
Bills of sale

GOODS MORTGAGES BILL: RESPONSE TO CONSULTATION AND UPDATE ON CURRENT DRAFT BILL

This document responds to the Law Commission's July 2017 consultation on draft clauses from the Goods Mortgages Bill, and provides an update on the draft Bill

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Replacing bills of sale with a Goods Mortgages Act: Analysis of responses on draft clauses, and update on the draft Bill

- 1.1 In July 2017, the Law Commission consulted on draft clauses intended to form part of a Goods Mortgages Bill. If enacted, the legislation would replace the Bills of Sale Acts 1878 and 1882, to provide a new way for individuals to use their existing goods as security for loans.
- 1.2 The consultation ran from 10 July 2017 to 7 August 2017. We asked whether the draft clauses successfully implemented the recommendations we made in our 2016 report,¹ but we did not consult again on the main policy questions. Where we had modified our policy during the drafting process, we asked specific questions about those changes.
- 1.3 We received 20 responses to the consultation, from the organisations and individuals listed in Appendix 1. We wish to thank all those involved for their detailed comments and advice.
- 1.4 Below we summarise the comments received in response to each question, and set out any changes we have made to the draft Bill in consequence. We also explain any other changes we have made since the July 2017 consultation on the draft clauses, which are reflected in the updated draft Bill published at the same time as this paper.

DEFINING BORROWERS WHO CAN OPT OUT OF ADDITIONAL PROTECTIONS

Question 1: Do consultees agree that high net worth individuals should be able to opt out of protections even if the loan does not exceed £60,260?

- 1.5 Our 2016 report distinguished between borrowers who could obtain suitable advice and borrowers who needed additional protections, such as the right to voluntary termination and the right to require a lender to obtain a court order before taking possession. In 2016, we recommended that the protections should apply to “regulated credit agreements” under the Consumer Credit Act 1974 (“CCA”), but not to obligations which were not regulated, namely:
 - (1) loans of more than £25,000 taken out for business purposes; or
 - (2) loans of more than £60,260 to high net worth individuals. Broadly speaking, individuals are high net worth if they have an income of at least £150,000 or net assets of at least £500,000 (other than a home or pension).

¹ Bills of Sale (2016) Law Com No 369, available at http://www.lawcom.gov.uk/wp-content/uploads/2016/09/lc369_bills_of_sale.pdf.

- 1.6 During the drafting process, it became apparent that it would be inappropriate to replicate the CCA concept of a regulated credit agreement in its entirety.² Instead, we adopted a simpler definition. A goods mortgage would be exempt if it secured
- (1) a loan of more than £25,000 taken out for business purposes; or
 - (2) a loan made to a high net worth individual (whatever the amount).
- 1.7 The main difference from the CCA is that *all* goods mortgages granted by high net worth individuals could be exempt from the additional protections of the Bill, provided that the individual expressly agrees to forgo the protections and the mortgage meets the prescribed requirements.
- 1.8 Nine consultees responded to this question, of whom all but one agreed. Money Advice Trust disagreed, arguing that it was too simplistic to assume that none of those who meet the definition of a high net worth individual would be vulnerable. This failed to “take into account issues such as coercive control or domestic violence”.
- 1.9 We accept that any line is arbitrary and may not cover all possible circumstances. However, we do not think that there is a case to maintain the £60,260 threshold. Unlike business credit, which may be given to sole traders or small partnerships of little means, credit to high net worth individuals will always concern wealthy borrowers who can afford legal advice. Removing the threshold provides these borrowers with greater flexibility. It also fits in with our policy of allowing high net worth individuals to secure obligations that are not readily quantifiable, such as guarantees.
- 1.10 **The draft Bill allows all high net worth individuals to opt out of the additional protections for borrowers, even if the loan does not exceed £60,260.**³

CHARGE OR TRANSFER OF OWNERSHIP?

Question 2: Do consultees agree that it is right to characterise a goods mortgage as a “charge”, in accordance with all other commonly-used modern security interests?

- 1.11 Under the current law, a security bill of sale transfers ownership of the secured goods from the borrower to the lender. It is a “true” mortgage, similar to a 19th century land mortgage. Land mortgages are no longer characterised as transfers of title but as “charges”, largely regulated by statute.
- 1.12 In 2016, we suggested that a goods mortgage may take effect either as a true mortgage or as a charge, depending on the choice of the parties. On further reflection we decided that this was unnecessarily complex, adding to the length of the legislation without providing significant benefits to either lenders or borrowers. In the July 2017 consultation we argued that a goods mortgage should be a “charge”. This aligns goods mortgages with mortgages of land, ships and aircraft, all of which are best

² The fact that an agreement is not regulated under the terms of the CCA does not mean that the agreement is not regulated elsewhere, or that the borrower is not in need of protection. In addition, there are several complexities associated with the definition of a regulated credit agreement which would not be helpful in the context of a goods mortgage. For example, the concept of “partly regulated” agreements is both difficult to transpose and of little relevance to goods mortgages.

³ See clause 6 of the draft Bill, and the high net worth conditions in clause 7.

characterised as charges. It also provides a more coherent legal framework where the borrower creates more than one type of security interest over the same property.

- 1.13 In all, 11 consultees responded to this question, of whom nine agreed, one agreed in part and one disagreed. The Chartered Trading Standards Institute thought that consumers might find the concept of a “mortgage” easier to understand than that of a “charge”, which is a relatively unfamiliar legal term. However, our view is that most consumers associate the term “mortgage” with land mortgages, which are also charges.
- 1.14 **The draft Bill defines a “goods mortgage” as a “charge”, rather than as a transfer of ownership.⁴**

A legal or equitable charge?

- 1.15 English land law distinguishes between a legal charge (which is registered against the title to the property) and an equitable charge (which is created over an equitable interest or which has not been registered). In contrast, all charges over goods are equitable, unless otherwise specified by statute. Several consultees asked whether a goods mortgage was best seen as a legal charge or as an equitable charge.
- 1.16 The answer is not straightforward, as goods mortgages share characteristics with both legal and equitable charges. Like legal charges, they bind trade purchasers even when they act in good faith without notice. Like equitable charges, they do not bind private purchasers who act in good faith without notice. In other respects, goods mortgages are unique in their consequences (such as the requirement for lenders to serve a possession notice, and the sanction for wrongfully taking possession from borrowers). The most accurate description of a goods mortgage is that it is a stand-alone statutory charge which, if not registered, is valid only against the borrower. If registered, it is valid against most (but not all) third parties.

MORTGAGING EQUITABLE INTERESTS

Question 3: Do consultees agree that beneficiaries under trusts should not be able to grant goods mortgages?

- 1.17 The draft Bill applies to security interests over tangible, moveable goods. In legal terms, the rights of beneficiaries under a trust are normally treated as intangible rights. A beneficiary is not an “owner” in the same way as someone who has legal title. In the July 2017 consultation, we suggested that the scheme in the draft Bill was unsuitable for beneficiaries. We asked if consultees agreed.
- 1.18 We had ten responses to this question: nine agreed and one disagreed. Of those who agreed, Boodle Hatfield was keen to ensure that the Bill does not limit beneficiaries’ ability to grant other security interests currently available to them. Similarly, the Chancery Bar Association said that “it would be odd if the option of charging an interest under a trust were not open at all”. We can confirm that nothing in the Bill affects the ability of equitable owners to deal with their interests in goods in ways other than a goods mortgage.

⁴ See in particular clause 2(4) of the draft Bill.

- 1.19 The main examples of mortgages of equitable interests are mortgages by beneficiaries under trusts, but they are not the only examples. The draft Bill has now been updated to reflect that goods mortgages cannot be granted over any equitable interest.
- 1.20 **Under the draft Bill, someone with an equitable interest in goods is not considered to be an owner for the purposes of granting a goods mortgage.**⁵

CROPS AND FIXTURES

Question 4: Do consultees agree with our proposed scheme of priority between a goods mortgage over fixtures and growing crops and a land mortgage?

Question 5: If not, would it be preferable to take out fixtures and growing crops from our definition of “goods” so that they could not be made subject to a goods mortgage at all?

- 1.21 Generally, it is easy to distinguish between goods and land. However, for fixtures and crops the dividing line is more difficult.
- 1.22 The courts have held that some items attached to the land are “fixtures” and should therefore be treated as part of the land. Examples include: machines bolted to the factory floor;⁶ a clock which was part of the design of a historic house;⁷ and kitchen units and bathroom fittings.⁸ At common law, fixtures are “land”. Therefore, a land mortgage automatically includes fixtures, even if the item is not specified in the mortgage document, and even if the fixture is attached to the land after the land mortgage has been granted.⁹
- 1.23 Similarly, some crops are treated as land while others are treated as goods.¹⁰ If a crop is considered to be land, it is subject to the land mortgage.

Our tentative proposal

1.24 The Bills of Sale Acts deemed fixtures to be goods for the purposes of granting a bill of sale over them¹¹ and we proposed to replicate the existing legal provisions. This gave rise to issues of priority between:

- (1) land mortgages and goods mortgages on existing fixtures; and

⁵ See clause 2(3) of the draft Bill.

⁶ *Reynolds v Ashby & Son* [1904] AC 466. In *Jordan v May* [1947] KB 427, an engine fixed by bolts was held to be a fixture but its batteries were not, as they were connected by wires.

⁷ *Kennedy v Secretary of State for Wales* [1996] EGCS 17.

⁸ *TSB Bank Plc v Botham* (1996) 73 P & CR D1.

⁹ See Halsbury’s Laws of England, *Mortgage* vol 77 (2016) para 169; see also the Law of Property Act 1925, ss 62(1) and 205(1)(ix).

¹⁰ Yearly crops, produced through an annual cycle of planting and reaping, are considered to be goods, while “natural” crops (such as timber, fruit and grass) are considered to be land: *Marshall v Green* [1874-80] All ER Rep Ext 2198.

¹¹ Bills of Sale Act 1878, s 4.

- (2) land mortgages and goods mortgages on goods which subsequently became fixtures.
- 1.25 In both these cases, the land mortgage lender would take free of the goods mortgage lender's interest, under the existing law on fixtures.
- 1.26 In the July 2017 consultation we noted that this could have unfair consequences for goods mortgage lenders. For example, a lender could lend money against an antique mirror or a statue, without it being obvious that the item would become a fixture.¹² When the borrower attached the mirror or statue to their mortgaged house, the land mortgage lender would get the benefit and the goods mortgage lender would lose their security.
- 1.27 We tentatively proposed that a goods mortgage lender should take priority over a land mortgage lender where the goods mortgage was created before the land mortgage, or where the goods were not affixed to the land until after the goods mortgage had been granted.
- 1.28 The proposal drew a mixed response, with strong voices against any interference with the law of land mortgages. UK Finance, representing mortgage lenders, flagged the extra expense for land mortgagees of checking the goods mortgage register and the risks of damage and diminution in value of the land through removal of fixtures. They said that this would add costs to borrowing against land mortgages. On balance, both UK Finance and HM Land Registry thought that it was preferable to exclude crops and fixtures from the draft Bill.
- 1.29 Two members of the Financial Law Committee of the City of London Law Society, Richard Calnan and Dorothy Livingston, argued that our tentative proposal was incompatible with land law principles:
- From a land law perspective, it is crucial that a purchaser or mortgagee of registered land takes free of any interest in the land which is not noted on the register or an overriding interest... The proposal would cut across conveyancing practice and would introduce different rules for charges created by individuals from those which apply to charges created by companies.
- 1.30 Dr Sean Thomas, of Durham Law School, reiterated the problems of the current law and said that leaving it as it was would be undesirable. He pointed out that the law of fixtures caused problems in other contexts and argued that a wider review was needed.

Our current view

- 1.31 In light of the strength of some of the arguments in the consultation responses, the draft Bill no longer deems fixtures to be goods. It also does not include any provisions about the priority between goods mortgages and land mortgages. This has the following consequences:

¹² See *D'Eyncourt v Gregory* (1866) LR 3 Eq 382 and *Kennedy v Secretary of State for Wales* [1996] EGCS 17 for examples of art and decorative objects which were held to be fixtures.

- (1) goods mortgages cannot be granted over growing crops or fixtures; and
 - (2) where goods subject to a goods mortgage become fixtures, the goods mortgage is extinguished. This is the position under the current law.
- 1.32 We remain of the view that there is the possibility of unfairness where a good (such as a work of art) subject to a goods mortgage is attached to land so that it becomes a fixture. In this case, the goods mortgagee loses their security interest to the land mortgagee (or land owner). This risk of unfairness is aggravated by the fact that the case-by-case judicial analyses of what constitutes a “fixture” have not been entirely consistent.¹³
- 1.33 However, these issues are a feature of land law and we accept that it would not be appropriate to attempt to tackle them in this Bill. We fear that any change to the rules of priorities between security interests on goods and land mortgages could have unexpected consequences for conveyancing and for mortgage borrowing. The government may wish to consider a specific review of the law of fixtures and other items attached to land (such as crops) in the future.
- 1.34 **The draft Bill no longer allows goods mortgages to be granted on fixtures and growing crops. The draft Bill does not affect the common law rules on the interaction between security on goods and security on land.**¹⁴

SHIP MORTGAGES NOT REGISTERED ELSEWHERE

Question 6: Do consultees consider that ship mortgages which are not covered by the specialist ship mortgage regime could be brought within the scope of the draft Bill without causing difficulty to the existing regime for ship mortgages?

- 1.35 At present, ships are excluded from the Bills of Sale Acts.¹⁵ Some ship mortgages must be registered on the UK Ship Register – but only if the ship is registered under Part I of the Register, or is a fishing vessel with full registration under Part II of the Register. There is no requirement to register a mortgage on a small ship, on a fishing vessel with only simple registration, or on an unregistered ship.¹⁶
- 1.36 In most cases, mortgages on these types of ships are registered – either because the owners are incorporated or because the owner chooses to register their ship under Part I or Part II with full registration. However, unregistered mortgages are still valid. A third party who buys a vessel subject to an unregistered ship mortgage is bound by it, even though the buyer had no way of discovering its existence.¹⁷

¹³ For example, statues were held to be fixtures in *D'Eyncourt v Gregory* (1866) LR 3 Eq 382 but to be goods in *Berkley v Poulett* [1977] 1 EGLR 86.

¹⁴ Clause 4(2) of the draft Bill defines goods as tangible moveable property. In the absence of a specific deeming provision, this does not include fixtures.

¹⁵ See the Bills of Sale Act 1878 Act, s 4: “the expression ‘bill of sale’ ... shall not include ... transfers or assignments of any ship or vessel or any share thereof”.

¹⁶ Merchant Shipping Act 1995, s 10(4) and Merchant Shipping (Registration of Ship) Regulations 1993 SI 1993 No 3138, reg 3 and reg 91.

¹⁷ *The Shizelle* [1992] 2 Lloyd’s Rep 444.

- 1.37 In July 2017 we asked whether all ship mortgages granted by individuals which were not registered on the Ship Register should be registered as goods mortgages. We said individual ship owners would have a choice: they could either use a goods mortgage, or they could register their ships under Part I or Part II of the UK Ship Register and abide by the rules of that regime.
- 1.38 We received five responses on this issue, including one from Watson Farley & Williams who provided very detailed comments. They expressed concerns about the fragmented law of ship mortgages which would result. Effectively, there would be three regimes: one for mortgages registered on the Ship Register; a second for unregistered mortgages issued by companies; and a third for goods mortgages. They thought that some rules in the draft Bill were inappropriate for ships, including the rule that innocent private purchasers take free of the mortgage, even if the mortgage is registered. They also argued that the possession process would be incompatible with the right to arrest a ship and apply to the Admiralty Court for an order for sale. It was particularly important for a ship mortgage lender to take possession quickly, before the ship left the jurisdiction.
- 1.39 Watson Farley & Williams argued that the problem of unregistered ship mortgages could be resolved in other ways by, for example, extending the Ship Register or creating another specialist register. The issue required further consultation.

Our current view

- 1.40 Following consultation we have concluded that it would not be appropriate to extend goods mortgages to ships. Although there are problems created by unregistered ship mortgages, we do not think the draft Bill is the appropriate place to address these issues. Instead, any reform would require wider consultation with shipping stakeholders, and should consider a variety of options.
- 1.41 **The draft Bill excludes all ships from the goods mortgages regime.**¹⁸

OBLIGATIONS CAPABLE OF BEING SECURED BY A GOODS MORTGAGE

- 1.42 The consultation asked three questions about the types of obligations which should be capable of being secured by a goods mortgage. These related to guarantees, running-account credit and obligations to perform services personally.

Guarantees

Question 7: Do consultees agree that only high net worth individuals should be able to use goods mortgages to secure guarantees?

- 1.43 In November 2016, Citizens Advice drew our attention to the rising number of people seeking their help with problems concerning “guarantor loans”. This is where “the borrower gives the name of a guarantor, normally a friend or family member, who is then pursued for payment if the borrower can’t repay”.¹⁹ Advice agencies told us that these loans carry a substantial risk that the guarantors will be faced with unexpected

¹⁸ See clause 4(4)(c) of the draft Bill.

¹⁹ See press release of 19 February 2017 at <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/citizens-advice-reports-rise-in-guarantor-loan-problems/>.

demands for payment, but people were often unaware of this danger. They thought that the problems would be aggravated substantially if the guarantor also risked losing valuable goods, such as their car.

- 1.44 In July 2017, we proposed that only high net worth individuals should be able to use goods mortgages to secure guarantees. We asked consultees if they agreed: seven out of the ten responses agreed and one partly agreed. The debt charity, StepChange, drew on their experience to make a powerful argument that ordinary consumers should not be able to use goods as security for guarantees:

We have evidence from our clients that indicates borrowers can feel significant pressure to prioritise repaying a guarantor loan in order to ensure their guarantor, who could be a close friend or family member, is not asked to repay. This pressure could be seriously aggravated if the guarantor also risked losing valuable goods such as a car.

- 1.45 Advice agencies suggested that guarantors do not always fully understand their obligations. Combining the complexity of a goods mortgage, which some consumers can already struggle to understand, with the complexity of a guarantor loan is likely to intensify the difficulties borrowers can face in understanding the credit agreement they have taken out and the risks associated with it.
- 1.46 Several consultees asked why the right to use goods mortgages to secure guarantees would be confined to high net worth individuals, rather than also including businesses borrowing more than £25,000. Richard Calnan and Dorothy Livingston wondered why businesses could secure overdrafts but not guarantees.
- 1.47 The reason for the difference is that a business which takes out an overdraft or other running-account credit does so as part of the business and will usually secure the debt on business property. We are not convinced that there is any demand for individuals acting in the course of business to be able to secure someone else's debt against business assets. As a matter of course, guarantees are granted personally by individuals who are then at risk of losing their personal property.
- 1.48 **Under the draft Bill, only high net worth individuals are able to use goods mortgages to secure guarantees.**²⁰

Running-account credit

Question 8: Do consultees agree that only high net worth individuals and businesses borrowing over £25,000 should be able to use goods mortgages to secure running-account credit?

- 1.49 Advice agencies were also concerned at the prospect that consumers would be asked to give goods mortgages over vehicles as security for overdrafts or credit card debts, which could trap borrowers in a cycle of debt. They pointed out that these credit arrangements could last for years. While borrowers are in work they might give a goods mortgage with little thought because they are not concerned about their ability to repay. This might come back to haunt them several years later when their

²⁰ See in particular clause 6(3) of the draft Bill.

circumstances change and they are unable to pay their debts. They may then find their car repossessed.

- 1.50 At present, there does not appear to be any demand for consumers to secure overdrafts or credit card debts on goods. However, advice agencies feared that if the law were changed, some credit card lenders may start to ask for goods mortgages from less well-off borrowers to secure their credit card borrowing.
- 1.51 In July 2017 we proposed that only businesses borrowing over £25,000 and high net worth individuals should be able to use goods mortgages to secure running-account credit. We drew on the existing definition of running-account credit in section 10 of the CCA.
- 1.52 Of the 11 consultees who answered this question, eight fully agreed and one partly agreed. Two consultees expressed concern. Boodle Hatfield argued in favour of greater flexibility in the range of applications of goods mortgages, including the ability to use goods mortgages to secure running-account credit. However, they acknowledged that:
- It may not be desirable for goods mortgages to become widely used as a method of securing running-account credit such as overdrafts and vulnerable borrowers will need to be adequately protected.
- 1.53 There appears to be broad agreement that it would be undesirable for goods mortgages to become widely used to secure overdrafts or credit card debts.
- 1.54 **Under the draft Bill only businesses borrowing more than £25,000 and high net worth individuals are able to use goods mortgages to secure running-account credit.**²¹

Obligations to perform services personally

Question 9: We welcome views about whether it is necessary to prevent goods mortgages from being used to secure the performance of services.

Question 10: We welcome comments on any disadvantages of a restriction which prevents goods mortgages being used to secure non-monetary obligations (such as an obligation to return shares in stock lending), either in a consumer or business context.

- 1.55 Not all obligations are to pay money. In the course of this project, we were told about other obligations which could possibly be secured by a goods mortgage. Examples include obligations to return shares under a stock lending agreement, to supply stock or goods, or to abide by the terms of a licence agreement.
- 1.56 Our starting point is that, at least for more commercially aware borrowers, the legislation should be written in broad terms, to allow flexibility. Therefore the draft clauses published in July 2017 defined a goods mortgage as security “for the

²¹ See in particular clause 6(4) of the draft Bill.

discharge of an obligation”.²² However, we noted concerns expressed by the City of London Law Society that people might be exploited if unscrupulous persons were able to take goods mortgages for the performance of services. They suggested that compelling an individual to perform services under the threat of losing essential property might be akin to “trucking, bondage or slavery”. We asked whether it was necessary to have further statutory provisions to prevent goods mortgages from being used to secure the performance of services.

- 1.57 Out of six responses, four argued that there should be further protections to prevent goods mortgages from being used to exploit vulnerable people. Richard Calnan and Dorothy Livingston expanded on the City of London Law Society’s previous concern that a “goods mortgage could be used to force a person to remain in employment they wished to leave”. The Chartered Trading Standards Institute agreed:

As this Draft Bill is replacing legislation deemed only used as an act of desperation we would share the concerns of the City of London Law Society.

- 1.58 Similarly, Money Advice Trust feared that allowing goods mortgages to be used for any obligation “could encourage innovation by the unscrupulous lender and cause harm in the future”. They thought that, given that the legislation needs to continue to work into the future, “it is wise to take a cautious approach in this matter”. Logbook Money also supported further restrictions.
- 1.59 Boodle Hatfield put the contrary argument. They warned against creating a securities regime which is inconsistent with the other regimes and gave examples of non-monetary obligations which might usefully be secured by a goods mortgage (such as the ones we mention above).
- 1.60 There are already protections in place against the most serious exploitation. Section 1 of the Modern Slavery Act 2015 prohibits “forced or compulsory labour” and “servitude”. This would also include cases of “debt bondage”. However, there remains at least a theoretical risk that, for example, a “gig economy” worker might be asked by the company they work for to grant a goods mortgage over their car or motorbike in order to “guarantee” the performance of their job.
- 1.61 We do not wish to exclude all non-monetary obligations, but have concluded that there should be an exclusion to prevent goods mortgages from being used to force people to remain in work relationships. This would not prevent goods mortgages from being used for a variety of commercial transactions, including obligations to sell goods or return stock.
- 1.62 **The draft Bill uses an amended version of section 230 of the Employment Rights Act 1996 to exclude obligations under contracts of employment and other obligations which are to be performed personally.**²³

²² “Obligation” in legislative language, including in the draft Bill, means “legally enforceable obligation”, not, for example, agreements to marry or to follow a certain religion.

²³ See clause 6(2) of the draft Bill.

POSSESSORY SECURITY WHERE THE BORROWER HAS CUSTODY OF THE GOODS

Question 11: Do you agree that pledges and other possessory security arrangements should become void if the borrower is given custody of the goods?

- 1.63 The draft Bill is not intended to affect any “possessory” security (such as pledges and liens) where the lender is in possession of the goods. However, for some security arrangements, the lender takes possession of the goods and then hands back custody to the borrower. There are various ways to do this, including “trust receipts” and “pledges by attornment”. The lender who has a pledge or lien could allow the borrower to keep the goods, either as a bailee (under a “pledge by attornment”) or as a trustee (under a “trust receipt”). The borrower has custody of the goods but the lender can argue that it still has possession because it has the right to recall the goods.
- 1.64 We were concerned that it might be possible to use these devices to achieve the same effect as a goods mortgage but without the borrower protections required by the draft Bill. We asked if consultees agreed that, as an anti-avoidance measure, pledges and other possessory security arrangements should become void if the borrower is given custody of the goods.
- 1.65 We received nine responses to this question, of which seven agreed, and two disagreed. Richard Calnan and Dorothy Livingston argued against attempting to invalidate trust receipts as part of this draft Bill. They said that a trust receipt is:
- a well-recognised financing technique, and we do not think it is appropriate to change it in a law dealing with goods mortgages. The result would be that trust receipts would continue to be effective where the pledgor was a company, but not where the pledgor was an individual. In our view, that would make no sense.
- 1.66 On further reflection, we think that our July 2017 proposal was too wide: in some cases a trust receipt may be used for a legitimate short-term purpose which is not intended to occupy the same niche as a goods mortgage.
- 1.67 The updated draft Bill takes a different approach to anti-avoidance. It specifies that some alternative forms of security over goods are not affected by the draft Bill. Other forms of security would be void if they were found to have the effect of a creating a charge or mortgage over qualifying goods in order to circumvent the requirements of the draft Bill. It will be for a court to look at the overall effect of the transaction to see if it is in essence a disguised goods mortgage.
- 1.68 **Under the draft Bill, a security interest is void if it would have the effect of creating a charge or mortgage over qualifying goods.**²⁴

PROMINENT STATEMENTS

- 1.69 In our 2016 report we said that a goods mortgage document should include prominent warnings that borrowers may lose the goods if they do not keep up the repayments.

²⁴ See clause 8 of the draft Bill.

We also thought that the document should warn borrowers that they may be guilty of a criminal offence if they sell the goods before paying off the loan.

1.70 For vehicles we recommended statements along the following lines:

YOUR VEHICLE MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON YOUR LOAN

IF YOU SELL THE VEHICLE BEFORE YOU PAY OFF YOUR LOAN, YOU MAY BE GUILTY OF A CRIMINAL OFFENCE

1.71 Although these statements will be in regulations rather than on the face of the draft Bill, we took the opportunity to ask for views on them.

Question 12: Do you consider the wording of these warnings to be appropriate?

Question 13: Do you think it is necessary to include a prominent warning for borrowers that they should not seek a second loan on the vehicle without disclosing the existence of a first loan?

1.72 Most consultees (nine out of 10 who answered this question) agreed that our statements were appropriate, though some made additional comments.

1.73 There was general agreement with the first statement that “your vehicle may be repossessed if you do not keep up repayments on your loan”.

1.74 Logbook lenders were more concerned about the second statement that “if you sell the vehicle before you pay off your loan, you may be guilty of a criminal offence”. They felt that this was not sufficiently strong to deter fraud.

1.75 Two logbook lenders (AutoMoney and Logbook Money) asked for a warning that it *is* (rather than may be) a crime to sell a vehicle without the lender’s permission. We do not think this would be appropriate: it would be a misstatement of the offence of fraud, which also requires dishonesty. However, we agree that the warning could be made stronger. In discussions post-consultation, lenders thought that the warning should mention fraud (which is a serious offence) and refer to prosecution.

1.76 We also asked whether to include an additional warning that the borrower may be guilty of a criminal offence if they obtained a second loan on the vehicle without disclosing the existence of a first loan. Views were mixed on whether this further warning was necessary, with six consultees saying that it was, and four saying that it was not.

1.77 **On reflection, we think that a statement along the following lines would be sufficient to cover both types of fraud. It would also be stronger in terms and act as a greater deterrent.**

YOU MAY BE PROSECUTED FOR FRAUD IF YOU SELL THE VEHICLE OR TAKE OUT ANOTHER LOAN ON IT WITHOUT MENTIONING THIS MORTGAGE

Other prescribed information

- 1.78 Several consultees suggested that a goods mortgage should also contain other prescribed information. In contrast, the Bar Council and the Financial Conduct Authority warned against “information overload”, pointing out that every additional prominent statement makes the other statements less prominent.
- 1.79 Money Advice Trust thought that the goods mortgage itself should be in a prescribed form. However, the experience of requiring a minutely prescribed form in the 1882 Act is discouraging. The form has become more and more out-of-date, and now actively confuses consumers. We are concerned about requiring lenders to use a fully prescribed form when we are not sure how goods mortgages might be used in the future.
- 1.80 However, we agree with Money Advice Trust that the form should provide borrowers with more information about rights. In particular, we think that borrowers would benefit from information about the right to voluntary termination. This protects all borrowers, including those who may be subject to having their goods seized without the new possession procedure. It would be unfortunate if borrowers failed to exercise this right because they did not know about it.
- 1.81 The draft Bill requires that the two prominent warnings described above must be included in a goods mortgage, although the exact wording will be specified in secondary legislation. The draft Bill also provides HM Treasury with a general ability to prescribe other information that should be included – such as information about voluntary termination.

OTHER CONCERNS RELATED TO FRAUD

- 1.82 The question about prominent warnings prompted logbook lenders to raise further concerns in respect of potential fraud. Lenders were worried that our proposed innocent private purchaser defence might facilitate fraud. In their view, an unscrupulous borrower might collude with a third party who could pretend to be an “innocent private purchaser” to free the vehicle from the goods mortgage. Lenders also asked for clarification on how they could take possession of the vehicles from third parties.

Wilful blindness/actual notice

- 1.83 One of the main worries that lenders had was the potential for fraud, and in particular that purchasers would deliberately not search the goods mortgage register, even if they knew about it, in order not to have “actual notice”. In our 2016 report we confirmed that a private purchaser would take free of the goods mortgage unless they had “actual notice” of it. They would not be fixed with “constructive notice” on the basis that they could have searched the register.
- 1.84 However, under existing law, “actual notice” includes “wilful blindness”.²⁵ This means that private purchasers will be expected to make “such inquiries as an honest and

²⁵ *Forsythe International (UK) Ltd v Silver Shipping Co Ltd* [1994] 1 WLR 1334; *Worcester Works Finance Ltd v Cooden Engineering Co. Ltd* [1972] 1 Q.B. 210; see also Bridge, *The Law of Personal Property* (1st ed) at 36-006.

reasonable man would make”.²⁶ The purchaser cannot turn a blind eye to the goods mortgages register if they are made aware of it, and then claim that they did not have “actual notice”. We do not think that this means that the purchaser would be deemed to have notice of entries on a register that the purchaser either did not know about or could not afford to check.

Taking possession from third parties

- 1.85 The lenders’ enquiry in relation to taking possession from third parties has caused us to look again at the draft Bill. The draft Bill sets out the circumstances in which the lender is entitled to take possession from the borrower, and sets out the possession notice procedure for borrowers who have repaid more than one-third of the loan. Although the circumstances for taking possession are the same, the possession notice procedure does not apply to taking possession from third parties, nor does it make sense that it would. If the borrower has sold or otherwise transferred title to the goods to another party, the lender should not have to serve a possession notice on the borrower and give the borrower the option of a 28-day period to take debt advice before taking possession from a third party.
- 1.86 However, the lender may need to take possession from a third party owner: other than in respect of innocent private purchasers (who take free), the goods will remain subject to the registered goods mortgage even after they have been transferred to a new owner. The draft Bill now gives lenders a right to take possession from third parties and a right to apply to court to get the goods from those parties.²⁷ We think the court should have discretion to consider all the circumstances, such as the new owner’s willingness to repay the debt, before granting an order for possession.
- 1.87 As is the case with mortgages and charges generally,²⁸ lenders will have a limited right to self-help (to take the goods without a court order). Nevertheless, exercising self-help is risky, for the following reasons:²⁹
- (1) It is unlikely that all the circumstances will be known to the lender, so they will not be sure of the third party’s right to the goods.³⁰
 - (2) The lender could face civil penalties: damages for conversion, trespass, entering premises without permission etc.
 - (3) The lender would have to compensate the third party for the time they were deprived of their goods if the lender took possession wrongfully.

²⁶ *Lewin on Trusts* (19th ed) at 41-124.

²⁷ See in particular clauses 15 and 25 of the draft Bill.

²⁸ Bridge, *The Law of Personal Property* (1st ed), 18-007-18-008.

²⁹ *Goode on Commercial Law* (5th ed), 23.32-23.33.

³⁰ For example, the goods may have got to the third party through an innocent private purchaser, in which case the goods mortgage will have been extinguished.

- (4) The lender could be prosecuted: under section 6(1) of the Criminal Law Act 1977 if they make a violent entry or threaten violence, or for theft if the third party took free of the goods mortgage.

1.88 It is difficult to envisage a scenario in which a lender could safely exercise their limited right to self-help. Lenders would be well advised to go to court as a matter of precaution.

THE NEED FOR A WITNESS

Question 14: Do you agree that it is unnecessary for the mortgage document to require the occupation of the witness?

- 1.89 In response to this question, several logbook lenders argued strongly that it was unnecessary for the borrower's signature to be witnessed at all. They asked us to reconsider our policy in this area.
- 1.90 We discussed this issue in our 2015 Consultation Paper.³¹ We explained that most logbook loans were granted after a face-to-face meeting between the borrower and lender which took between 45 minutes and two hours. This had three purposes: to examine the vehicle, to sign and witness the bill of sale and to comply with Financial Conduct Authority (FCA) requirements on affordability checks and explanations. The FCA requires lenders to provide adequate explanations of all adverse consequences of a credit agreement, including the possibility of repossession.³² We noted that this did not necessarily require a face-to-face meeting.
- 1.91 In 2015, we said that we supported the practice of face-to-face meetings. We thought that this would prevent borrowers taking out loans without thought, "possibly late at night and while drunk, without understanding the implications of what they are doing".³³ We therefore proposed to retain a requirement for a physical signature in the presence of a witness.
- 1.92 This proposal received a mixed response in 2015, with 14 out of 24 respondents agreeing. Logbook lenders have said that requiring a signature to be witnessed to prevent borrowers from taking out a goods mortgage while drunk was both paternalistic and ineffective, as the witness could be similarly inebriated.
- 1.93 Logbook lenders also argued that any legislation designed for the 21st century should allow e-signatures. Electronic signatures are increasingly common, and are, for example, permitted for CCA-regulated consumer credit agreements.³⁴ In our 2016 report we said that e-signatures should be allowed.³⁵ Although it is possible to use e-

³¹ Bills of Sale (2015) Law Commission Consultation Paper No 225, paras 9.10 to 9.12, available at http://www.lawcom.gov.uk/wp-content/uploads/2015/09/cp225_bills_of_sale.pdf.

³² CONC 4.2.5.

³³ Bills of Sale (2015) Law Commission Consultation Paper No 225, para 9.11.

³⁴ *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLIC 117. See also the Law Society on electronic signatures at <http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/>.

³⁵ Bills of Sale (2016) Law Com No 369, para 5.20, available at http://www.lawcom.gov.uk/wp-content/uploads/2016/09/lc369_bills_of_sale.pdf.

signatures which are witnessed, the need for a witness adds to complexity of the arrangements. While we still consider that face-to-face meetings are desirable, we do not think that this can or should be achieved through a requirement for witnessing.

- 1.94 On balance we have decided that requiring the borrower's signature to be witnessed would not be compatible with our overall aim, which is to remove unnecessary complexity in documentation and registration. It is still important that lenders provide adequate explanations about the nature of the loan, but how they do this is a matter for the FCA rather than this draft Bill.
- 1.95 **The requirements for signing will be included in regulations rather than in the draft Bill, but we recommend that these do not require a witness.**

REGISTRATION

Our 2016 recommendations

- 1.96 In our 2016 report, we recommended that the system of registration of bills of sale should be reformed for goods mortgages. In our July 2017 consultation, we said that such reform should be guided by two key principles:
- (1) Goods mortgages must be registered in order to have effect against third parties.³⁶
 - (2) Registration should determine priority between lenders, in situations where more than one goods mortgage has been created over the same asset.³⁷
- 1.97 Under current law, security bills must be registered at the High Court to be valid.³⁸ As noted in our 2016 report, there was widespread agreement among consultees that the existing regime is expensive, cumbersome and in need of modernisation.³⁹ Logbook lenders have told us that they also register their interests voluntarily with commercially-run asset finance registers such as Cap HPI, Cheshire Datasystems Ltd (CDL) and Experian. In practice, other lenders and trade purchasers tend to rely on searches of these commercial registers when deciding whether to grant finance to a potential borrower, rather than the High Court register.
- 1.98 We acknowledged in our report that there were persuasive reasons for the development of a comprehensive electronic register of security interests. However, we felt that such a register was unlikely to be achieved as part of the reform of bills of sale alone.
- 1.99 Therefore, we recommended a pragmatic solution: a system in which goods mortgages over vehicles ("vehicle mortgages") would be distinguished from goods mortgages over other types of asset ("general goods mortgages"). General goods

³⁶ Bills of Sale (2016) Law Com No 369, paras 6.23, 6.47.

³⁷ Bills of Sale (2016) Law Com No 369, para 6.23.

³⁸ Section 10 of the 1878 Act and sections 8 and 10 of the 1882 Act.

³⁹ See for example CCTA, *Response to Law Commission Call for Evidence* (2014), p 5: "The register is not fit for purpose and does not provide any benefits to lenders or borrowers." See also Bills of Sale (2016) Law Com No 369, paras 6.13 to 6.16.

mortgages would continue to be registered at the High Court, but according to a simplified procedure.⁴⁰ Vehicle goods mortgages would be registered with existing asset finance registers, which would be designated by HM Treasury.⁴¹

The current position

- 1.100 In the July 2017 consultation we noted that discussions between the Ministry of Justice and HM Treasury were ongoing and that the practical implications of our recommendations were being explored.
- 1.101 Since that consultation, it has become clear that the government's preferred approach is to establish a single, central, register for all goods mortgages, regardless of the asset involved. This new register will be kept at the High Court.
- 1.102 We are supportive of this alternative approach, on the basis that the registration process will be simplified and the costs for registering, searching and discharging goods mortgages will be reduced. Lenders will be required to submit certain basic information, rather than filing the entire goods mortgage agreement. This will also reduce the administrative burdens on lenders.

Implementing the policy⁴²

- 1.103 The draft Bill provides for a register of goods mortgages to be kept. Operational details such as the procedure through which registration applications are lodged, or the way that searches of the register are conducted, will be set out in detail in regulations. The draft Bill sets out that such regulations may provide for the following:
- (1) the way in which a lender can apply for a mortgage to be entered onto the register, and the steps that the keeper of the register must take upon receiving such an application;
 - (2) notification of the registration of a goods mortgage;
 - (3) the type of information to be included on the register;
 - (4) searches of the register;
 - (5) how an entry on the register may be rectified or discharged; and
 - (6) fees payable in respect of registration or searches of the register.
- 1.104 We expect that these regulations will be the subject of further discussions with stakeholders to ensure that the register is an effective replacement for the current outdated system of registration of bills of sale.

⁴⁰ Bills of Sale (2016) Law Com No 369, paras 6.57, 6.69.

⁴¹ Bills of Sale (2016) Law Com No 369, para 6.23. See also July 2017 consultation, para 5.27.

⁴² See clause 9 of the draft Bill.

Priority between registered goods mortgages

- 1.105 We outlined above that, when considering registration of goods mortgages, a key principle is that registration should determine priority between lenders, in situations where more than one goods mortgage has been created over the same asset.
- 1.106 Under the draft Bill, goods mortgages will take priority according to the time at which the applications for registration are received. At this point, the lender will have done everything they can to register their interest and ensure that third parties are aware of the goods mortgage. This is consistent with our policy as outlined in our 2016 report.⁴³

Expiry of registration

- 1.107 In our 2016 report, we recommended that goods mortgages registered at the High Court should be re-registered after 10 years. The purpose of such a requirement would be to maintain accuracy of the register.⁴⁴ The draft Bill implements this recommendation.

Sale of information on the register

- 1.108 Although all goods mortgages will be registered on a single government register, we think that the draft Bill should enable the sale of information about goods mortgages to third parties, such as the commercial asset finance registers.
- 1.109 This will enable asset finance registers to add value to the information contained on the goods mortgages register. For example, we are aware that asset finance registers currently provide reports on vehicles to consumers, for a fee. Such reports may include information about a vehicle which a prospective buyer would like to know, such as the number of previous owners and whether it has been reported as stolen, as well as the existence of any bill of sale. If information from the goods mortgage register could be added to these reports, consumers would benefit from the ability to purchase comprehensive information on a vehicle.
- 1.110 However, we are aware of the need to protect the personal data of lenders and borrowers. Therefore, we think that information sold to third parties should not identify, or enable identification of, any individual. Data which is anonymised in this way can be used without infringing the privacy or data protection rights of individuals.⁴⁵

TACKING

Question 20: Do consultees agree with our proposed provisions on tacking? If not, do consultees think that the Bill should forbid tacking for goods mortgages?

- 1.111 The draft Bill allows borrowers to grant multiple goods mortgages over the same goods. The general rule is that priority between mortgages is determined by the time of the application for registration. The first mortgage to be registered takes priority over the second.

⁴³ Bills of Sale (2016) Law Com No 369, paras 6.23(3) and 6.69(2).

⁴⁴ Bills of Sale (2016) Law Com No 369, para 6.86(3).

⁴⁵ For the definition of "personal data" see s 1 of the Data Protection Act 1998.

- 1.112 This leads to potentially complex disputes where the first mortgage lender provides further advances after a subsequent mortgage has been registered. In what circumstances should these further advances take priority over the subsequent mortgage? The issue has arisen for land mortgages, where it is referred to as “tacking”. If a further advance is “tacked” to the first loan it takes priority to any subsequent mortgage. If the loan is not “tacked”, it ranks behind the interests of the subsequent lender.
- 1.113 The July 2017 consultation proposed a solution based on the policy behind section 94 of the Law of Property Act 1925, which is considered by some academics to apply to personal property as well as land. In broad summary, we thought that a first goods mortgage lender should only be given priority for further advances if the lender was obliged to make those advances and did so in the absence of notice from the lender who has a subsequent mortgage. The draft Bill originally provided that the prior lender must have “actual notice” of the second lender’s interest, but on reflection we think the policy intention is best reflected if we place the obligation on the second lender to give notice.
- 1.114 We asked if consultees agreed with these proposals. As an alternative we suggested that the Bill could “forbid tacking”, by which we meant that a further advance would *never* take priority to the second mortgage. Unfortunately, however, we failed to make our meaning clear. Most of those who responded addressed the broader policy question of whether subsequent mortgages should be permitted at all.
- 1.115 The Chancery Bar Association saw merit in keeping land mortgage law and goods mortgage law harmonised as we suggested, at least in the short term.
- 1.116 We can understand why other consultees failed to engage with this question. In most cases, and especially in the context of logbook loans, it is unrealistic to suppose that a lender would ever be prepared to take a second mortgage over goods. This will only occur for items which have enough value to cover multiple loans. Even then a second lender would need to exercise diligence by, for example, making enquires of the first lender about the terms of the loan.
- 1.117 However, we are keen to provide an open and flexible regime for goods mortgages for higher value goods. As we argued in 2016, this should include the ability to grant subsequent mortgages.⁴⁶ If we are to allow more than one mortgage over the same goods, we think we should provide some rules on “tacking”, in line with common law and statutes in other areas. In these circumstances, we see no compelling reason to depart from the policy behind section 94 of the Law of Property Act 1925.
- 1.118 The draft Bill retains the tacking provisions described above, with small modifications.⁴⁷**

⁴⁶ Bills of Sale (2016) Law Com No 369, paras 4.46 to 4.49.

⁴⁷ See clause 10 of the draft Bill.

DEFINING A DISPOSITION TO A THIRD PARTY

Question 21: Do consultees think that the draft bill clearly expresses the concept of a contract to transfer ownership of goods for value?

1.119 One of the key protections in the draft Bill is for private purchasers who act in good faith without notice of the goods mortgage. Following a “disposition” of the goods mortgage to such a purchaser, the goods mortgage will “cease to exist”.

1.120 The July 2017 consultation explained that a disposition should cover any transfer of ownership of goods for value. We wished to record this concept, drawing on other commonly used definitions. The draft Bill followed section 8 of the Consumer Rights Act 2015 and we asked consultees whether that encapsulated the concept of a contract to transfer ownership of goods for value in a clear way. Five consultees responded on this point, and all agreed that it did.

1.121 **The draft Bill maintains the definition taken from section 8 of the Consumer Rights Act 2015.**⁴⁸

TAKING POSSESSION FROM PREMISES

Question 22: Do consultees think that the draft Bill should specify whose consent is needed for entry onto premises?

Question 23: Do consultees agree that the occupier of the premises (rather than the borrower) should be the person required to consent to the lender entering premises to repossess the goods?

1.122 Hire-purchase creditors are not entitled to enter premises to take possession of goods. Section 92(1) of the Consumer Credit Act 1974 (CCA) states that:

Except under an order of the court, the creditor or owner shall not be entitled to enter any premises to take possession of goods subject to a regulated hire-purchase agreement, regulated conditional sale agreement or regulated consumer hire agreement.

1.123 The section does not prevent lenders from taking possession of vehicles parked on the street. However, it does prohibit lenders from entering premises without a court order. It applies both to the borrower’s own premises and those owned by third parties.

1.124 Consumer groups argued that the draft Bill should replicate the protection provided by section 92 of the CCA. We agree. It prevents lenders from entering premises without consent and guards against attempts to “snatch” the goods from borrowers.

Consent “to enter premises to take possession” under the CCA

1.125 Section 92 of the CCA must be read alongside the contracting out provisions, set out in section 173 of the CCA. Section 173(3) states that:

⁴⁸ See clause 32 of the draft Bill.

a provision of this Act under which a thing may be done in relation to any person on an order of the court... shall not be taken to prevent its being done at any time with that person's consent given at that time...

- 1.126 Thus the lender may enter premises either with a court order or with the relevant person's consent. The consent must be genuine and voluntary⁴⁹ and given at the time (not when the agreement is signed).
- 1.127 The consent must be to do the thing which would otherwise be prohibited which, in the case of section 92, is to enter premises "to take possession". In our view, it is not sufficient for the lender to obtain consent to enter: the lender must be given specific consent to enter *for the purposes of taking possession*.
- 1.128 Take, for example, a case in which the lender visits the borrower's home and asks to speak to the borrower. The borrower invites them in. We think that this invitation would not be sufficient to allow the lender to take the goods. Section 173(3) would only provide a defence if the lender had been given consent not only to enter but also to take the goods.

Who should give consent under the draft Bill?

- 1.129 The CCA does not state whether the relevant consent is that of the borrower or of the occupier of the premises from which the goods are being taken.
- 1.130 In the July 2017 consultation we said that, for the purposes of goods mortgages, consent should be given by the occupier (that is, the person who is entitled to give consent to enter premises), and gave some examples.⁵⁰ The purpose of this particular protection is to prevent lenders from trespassing on or breaking into premises to recover goods, rather than to protect the borrower. There are other protections in the draft Bill to protect borrowers, notably the requirement for a possession notice.
- 1.131 We asked consultees whether the law of goods mortgages should simply replicate section 92 of the CCA, or whether we should specify whose consent was needed. If so, we asked whether consultees agreed that consent should be given by the occupier of the premises.

Consultees' views on giving consent

- 1.132 The issue elicited divergent views. Overall, six out of nine consultees agreed that the draft Bill should specify whose consent is needed to take possession under a goods mortgage – with six consultees stating that it should be the occupier, two the borrower and two answering "other".
- 1.133 The Bar Council agreed that the CCA is not clear, "although the academic commentators seem to agree that potentially the occupier is the person whose consent is required". However, they thought that the draft Bill should simply mirror the wording of the CCA and "leave the point for a Court to determine in due course". Meanwhile the uncertainty would "encourage a cautious approach from lenders".

⁴⁹ See, in the context of hire-purchase: *Mercantile Credit Co Ltd v Cross* [1965] 2 QB 205, [1965] 1 All ER 577.

⁵⁰ July 2017 consultation, para 7.16.

- 1.134 However, we think there is a strong argument for providing certainty in the context of goods mortgages. Those affected can rarely afford expensive litigation, so the point is unlikely to reach the courts for many years.
- 1.135 StepChange agreed with us that “the occupier of the premises should be required to consent to the lender entering premises to repossess the goods”. However, they thought that further safeguards may be needed in order to ensure that people could not be persuaded to permit entry without understanding the situation.
- 1.136 In response, we should explain that the occupier’s consent relates only to this particular protection. There is no question that the occupier may consent to a breach of the possession notice procedure, which exists specifically to protect the borrower. The issue of occupier’s consent applies only where the lender would be entitled to seize goods on the street but not to enter premises.
- 1.137 **The draft Bill therefore specifies that consent to enter premises to take possession of goods must be given by the person entitled to authorise entry to the premises.**⁵¹

ENFORCEMENT OF COURT ORDERS

- 1.138 In relation to court orders, we wish to clarify one of our recommendations. In our 2016 report, we recommended that a lender who had obtained a court order should be permitted to use their own employees or debt collectors to repossess goods.⁵² We were told that it was common for hire-purchase lenders to use their own employees or agents rather than court bailiffs, and we wanted to replicate this system.
- 1.139 Looking at this issue again, we think that it is important to distinguish between voluntary compliance with a court order and enforcing that order. We were told that it is common for hire-purchase lenders to take possession of vehicles on the basis of a return of goods order using their own employees or private debt collectors. However, where such an agent of the lender visits the debtor who hands over the goods, this is not “enforcement” – it simply provides the debtor with an opportunity to comply with the return order.⁵³
- 1.140 “Enforcement”, technically speaking, involves executing the judgment against the wishes of the judgment debtor. The procedures for enforcement are heavily prescribed, both in the county courts and in the High Court.⁵⁴ We do not think that we should depart from these principles only for goods mortgages. This, however, would not prevent the same sort of voluntary compliance mechanisms which are commonly used for hire-purchase.
- 1.141 This does not require a provision in the draft Bill. A judgment creditor who is granted power under a warrant of possession or delivery to take control of goods and sell them

⁵¹ See clause 16 of the draft Bill.

⁵² Discussed in the Bills of Sale report (September 2016), from para 7.86.

⁵³ Discussed in the Bills of Sale report (September 2016), from para 7.86.

⁵⁴ See CPR Parts 70, 83, 84 and the Tribunals, Courts and Enforcement Act 2007.

to recover a sum of money must already comply with the Tribunals, Courts and Enforcement Act 2007.⁵⁵

A FIVE DAY DELAY BETWEEN SEIZURE AND SALE

Question 24: Do consultees think that it is desirable to prevent lenders from selling goods for five working days after taking possession without a court order? If so, is this protection necessary in all such circumstances?

1.142 Under the Bills of Sale Act 1882, a lender must leave a period of five clear days between taking possession of the secured goods and selling them. We asked if this protection is still necessary in all circumstances. We noted that any delay following seizure involves costs (including mounting interest and storage costs).⁵⁶

1.143 Views on this issue were split. Advice agencies thought that the five day period was essential. The Chartered Trading Standards Institute described it as “the only real safeguard” against unlawful seizures by logbook lenders.

1.144 Logbook Money and Loans 2 Go thought the five days were unnecessary, given the other grace periods now provided to borrowers. However, Logbook Money pointed out that logbook lenders adhered to the CCTA code of practice, which “states that members should hold the vehicle post repossession for not less than 14 days”:

The 14-day time period can actually be useful to both lenders and borrowers as it allows further opportunity for the borrower to find the funds to have the vehicle released.

1.145 Logbook Money wrote that it would continue to allow at least 14 days as a standard policy regardless of the requirements of the new Bill.

1.146 The main case against the five day period was put by Boodle Hatfield, on behalf of high net worth individuals and business borrowers. They flagged the extra costs of storing, maintaining and insuring for five days, as well as the undesirability of delays in such circumstances. They argued that high net worth individuals and businesses borrowing more than £25,000 should be able to opt out of this provision. They thought that this would be consistent with land mortgages, where the mortgage deed may vary or extend the lender’s powers of sale.⁵⁷

1.147 We have been convinced that the five day period is an important safeguard and should be retained for non-exempt agreements, such as logbook loans. However, businesses borrowing over £25,000 and high net worth individuals should be allowed to opt out of this protection in the mortgage agreement, if they wish to do so. This would reduce the cost of storing or insuring high value items.

⁵⁵ Tribunals, Courts and Enforcement Act 2007, s 62.

⁵⁶ We were told the lenders charge £2 per day plus VAT plus an administration charge of £20 for the storage of cars. It is likely that they would charge more for more valuable assets (such as art).

⁵⁷ Law of Property Act 1925, s 101(3).

1.148 **Under the draft Bill, the five day period is mandatory for non-exempt goods mortgages. However, exempt borrowers are entitled to opt out of the five day protection in the goods mortgage document.**⁵⁸

SHARES IN GOODS HELD IN COMMON

Question 25: Do consultees agree that the draft Bill works for shares in goods?

1.149 Where two or more people hold goods in common, it is possible for one person to grant a mortgage over their share of the goods. The draft Bill is designed to work with mortgages over undivided shares in goods (for example, a share in a racehorse). First, the lender would need to establish a right to take possession in the normal way. Once the right to possession is established, they may not need to take physical possession in order to sell the goods: they could simply sell the share or agree with the other owners in common to sell the goods in their entirety and split the proceeds of sale. Otherwise, a lender with a mortgage of a share can apply to court to be permitted to sell the share or the goods in their entirety (in order to obtain the value of the share).⁵⁹

1.150 In our July 2017 consultation we asked if consultees agreed that the draft Bill worked for shares in goods. The three consultees who addressed this question agreed that it does.

1.151 **We have not therefore made any changes to the draft Bill in relation to shares in goods.**

⁵⁸ See clause 18 of the draft Bill.

⁵⁹ In *The James W Elwell* [1921] P 351, the court held (in relation to a ship) that “there is no doubt that at common law an undivided share in a chattel can be taken in execution by seizure of the chattel and sale of the share”.

Appendix 1: List of respondents

Boodle Hatfield LLP

Cap HPI

Chancery Bar Association

Chartered Trading Standards Institute

Dr Sean Thomas

Experian Limited

Finance and Leasing Association

Financial Conduct Authority

HM Land Registry

Loans 2 Go

Logbook Loan Industry Working Group

Logbook Money LTD

Money Advice Trust

QuickClick Loans Limited d/b/a AutoMoney

Richard Calnan and Dorothy Livingston

StepChange Debt Charity

The Bar Council of England and Wales

Total Car Check Ltd

UK Finance

Watson Farley & Williams