



REPLACING BILLS OF SALE: A NEW GOODS MORTGAGES BILL
CONSULTATION ON DRAFT CLAUSES

This optional response form is provided for consultees' convenience in responding to our consultation on draft clauses.

The response form includes the text of the questions in the consultation, with boxes for yes/no answers (please delete as appropriate) and space for comments. You do not have to respond to every question. Comments are not limited in length (the box will expand, if necessary, as you type). There is an opportunity to give more general comments at the end of this form.

Each question gives a reference in brackets to the paragraph of the consultation at which the question is asked. Please consider the surrounding discussion before responding.

We intend to share responses to our consultation with HM Treasury. Please let us know if you would prefer that your response is not shared, along with any reasons for that preference.

*We invite responses by **Monday 7 August 2017**.*

Please return this form by email to bills_of_sale@lawcommission.gsi.gov.uk.

If you would prefer to respond by post, the relevant address is:

John Williams,
Law Commission,
1st Floor Tower, Post Point 1.53,
52 Queen Anne's Gate,
London SW1H 9AG

We are happy to accept responses in any form. However, we would prefer, if possible, to receive emails attaching this pre-prepared response form.

Freedom of information statement

Any information you give to us will be subject to the Freedom of Information Act 2000, which means that we must normally disclose it to those who ask for it.

If you wish your response to be confidential, please tell us why you regard the information as confidential. On a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

The Law Commission processes personal data in accordance with the Data

Protection Act 1998 and in most circumstances it will not be disclosed to third parties.

YOUR DETAILS

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CONFIDENTIALITY

Do you wish to keep this response confidential?

<i>Yes:</i>	No: ✓
<i>If yes, please give reasons:</i>	

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? (paragraph 2.17)

<i>Yes:</i>	<i>No:</i>	Other: ✓
<p>The only point we would make is that this would create an inconsistency with the provisions of the Consumer Credit Act (CCA) 1974, where a loan below £60,260 would be regulated whether or not the borrower was a high net worth individual. That would mean that the loan would be regulated, but the goods mortgage would not, except insofar as s.140A of the CCA (unfair relationship) would also apply to it (by virtue of s.140C(4)(c)). This might be productive of uncertainty.</p>		

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? (paragraph 3.15)

Yes: ✓	No:	Other:

QUESTION 3

Do consultees agree that beneficiaries under trusts should not be able to grant goods mortgages? (paragraph 3.25)

Yes: ✓	No:	Other:

QUESTION 4

Do consultees agree with our proposed scheme of priority between a goods mortgage over fixtures and growing crops and a land mortgage? (paragraph 3.49)

Yes: ✓	No:	Other:

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? (paragraph 3.50)

Yes:	No:	Other:
No comment		

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? (paragraph 3.65)

Yes:	No:	Other: ✓
We are not aware of any material conflict, although this is a very specialist area in which we have only limited experience.		

QUESTION 7

Do consultees agree that only high net worth individuals should be able to use goods mortgages to secure guarantees? (paragraph 3.75)

Yes: ✓	No:	Other:
In relation to both this area and the securing of running-account agreements we agree that it is not appropriate to extend the regime to encompass the typical consumer.		

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? (paragraph 3.76)

Yes: ✓	No:	Other:
See above.		

QUESTION 9

We welcome views about whether it is necessary to prevent goods mortgages from being used to secure the performance of services. (paragraph 3.92)

We are not aware of any particular issues arising in this context.

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. (paragraph 3.93)

No comment

QUESTION 11

Do you agree that pledges and other possessory security arrangements should become void if the borrower is given custody of the goods? (paragraph 3.109)

Yes:	No:	Other:
No comment		

QUESTION 12

Do you consider the wording of these warnings to be appropriate? (paragraph 4.10)

Yes:	No:	Other: ✓
We have concerns about the second warning, which we set out in the further comments section below because they relate to the underlying principle rather than the wording of the warning itself.		

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? (paragraph 4.14)

Yes:	No: ✓	Other:
We would be concerned about an overload of information in this regard. Lenders are able to protect themselves in such circumstances so the utility of such a warning appears limited and it may dilute the impact of other, more important warnings.		

QUESTION 14

Do you agree that it is unnecessary for the mortgage document to require the occupation of the witness? (paragraph 4.19)

Yes:	No:	Other:
No comment		

QUESTION 15

If you have particular concerns about the practical consequences of dividing goods mortgages between the High Court register and private asset finance registers, we would welcome your comments. (paragraph 5.10)

No comment

QUESTION 16

Do consultees have experience of registering a vehicle which has been registered at the DVLA but does not have a VIN or other unique identifier? (paragraph 5.17)

Yes:	No:	Other:
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No comment

QUESTION 17

Do consultees agree that the definition of “vehicle mortgage” is sufficiently clear and wide to cover the types of vehicles over which a goods mortgage is likely to be granted? (paragraph 5.18)

Yes:	No:	Other:
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No comment

QUESTION 18

We welcome comments on how often lenders and registers are faced with multiple registrations of interests over the same vehicle within a short timeframe, and the impact of this. (paragraph 5.36)

We do not have any experience of this.

QUESTION 19

We welcome consultees’ views on the different options for ensuring adequate data-sharing. (paragraph 5.44)

These are practical matters which are more appropriate for those involved in the industry to address and accordingly we do not comment.

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? (paragraph 5.55)

Yes:	No:	Other:
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No comment

QUESTION 21

Do consultees think that clause 34 clearly expresses the concept of a contract to transfer ownership of goods for value? (paragraph 6.34)

Yes:	No:	Other:
No comment		

QUESTION 22

Do consultees think that the draft Bill should specify whose consent is needed for clause 19? (paragraph 7.17)

Yes:	No: ✓	Other:
<p>We are not convinced that it should. There will be a clear inconsistency with the approach taken by the CCA if there is an explicit provision to address this point, and we set out below some of the arguments which may be made in relation to whether the consent should be that of the borrower or the occupier.</p>		

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? (paragraph 7.18)

Yes:	No:	Other: ✓
<p>We think this is a difficult point. The CCA is not clear, although the academic commentators seem to agree that potentially the occupier is the person whose consent is required. However, we think this may be productive of uncertainty and, potentially, undesirable results. For example, if the owner of a car which is subject to a goods mortgage parks it at the home he jointly owns with another person, would it be sufficient for that other person to give consent to entry for possession? Would it be different if the other person was merely a tenant of the property? We think there is a respectable argument in</p>		

favour of the proposition that the borrower should be the person giving consent, since it will directly impact on his rights under the mortgage, but this would put the new provisions at odds with the current academic understanding of the equivalent CCA provisions. It might be preferable to leave the point for a Court to determine in due course, since that would be likely to encourage a cautious approach from lenders until such time as the matter is authoritatively determined.

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? (paragraph 10.13)

Yes: ✓	No:	Other:
<p>We think this is a useful protection. Given the periods of delay envisaged by the possession process (plus the potential for further delay in accordance with the new pre-action protocol for debt claims) a further five days in the case of possession without a court order is a relatively short delay.</p>		

QUESTION 25

Do consultees agree that the draft Bill works for shares in goods? (paragraph 11.11)

Yes:	No:	Other:
<p>No comment</p>		

FURTHER COMMENTS:

We also welcome any additional comments you may have beyond the scope of the questions above.

<p>We have concerns as to the necessity of imposing criminal liability in the case of non-disclosure of a goods mortgage. Whilst we accept the possibility that some mortgagors may seek to fraudulently dispose of a vehicle without disclosing the existence of the goods mortgage, the risk does not seem to us to be any greater than that which applies in relation to hire purchase (HP). There is no equivalent duty to disclose the fact that the vehicle is subject to</p>

HP, and the only warning which has ever been required (under the Consumer Credit (Agreements) Regulations 1983) in relation to hire purchase agreements stated “*The goods will not become your property until you have made all the payments. You must not sell them before then.*” (Form 1 of Schedule 5 to the Regulations).

We are particularly concerned that the duty to disclose will apply even if a subsequent owner of the goods does not in fact know about the goods mortgage - perhaps because they were given the goods by the original owner (see the consultation document at paragraph 6.7). We accept that such a person would not be dishonest, and therefore not liable for fraud under the Fraud Act 2006, but we question whether it is appropriate for such a person to be considered in breach of a legal duty if they could not reasonably have avoided such a breach.