

THE **LAW SOCIETY**
OF NORTHERN IRELAND



Committee for Communities

Call for Evidence

**Support for Mortgage Interest etc. (Security for Loans)
Bill (Bill 42/17-22) ('the Bill')**

**Response of the Law Society of
Northern Ireland**

January 2022

*96 Victoria Street
Belfast BT1 3GN
Tel: 02890 23 1614
Fax: 02890 232606
Email: enquiry@lawsoc-ni.org
Website: www.lawsoc-ni.org*

ABOUT THE LAW SOCIETY

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (Northern Ireland) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,800 solicitors working in approximately 480 firms, based in 65 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients, Government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which responsibility for the development of justice policy and law reform takes place at a local level, this role is as important as ever.

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THE SOCIETY'S COMMENTS

1. The Society agrees that there are differences in land law between the separate legal jurisdictions of Northern Ireland, England & Wales and Scotland. These include for Northern Ireland, differences arising from the two systems of registration of title to land in this jurisdiction for **registered** land (where title has been registered at the Land Registry) and **unregistered** land (where title has been registered at the Registry of Deeds and not at the Land Registry).
2. The Society recognises those differences could potentially give rise to some of the matters raised by the Department for Communities ('the Department') from its position, for securing a Support for Mortgage Interest (SMI) loan (under the Welfare Reform and Work (Northern Ireland) Order 2016 and regulations made thereunder) depending on whether the title to the property is 'registered' or 'unregistered'.
3. The Society notes from the Explanatory and Financial Memorandum to the Support for Mortgage Interest etc (Security for Loans) Bill (NIA Bill 42/17-2 EFM) ('the Memorandum') that:

'...it is only practicable [for the Department] to secure loans when the property is registered and appears on the Title Register in the Land Registry. Departmental officials have placed charges on properties that are unregistered through the Registry of Deeds and currently have secured 156 loans using this method. However, the process of placing/removing a charge on these cases is cumbersome and can require action to be taken by Departmental Solicitors'.
4. The Society also notes the comment in the Memorandum that:

'For properties where all legal owners are not included in the claimant's benefit claim (benefit unit), it is currently not possible to place a charge on the property'.
5. The Society further notes from the Memorandum that:

'18. As it currently stands, 541 loans of the 1,409 outstanding loans, are loans which do not have the security of a legal charge.

19. *A Statutory Charge provides a method of security to allow the Department to consider recovery of all loans provided for all properties/land in Northern Ireland.*
6. The Society acknowledges that (pursuant to the Statutory Charges Act (NI) 1951, and Land Registration Act (Northern Ireland) 1970) statutory charges can affect both registered and unregistered land and the Statutory Charges Register enables public authorities to register statutory charges against land without having to investigate whether the title to a property is registered or unregistered.
7. Further, the main function of the Statutory Charges Register is to record charges and restrictions that are imposed on property as a result of statutory provisions. These charges and restrictions are not generally created by the legal owner(s) of the property but may nevertheless significantly affect the property.
8. The reference to 'statutory charge(s)' embraces a variety of charges, restrictions and notices, which are listed in Schedule 11 to the Land Registration Act (Northern Ireland) 1970 (as amended). Since 1970, over 50 new items have been added to the list and several of the original items have been repealed.
9. The Bill appears therefore to address some of the matters raised by the Department in relation to current arrangements including:
- The statutory charge can affect both registered and unregistered land and the Department does not have to investigate if the title is registered or unregistered.
 - The application for registration of the statutory charge can potentially be made even where all of the legal owners are not within the benefit unit.
10. The Society suggests that the following matters should also be taken into consideration.
11. The proposed change by the Department to a method of security for repayment of monies using a statutory charge has potential unintended consequences for conveyancing practice. Security for loans/monies owed are typically by way of

mortgage registered in the Registry of Deeds for unregistered land and by way of charge registered in the Land Registry for registered land.

12. Statutory charges for monies to be repaid are not typically encountered in practice. The proposed method of security via statutory charge for SMI loans, could result in changes to conveyancing practice.
13. The Society notes the reference in the Memorandum to it only being practicable for the Department to secure loans when the property is registered. However, it is also noted from the Memorandum that it does remain possible for the Department to secure loans when the title to the property is unregistered under present arrangements.
14. The Memorandum reiterates

'...the original policy intention to consider recovery of loans providing there is available funds'.

and

'...policy intention to ensure that a loan is recovered if there is available equity when it becomes repayable'.

Accordingly,

'Unless a default event occurs, the current regulations and loan agreements provide that a loan is only recoverable from any equity on the sale or transfer of ownership of the property or when the claimant (or their partner) dies. If there is insufficient equity to repay the total of the loan after sale/transfer/death, the Department will write off any amount that cannot be repaid'.

15. Where the original policy intention is to be maintained, the Society submits that if the Bill comes into operation, any necessary regulations to be made by the Department should ensure that these provisions are reflected in the drafting of any statutory charge and corresponding entry on the Statutory Charges Register.

16. As part of the conveyancing process and in accordance with the requirements of the Society's regulatory Home Charter Scheme (which applies where a solicitor is acting in the purchase, sale, mortgage, or re-mortgage of domestic property), a search in the Statutory Charges Register is obtained by the vendor's solicitor in a sale and provided to the purchaser's solicitor as part of the pre-contract title investigation.
17. Where a statutory charge for repayment of an SMI loan and/or interest charged in respect of such a loan appears on such search affecting the property, a prospective new purchaser of the property (and any lender) will likely require removal of that statutory charge before completion of the transaction. It will be important therefore for the Department to establish satisfactory processes to provide prompt repayment figures and to exercise its duty as the body which registered the statutory charge, to promptly apply for its cancellation to include when the charge is discharged, becomes unenforceable or ceases to affect the property.
18. The Society suggests that the matters of registration and priority of the statutory charge should also be considered. It will be important for the Department to clarify the proposed timeframe between the acceptance of the offer of loan payments and the Department's application for registration of the corresponding statutory charge and/or if the Department intends to apply to register a priority notice in respect of the statutory charge. The ongoing importance of any qualifying loan and its security should be recognised and maintained.
19. Such matters will likely have implications for conveyancing practice in general, including ensuring priority of any prior ranking charge, any qualifying loan or any subsequent loan and the date of any statutory charges search that should be obtained. Appropriate notice to be given by the Department of its intention to apply for registration of the corresponding statutory charge to all interested parties should also be considered.
20. As noted above, there are many different types of statutory charges. The statutory charges typically encountered in practice are not charges for monies to be repaid as proposed by the Bill. It will therefore be important that should the Bill be enacted

and the provision for charges securing SMI loans to be registrable in the Statutory Charges Register is to come into effect, that this is widely communicated and publicised in advance, so that all relevant stakeholders, including conveyancing solicitors, have sufficient notice of same.

21. The position of any legal owner(s) of a property who are not included in the benefit unit should also be considered.
22. Under current arrangements a charge cannot be registered against the property without all legal owners being within the benefit unit and each of those legal owners executing a mortgage in favour of the Department in respect of the property.
23. The proposed statutory provision for the Department to register a statutory charge which affects the property as opposed to being created by the legal owners, potentially means that the interest of a joint legal owner(s) who is not included in the benefit unit could be detrimentally affected.
24. For example, registering a statutory charge in those circumstances could potentially have the unintended consequence of changing how all the legal owners share ownership of the property, potentially without the affected owner(s) knowing.
25. Prior to registering the statutory charge all the legal owners may share ownership of the property jointly in equal, undivided shares, so that if one of them dies their undivided share automatically passes to the surviving legal owner(s). This is perhaps the most common type of joint ownership and is referred to as 'joint tenancy'.
26. However, if a statutory charge is registered in relation to an SMI loan, registration of that statutory charge may automatically 'sever' the joint tenancy, i.e. change the nature of that shared ownership. In that event, the legal owners would now hold distinct and separate shares in the property and if one of them dies their share will not automatically pass to the surviving legal owners. This may have potentially significant implications for the legal owners.

27. Further, the legal owner not included in the benefit unit may be unaware of the registration of the statutory charge and therefore of the potential change to their shared ownership of the property.
28. Also, clarification in the statutory charge that repayment of the SMI loan and/or interest is limited to the sum of the interests in the property of only all legal owner(s) within the benefit unit and that the statutory charge does not affect the interests of the legal owner not included in the benefit unit, will also be important.
29. Further consideration to protect the position of legal owner(s) of the property not included in the benefit unit may therefore be required.

CONCLUSION

The Society welcomes the opportunity to submit a response in respect of the Call for Evidence and Views on Support for Mortgage Interest etc. (Security for Loans) Bill.

We trust our contribution is constructive and we are happy to meet with the Committee for Communities or the Department to discuss any of the issues raised in our response.

We would like to be kept informed of any subsequent proposals formed as a result of this consultation and also any changes to the overall policy direction of the topic under discussion along with a stated rationale.