 108 or section 110.

### ***Section 108 – Acquisition of property confirmed by creditor not to be encumbered property***

461. This section sets out a special rule to protect purchasers of encumbered property. It should be read with section 107.
462. If a person making a request under section 107 is advised wrongly by the person to whom the request was made that the particular property is not subject to the pledge and the person then acquires the property (or a right in it) in good faith within 3 months, then the pledge is extinguished in relation to the property (or right) acquired.

### **Entitlement to compensation**

#### ***Section 109 – Liability of Keeper***

463. This section provides for the Keeper to compensate any person who has suffered a loss in consequence of a matter specified in subsection (1). Liability under subsection (1) is strict, in that 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, subsection (2) limits the losses that can be recovered by excluding certain types of claim.
464. Subsection (3) provides more information about what is meant in subsection (1)(a) by "an inaccuracy which is attributable to the making up, maintenance or operation of the register". It provides that an inaccuracy in information included in an entry in the statutory pledges record when the entry is made up, revised for an amendment document or corrected is not covered by subsection (1)(a) to the extent that the Keeper has been misled into making the inaccuracy and reasonably believed the information to be accurate. Subsection (4) provides that circumstances in which the Keeper is entitled to reasonably believe information to be accurate include if it is provided in connection with an application to which the entry relates, or by the court. As such, if the Keeper faithfully replicates the information provided in an application form 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 section 110. Subsection (4) is not exhaustive of the circumstances in which the Keeper is entitled to reasonably believe that information is accurate.

### ***Section 110 – Liability of certain other persons***

465. This section provides for certain persons to be liable, on fault being shown, for losses suffered by another person in consequence of a matter specified in subsection (1).
466. Subsection (1)(a) applies where a person suffers loss as a result of an inaccuracy in an entry. It applies 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.

#### *Example*

Alan maliciously registers a forged constitutive document bearing to be granted by Bruce over property owned by Claire. Claire has a claim against Alan for any loss.

467. Subsection (1)(b) applies, where as a result of a failure to take reasonable care, there is an inaccuracy in responding to an information request under section 107 of the Act. It should be read with section 108 of the Act, which provides for certain pledges to be extinguished where property is acquired within 3 months after faulty information is given to an entitled person.

#### *Example*

Information is supplied to Ailsa by Brendan that certain property is not pledged. Brendan does not take reasonable care, and the information is wrong. Ailsa takes a pledge over the property in reliance on that information. She expects that the pledge will be a first-ranked security, but it is in fact subject to the existing pledge. Ailsa will have a claim against Brendan.

468. Subsection (1)(c) applies where a person has failed, without reasonable cause, to provide information under section 107 of the Act.
469. Subsection (2) imposes the same restrictions on liability as those set out in section 109(2) of the Act.

## **Rules**

### ***Section 111 – RSP Rules***

470. This section sets out that the Scottish Ministers may, by regulations, make rules (RSP Rules) providing for the operation of the Register of Statutory Pledges. They must consult the Keeper before doing so.
471. The power to make RSP Rules includes the powers to authorise the redaction of information or signatures from an entry in the RSP (paragraphs (d) and (e) of subsection (2)), as well as the power in subsection (2)(f) to make certain information unavailable to searchers (which might include an individual's date of birth). Subsection (1)(c) would also permit the rules to specify the specificity with which the search mechanism for the register is to operate – for example, whether it returns close results or only exact matches.

## ***Chapter 3 – Miscellaneous and interpretation of Part 2***

### ***Section 112 – Competence of creating an agricultural charge***

472. This section prevents the creation of a new agricultural charge, which is a rarely used form of security right.
473. The agricultural charge was introduced by the Agricultural Credits (Scotland) Act 1929. It can only be granted by agricultural co-operatives in favour of banks. The effect is similar to a floating charge – though while a floating charge can cover property of every type, the agricultural charge is limited to “stocks of merchandise”. In addition,

agricultural charges appear to now only be capable of enforcement by placing the debtor into insolvency (since sequestration for rent, which is provided for in the 1929 Act, no longer exists as a process). They have therefore fallen out of use. In practice, co-operatives grant floating charges rather than agricultural charges.

### ***Section 113 – Interpretation of Part 2***

474. This section defines key terms used in this Part. It should be read alongside section 120 which defines some terms for the purposes of the whole Act, as well as schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.
475. In particular, subsection (1) defines a “right in security” so that, unless the context requires otherwise, it includes a floating charge but does not include a right to use diligence – diligence being the Scots law term for the several methods of enforcing a debt due under a court order (or equivalent). The effect is that an effectively executed diligence is not to be treated as a security right for the purposes of the Part. The expression “right in security” can be used in various legal senses, including being limited to “true” securities where the secured creditor has a subordinate real right in the asset. For floating charges, however, there is no such real right prior to attachment (crystallisation) of the charge as a result of the insolvency of the legal person who granted the charge.
476. It should also be noted that the terms “provider” and “secured creditor” can include or, as the case may be, consist of successors in title. For example, if the secured creditor assigns their right as creditor to another person, it would be their successor in title who would be required to serve various notices if they wished to take enforcement action.