Abigail Bremner and Lizzy Burgess

Stage 3 proceedings in relation to the Home Owner and Debtor Protection (Scotland) Bill are scheduled to take place on 11 February 2010.

This briefing summarises the Local Government and Communities Committee’s Stage 1 Report on the Bill and the Scottish Government’s response, as well as the Stage 1 debate and the main amendments debated at Stage 2.
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EXECUTIVE SUMMARY

The Home Owner and Debtor Protection (Scotland) Bill was introduced in the Parliament on 1 October 2009 by Nicola Sturgeon, Cabinet Secretary for Health and Wellbeing. The Bill introduces measures to protect people struggling to cope with debt. Part 1 of the Bill provides additional protections for those facing repossession of their homes. Part 2 makes several changes to bankruptcy law to increase access to bankruptcy and provide for greater flexibility in relation to protected trust deeds. The Bill has its origins in the work of the Debt Action Forum and the Repossessions Group, which were convened by the Scottish Government as part of its response to the economic downturn.

Stage 1

Stage 1 scrutiny of the Bill was carried out by the Local Government and Communities Committee. The Stage 1 evidence received by the Committee and draft Scottish statutory instruments which accompany the Bill are available at the Home Owner and Debtor Protection (Scotland) Bill section of its website.

The main themes discussed in the Committee’s Stage 1 Report were as follows:

- Consultation in relation to Part 2 of the Bill had been unsatisfactory, leading to a lack of clarity over the effect of a number of its provisions
- The “voluntary surrender” process may be too bureaucratic
- It may be fairer to allow more than one petition for recall of a decree
- It was unclear whether provisions in relation to court hearings and lay representation would be sufficiently resourced to meet expectations
- The Scottish Government should address insolvency practitioner concerns that the Bill would take work away from the sector in favour of the Accountant in Bankruptcy, an agency of the Scottish Government
- The Scottish Government should engage with stakeholders to address concerns over how proposals to exclude the family home from a protected trust deed will operate

1 A trust deed is an agreement between a debtor and their creditors to pay a certain amount towards their debts. When a trust deed becomes protected, all creditors are bound by its terms and are prevented from taking court action against the debtor to enforce a debt. Once a debtor has made the agreed payments under a protected trust deed (generally for three years) most remaining debts are written off. Protected Trust Deeds are administered by insolvency practitioners, and a debtor must have at least enough income to cover their fees (and, as a matter of good practice, pay a dividend to creditors) before they can access this debt solution.

2 Voluntary surrender is when someone who cannot pay their mortgage vacates the property voluntarily and gives the keys back to the lender. Section 1(3) of the Bill outlines the requirements for a property to be considered voluntarily surrendered.

3 A recall of decree allows the debtor or entitled resident to make an application for the case to be heard again in court.
Further reassurances were needed in relation to plans to improve the Register of Insolvencies so that information stored there could replace current requirements to advertise in the Edinburgh Gazette. In conclusion, the Committee highlighted a number of outstanding issues particularly with regard to Part 2 of the Bill and called for these to be resolved as soon as possible. With that caveat in relation to Part 2 of the Bill, the Committee recommended that the general principles of the Bill be agreed to.

The Stage 1 debate took place on Thursday 17 December 2009 and the general principles of the Bill were agreed to.

Stage 2

Scottish Government amendments to address concerns about the voluntary surrender process, recall of decree, insolvency practitioners’ work and the exclusion of the family home in protected trust deeds were passed at Stage 2. Amendments which would extend the court’s powers to consider a creditor application for eviction under the Conveyancing and Feudal Reform (Scotland) Act 1970 were rejected, while similar amendments to the Heritable Securities (Scotland) Act 1894 were agreed.

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4 The Edinburgh Gazette is Scotland’s official newspaper of record, which publishes notices in relation to bankruptcy and trust deeds.
INTRODUCTION

The Home Owner and Debtor Protection (Scotland) Bill was introduced in the Parliament on 1 October 2009 by Nicola Sturgeon, Cabinet Secretary for Health and Wellbeing. The Bill introduces measures to protect people struggling to cope with debt. Part 1 of the Bill provides additional protections for those facing repossession of their homes. Part 2 makes several changes to bankruptcy law to increase access to bankruptcy and provide for greater flexibility in relation to protected trust deeds.

The current economic downturn puts particular pressures on home owners, with increased unemployment especially making it more difficult for people to pay their mortgages. Home owners may also find that the equity in their home is reduced, one effect of which is that they are able to release less money from their main asset and therefore have less flexibility in dealing with other debts. The “credit crunch” has also made it more difficult to access new loans at favourable terms in order to release the equity available in a home.

One aspect of the Scottish Government’s response to the economic downturn was to establish a Debt Action Forum. The Forum’s remit was to review current initiatives in relation to personal debt. The Scottish Government also established a sub-group of the Debt Action Forum – the Repossessions Group – to specifically address issues affecting those facing the repossession of their home. The Final Report of the Repossessions Group (Scottish Government 2009a) made a number of recommendations to increase protection for home owners, which are being taken forward in this Bill. The Debt Action Group’s Final Report (Accountant in Bankruptcy 2009) also contains consideration of many of the proposals which appear in Part 2 of the Bill, although there were diverging views within the group in relation to the best way forward.

Information on the Bill the main provisions of the Bill can be found in the SPICe briefing Home Owner and Debtor Protection Bill (Bremner and Burgess, 2009).

STAGE 1

THE LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

Stage 1 scrutiny of the Bill was undertaken by the Local Government and Communities Committee. The Scottish Parliament agreed a shortened timetable for consideration at Stage 1 in order to assist with the speedy implementation of the Bill. This was done on the consideration that the Bill’s proposals were likely to help those facing repossession or struggling with debt in the economic downturn.

The written evidence received by the Committee is available at the Home Owner and Debtor Protection (Scotland) Bill section of its website. The Committee also received a number of supplementary evidence statements in relation to the Bill. Many of the submissions received came from insolvency practitioners. These raised concerns that the provisions in relation to bankruptcy would take work away from the sector. They also alleged that the provisions in relation to protected trust deeds would upset the balance between debtors and creditors to the advantage of debtors and to the detriment of those who paid their debts.

The Committee held four oral evidence sessions with stakeholders and with the Minister for Housing and Communities and the Minister for Community Safety. Details of the oral evidence sessions can also be accessed from the Home Owner and Debtor Protection (Scotland) Bill section of the Committee’s website.
DRAFT STATUTORY INSTRUMENTS

The Scottish Government agreed, as part of the Stage 1 scrutiny process, to supply the Local Government and Communities Committee with draft Scottish Statutory Instruments (SSIs) to further clarify some of the Bill’s proposals. The contents of the draft SSIs are summarised below. Copies are available on the Committee’s website. Please note that the SSIs are in draft format and may be revised. Several will require revision as a result of amendments to the Bill agreed to at Stage 2.

The Applications by Creditors (Pre-Action Requirements) (Scotland) Order

This SSI sets out in detail what creditors have to do to comply with the pre-action requirements contained in section 4 of the Bill. For example, in taking reasonable steps to agree a proposal, a creditor must: contact the debtor to discuss the arrears; give the debtor adequate time to consider any proposals made by the creditor; and give the debtor reasons in writing where a proposal from the debtor is refused.

The Lay Representation in Proceedings relating to Residential Property (Scotland) Order

This SSI outlines the bodies that can approve people to act as lay representatives in repossession cases. These are:

- organisations listed in the Scottish Legal Aid Board’s register of advice organisations eligible to receive “advice and assistance” funding
- organisations accredited to Type III under the Scottish National Standards for Advice and Information Providers (Scottish Government 2009b)
- local authorities
- Citizens Advice Bureaux

The Bankruptcy (Certificate for Sequestration) (Scotland) Regulations

These regulations control how the “certificate for sequestration” route into bankruptcy will work. Those authorised to issue “certificates for sequestration” will be qualified insolvency practitioners and money advisers, and no fee will be chargeable for issuing a certificate. The certificate will be valid for 30 days in relation to applying for bankruptcy. Before the certificate is signed, an authorised person must be satisfied that the debtor has considered the alternative options of negotiated payments to their creditors, a debt payment programme under the Debt Arrangement Scheme and a protected trust deed.

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5 A debt payment programme allows a debtor to repay their debts over a longer period while being protected from court action by their creditors. Debts must be repaid in full (although interest and charges can be frozen). This means that some debtors cannot access the scheme because they have insufficient income to make full repayment.
The Bankruptcy (Scotland) Amendment Regulations

These regulations update the official forms used in the administration of a bankruptcy to take account of the provisions in the Bill. They also increase to £3,000 the value of a vehicle which can be exempted from the bankruptcy process (subject to the provision that it is reasonably required by the debtor).

The Protected Trust Deeds (Scotland) Amendment Regulations

This SSI amends the regulations governing protected trust deeds to take account of the provisions of the Bill. In particular, it introduces a procedure for excluding from a protected trust deed:

- a creditor under section 10(b) (i)
- the family home under section 10(b) (ii)

In relation to the family home, the regulations state that it will be presumed that the family home is not conveyed to the trustee by the trust deed unless the trust deed specifically states that it is.

The SSI removes the obligation to advertise in the Edinburgh Gazette and replaces this with a requirement for the information to be included in the Register of Insolvencies. In addition, it provides a procedure for the debtor to terminate the trust deed where it fails to become protected because sufficient creditors object.

STAGE 1 REPORT

The Local Government and Communities Committee supported the principles of the Bill in its Stage 1 Report, although it noted that there were a number of outstanding issues that needed to be resolved in relation to Part 2. The Scottish Government responded to the Committee’s recommendations (Scottish Government 2010). The main recommendations of the Stage 1 report and the Scottish Government’s response are highlighted below.

<table>
<thead>
<tr>
<th>Committee recommendation</th>
<th>Government response</th>
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<tr>
<td>Data on repossession numbers in Scotland should be made available through the Council of Mortgage Lenders and Financial Services Authority to aid understanding of the scale of repossessions in Scotland and the effectiveness of policy interventions (paragraphs 20 and 113).</td>
<td>The Scottish Government has written to the Council of Mortgage Lenders and the Financial Services Authority requesting that Scottish information is made available. Copies of the correspondence have been lodged with SPICe.</td>
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<tr>
<td>Consultation in relation to Part 2 of the Bill was unsatisfactory, leading to significant disagreement regarding the effect of certain provisions contained in the Bill, their cost and which matters are to be the subject of further consultation (paragraph 43). The Finance Committee separately noted that “failure of the Scottish Government to engage adequately with a number of key stakeholders appears to</td>
<td>The Scottish Government recognised that there was less consensus around the provisions of Part 2 of the Bill. However, it notes that the proposals which appear in Part 2 were set out in the Debt Action Forum’s terms of reference, were discussed by the group and were based on the work of an Independent Experts Group. It also notes that the Bill’s Policy Memorandum (Scottish</td>
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have been the main reason for disputes about cost implications persisting” (Scottish Parliament Finance Committee 2009, paragraph 54).

| Parliament 2009) sets out which matters are to be included in the Bill and which will be the subject of further consultation.  
The Scottish Government has further indicated that it is prepared to listen to stakeholder concerns and introduce Stage 2 amendments where appropriate. |
|---|
| The “voluntary surrender” process envisaged in section 1 of the Bill may be too bureaucratic to work in practice and should be looked at again by the Scottish Government in light of the concerns raised with the Committee (paragraphs 59 and 60).  
The Scottish Government will introduce Stage 2 amendments to deal with stakeholder concerns while still offering protection for homeowners. |
| The use of the term “reasonable time” in section 2 of the Bill may in fact result in less flexible treatment of debtors’ repayment proposals than is currently the case. The Scottish Government should therefore consider whether an amendment is necessary to clarify its meaning (paragraph 66).  
The Scottish Government does not consider that the courts will necessarily interpret the term “reasonable time” in a manner which will provide less flexibility than at present. Subordinate legislation and guidance will provide further information as to what is intended. |
| The inclusion of “pre-action requirements” (which oblige lenders to demonstrate that they have taken certain steps to deal with a borrower’s arrears before they can raise a court action) in section 4 of the Bill strikes the right balance between providing statutory force to the requirements and allowing flexibility to deal with future circumstances. The Committee notes that enshrining the requirements in legislation avoids any question of them being ignored by lenders, as can be the case with the pre-action protocol used in England and Wales (paragraph 87).  
The Scottish Government notes that the reason for providing for much of the detail of the pre-action requirements in subordinate legislation is to facilitate future amendment if required. |
| The Committee endorsed the view of the Subordinate Legislation Committee that the powers contained in section 4 allowing the Scottish Government to revise the contents of the pre-action requirements are too wide (Scottish Parliament Subordinate Legislation Committee 2009, paragraphs 16 to 19).  
The Scottish Government is considering the Subordinate Legislation Committee’s recommendations and will report back to that committee before Stage 2. |
| The Scottish Government should consider amending section 6 of the Bill to allow for a second application for recall of decree (enabling the court to reconsider its decision to issue a decree for eviction) by an entitled resident where this is made on different grounds from the first application (paragraph 98).  
The Scottish Government’s view is that the recall process should not be open to abuse which would unfairly prejudice a lender’s right to recover possession. However, an amendment will be tabled at Stage 2 to address this issue. |
The Scottish Government should outline how it will support the delivery of lay representation envisaged in section 7 of the Bill and report back to the Committee on an ongoing basis to address concerns that there is insufficient capacity in the advice sector at the moment to match the Bill’s commitments (paragraphs 119 and 120).

Interested members of the Debt Action Forum and Repossessions Group have been reconvened as the Repossessions Advice Group under the auspices of the Scottish Legal Aid Board. This group will consider the advice-related recommendations of those groups, as well as up-dating previous work on weaknesses in the funding and delivery of advice work.

The Scottish Government expects that existing infrastructure for advice sector training, plus £3 million allocated to the Scottish Legal Aid Board for advice-related projects up to March 2011, will be sufficient to meet the requirements of the Bill. However, the Repossessions Advice Group will consider whether more funding is needed.

The Committee does not believe that there is sufficient evidence to demonstrate that the courts will be able to deal with the predicted increase in demand for hearings in relation to eviction actions. It therefore asks for reassurances from the Scottish Government that the courts will be able to cope with this demand without there being an impact on other court work (paragraph 123).

The Scottish Government notes that lenders remain concerned about the impact of the Bill, particularly on large, urban courts. However, it stresses that the figures used in the Financial Memorandum represent the upper limit of what is expected. The experience in England and Wales suggest that 20 to 30% of cases are defended, which is below the Scottish Government estimate of 50%.

In addition, the Scottish Courts Service has indicated that the procedures introduced by the Bill will be manageable.

The Committee highlights the appointment of the Accountant in Bankruptcy (AiB) as the trustee under the new “certificate for sequestration” route into bankruptcy (section 9) as an example of an issue on which stakeholders were not consulted in advance of the publication of the Bill. This has led to a difference of opinion between insolvency practitioners and the Scottish Government as to the likely implications of the proposals for the insolvency sector.

The Committee therefore asks the Scottish Government to outline in more detail what work will be required by the AiB and how this compares in complexity to the work usually carried out by this office (paragraph 154).

The Scottish Government accepts that the details of proposals to introduce a new route into sequestration were not discussed at the Debt Action Forum. Following consultation with stakeholders, it is intended to bring forward an amendment at Stage 2 which will allow an insolvency practitioner to act as trustee in “certificate for sequestration” cases.

The Scottish Government expects that the majority of cases using the “certificate for sequestration” route will require limited administration, in line with the “Low Income, Low Assets” scheme which the AiB currently operates. However, in complex cases, the AiB will continue to contract qualified insolvency practitioners to carry out the work.

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6 This funding was announced before the Home Owner and Debtor Protection (Scotland) Bill was introduced (Scottish Government 2008). The projects which are to receive funding were announced in September 2009 (Scottish Legal Aid Board 2009).
<table>
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<tr>
<th><strong>In terms of the AiB’s current work, the Scottish Government notes that the agency took on 13,285 new bankruptcies in 2008. It is confident that the 500 new cases it predicts under the “certificate for sequestration” route can be managed within the staff resource identified in the Financial Memorandum.</strong></th>
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<td><strong>Given the impact of the Bill’s proposals on the insolvency practitioner sector, the Committee welcomes the Scottish Government’s commitment to look again at whether insolvency practitioners should be able to administer a bankruptcy which results from a trust deed proposal which fails to become protected (paragraph 158).</strong></td>
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<td><strong>The Scottish Government will bring forward an amendment at Stage 2 to keep the “failed trust deed” route into bankruptcy, enabling insolvency practitioners to administer such bankruptcies.</strong></td>
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<tr>
<td><strong>The Scottish Government should respond to concerns that more training and resources would be required for money advisers to act as “authorised persons” for the purposes of issuing a certificate for sequestration (paragraph 163).</strong></td>
</tr>
<tr>
<td><strong>The Scottish Government notes that it already funds money advice training through the Money Advice Training, Resources, Information and Consultancy Service (MATRICS). It is intended that this will be used to support money advisers to become “authorised persons”.</strong></td>
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<tr>
<td><strong>The Scottish Government should clarify how it intends that provisions which allow a creditor to exclude themselves from a protected trust deed will work in practice. Concerns have been raised that the proposal will result in a “two-tier” system of debt recovery, with creditors free to pursue their debts outwith the terms of the protected trust deed (paragraph 171).</strong></td>
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<tr>
<td><strong>It is the Scottish Government’s intention that creditors will only be allowed to exclude themselves with the agreement of the person granting the protected trust deed. The provision will be examined again to ensure that this is made clear.</strong></td>
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<td><strong>There is significant disagreement over the effects of section 10(b) (ii) of the Bill, which would allow a protected trust deed which does not include the family home to become protected and therefore binding on all creditors. The Committee believes that the wide divergence of views highlight a failure in the consultation process and recommends that the minister report back on further discussions with the insolvency practitioner sector to resolve matters (paragraph 209).</strong></td>
</tr>
<tr>
<td><strong>The Scottish Government believes that paragraph 67 of the Policy Memorandum provides a clear description of what is intended by section 10(b)ii). However, it accepts that stakeholders have misunderstood this. It also confirms that discussions with insolvency practitioners on this issue are ongoing.</strong></td>
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<tr>
<td><strong>The Committee also calls for the Scottish Government to provide examples which show how section 10(b) (ii) will work in practice.</strong></td>
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<tr>
<td><strong>The Scottish Government has provided some examples of how section 10(b)ii) would work in practice at section 209 of its response to the Stage 1 Report (Scottish Government 2010).</strong></td>
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<tr>
<td><strong>The Scottish Government should enter into discussions with the Edinburgh Gazette in relation to the costs of removing certain</strong></td>
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<tr>
<td><strong>The Scottish Government states that it has had further discussions with Her Majesty’s Stationery Office (which is responsible for</strong></td>
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</table>
The fact that disagreement remains over the actual costs and benefits of the proposals was highlighted in the Finance Committee's report on the Financial Memorandum as an example of the failure of the consultation process (Scottish Parliament Finance Committee 2009, paragraphs 54 and 55).

The Scottish Government should provide further information on the work which will be undertaken and the timescales involved to ensure that the Register of Insolvencies is able to supply the information currently provided by the Edinburgh Gazette to clients such as credit reference agencies (paragraph 235).

The Scottish Government reports that it has held meetings with credit reference agencies and other data users and will continue this dialogue. The credit reference agencies supplied the AiB with their data requirements on 5 January 2010, and the AiB is confident that the data requested can be delivered. The Scottish Government estimates that the necessary changes can be made to the Register of Insolvencies by October 2010 and states that the relevant section of the Bill will not be commenced until satisfactory arrangements are in place.

The Scottish Government should enter into discussions with those stakeholders who disagree with the assumptions made in the Financial Memorandum to the Bill and report back to the Committee on the results prior to Stage 2 (paragraph 240).

The Scottish Government states that it has held meetings with Her Majesty’s Stationery Office as well as insolvency practitioners. However, nothing has arisen that would cause a revision of the costings in the Financial Memorandum.

### STAGE 1 DEBATE

The Stage 1 debate took place on Thursday 17 December 2009. Below is a summary of the main points raised in the debate.

Alex Neil MSP, the Minister for Housing and Communities, spoke to the motion. He emphasised the Scottish Government’s view that both parts of the Bill were needed to address unnecessary homelessness. He also suggested that, where there was disagreement among stakeholders, this related to the method of implementation rather than the fundamental principles of the Bill. He noted that the Scottish Government would be bringing forward amendments at Stage 2 to address some of the concerns expressed in relation to the Bill.

Duncan McNeil MSP, convener of the Local Government and Communities Committee, noted the differences between Parts 1 and 2 of the Bill. The Committee had found general support for the principles of Part 1 and, given the need to act quickly to provide protection for those facing repossession, was happy that the consultation process had been adequate. However, there was much disagreement among stakeholders over the need for, and effects of, provisions in Part 2. In this respect, the consultation process which led to the production of Part 2 had been unsatisfactory.

Cathy Jamieson MSP agreed that it was important to provide additional support to homeowners during the recession. However, she raised concerns that the good intentions behind Part 1 of...
the Bill were being jeopardised by the poor manner in which Part 2 had been handled. She stated that the Scottish Parliament would expect to see a much improved Bill when it returned at Stage 3.

David McLetchie MSP noted that, in his view, the Bill did little more than enshrine in legislation the good practice followed by most lenders. He was very critical of the process which led to the proposals in Part 2 of the Bill and the lack of clarity around how the Scottish Government intended to take forward other legislative initiatives in this area.

David Whitton MSP highlighted the concerns of insolvency practitioners that Part 2 of the Bill had not been properly consulted on and risked creating a number of unintended consequences. Their biggest area of concern was allowing the family home to be exempted from a protected trust deed, and Mr Whitton suggested this issue was best dealt with as part of a forthcoming consultation on personal insolvency rather than in this Bill.

Patricia Ferguson MSP argued that the Bill had been badly constructed by linking together the much needed provisions of Part 1 with the controversial aspects of Part 2. However, she noted that the need for action had meant the Committee was prepared to accept the general principles of the Bill. Of particular concern was the resourcing of proposals regarding lay representation, and she called on the Scottish Government to indicate that current funding would be supplemented if required to allow advice organisations to meet expectations.

Bob Doris MSP emphasised that, in his view, the protected trust deed provision of the Bill simply allowed negotiation over the treatment of a family home. He stressed that no solution was being forced on creditors and therefore the concerns raised by insolvency practitioners were a “red herring”.

Nigel Don MSP noted that the provision of written information was not an effective method of intervention for some people, especially at times of stress. He asked that this point was taken on board when considering how to support people to make use of the provisions in the Bill. He also highlighted that lay representatives may not be equipped to argue on points of law, and that this factor should also be considered when implementing the Bill.

In closing for the Scottish Government, Fergus Ewing, Minister for Community Safety, confirmed that the Scottish Government would lodge amendments at Stage 2 enabling insolvency practitioners to act as trustees in “certificate for sequestration” cases and re-introducing the failed protected trust deed route into bankruptcy. He hoped that this would make it clear that it was not the intention of the Bill to remove work from the insolvency practitioner sector.

**STAGE 2**

The Local Government and Communities Committee held Stage 2 proceedings in relation to the Bill on 27 January 2010. The Official Report of the Stage 2 meeting can be found at:

[http://www.scottish.parliament.uk/s3/committees/lgc/or-10/lg10-0302.htm#Col2753](http://www.scottish.parliament.uk/s3/committees/lgc/or-10/lg10-0302.htm#Col2753)

**AMENDMENTS**

What follows is a description of the main amendments proposed to the Bill and how the Committee dealt with them. It is not an exhaustive discussion of all amendments tabled.
PART 1

Section 1: simplified voluntary surrender process

The Committee agreed Scottish Government amendments 1 to 3. These are intended to create a simplified process for voluntarily surrendering possession of a property without the lender having to go to court. Instead of swearing an affidavit\(^7\), the borrower and other interested parties are able to confirm in writing that they consent to repossession by the creditor. This addresses concerns that the original process was too bureaucratic (col 2754).

Section 2: court powers on application by creditor under the 1970 Act

Scottish Government amendment 4 was directed at ensuring the court had a full range of powers when considering a creditor’s application under the Conveyancing and Feudal Reform (Scotland) Act 1970 (c. 35). Non-Government amendment 55 sought to extend those powers further by requiring that the court may only grant a creditor application where it is reasonable in all the circumstances to do so.

The Minister argued that the introduction of a reasonableness test would disrupt business in the sheriff courts as sheriffs may continue cases where the debtor is not available to comment. Mary Mulligan MSP, proposing amendment 55, argued that the test reflected provisions in other legislation in relation to eviction and, in any event, a court should be free to decide for itself which circumstances were relevant to its decision. Both amendments fell after a division where the convener cast his deciding vote in favour of the status quo (col 2759).

A further non-Government amendment (amendment 56) aimed to ensure that, where a creditor application fails because the creditor has not complied with the pre-action requirements, the debtor will not be liable for expenses. Bob Doris MSP withdrew this amendment after the Minister stated that the matters it dealt with were reserved and therefore outwith the competence of the Scottish Parliament (col 2762).

Section 3: court powers on application by creditor under the 1894 Act

Scottish Government amendment 7 sought to replicate the effects of amendment 4 in relation to the Heritable Securities (Scotland) Act 1894 (c. 44). Similarly, non-Government amendment 57 replicated amendment 55 to introduce a reasonableness test to court consideration of a creditor application under the 1894 Act. Amendment 7 was passed after a division where the convener cast his deciding vote in favour of the amendment. Amendment 57 was also passed on division, with four votes in favour, three against and one abstention (col 2767).

Non-Government amendment 58 replicated amendment 56 to prevent a debtor becoming liable for expenses where a creditor has failed to meet the pre-action requirements under the 1894 Act. For the reasons discussed above, the amendment was not moved.

Section 6: recall of decree under the 1970 Act

The Committee agreed a series of Scottish Government amendments to alter the process for recalling a decree. Amendment 21 enables a creditor to petition to recall a decree. Amendment 22 removes the time limit to recalling a decree so that a recall can happen any time before

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\(^7\) An affidavit is a written document, the contents of which the person making the affidavit swears under oath, or affirms, to be true.
actual eviction. Amendments 23 and 24 removes the restriction that only one petition for recall of decree can be made. This was intended to address stakeholder concerns that allowing only one recall may unfairly prejudice the interests of other entitled residents (col 2767).

Section 6: recall of decree under the 1894 Act

The Committee agreed Scottish Government amendments 27 to 30 to replicate amendments 22 to 24 in relation to the 1894 Act.

PART 2

Section 9: “certificate for sequestration” route into bankruptcy

The Committee agreed Scottish Government amendments 43 to 48 to alter the process for certifying that a debtor is bankrupt. Amendment 43 removes the requirement that the AiB is appointed as trustee in certificate for sequestration cases, leaving it open for insolvency practitioners to take on this work. Amendment 45 re-instates the “failed trust deed” route into bankruptcy, further allaying insolvency sector concerns that the Bill would unfairly limit their ability to do business. Amendments 47 and 48 change the process for granting a certificate for sequestration so that evidence of bankruptcy is required from the debtor. Amendment 47 was agreed to and amendment 48 was agreed to after division, with seven votes in favour and one against (col 4744).

Section 10: exclusion of debtor’s home from a protected trust deed

Scottish Government amendment 50 makes significant changes to section 10:

- it changes the definition of property which can be excluded. The Bill as introduced applied to a “family home”, covering homes occupied by current/former spouses and civil partners. The amendment replaces this with the “debtor’s dwellinghouse”, defined as the sole or main residence of the debtor. This allows single people to benefit from the proposals, but excludes those (such as ex-spouses) who live somewhere which is owned but not occupied by the debtor
- it limits property which can be excluded to homes where there is a secured creditor. This means that the house has to be the subject of a mortgage/secured loan before it can be excluded, although the extent of the secured loan is not specified
- it clarifies that the only debts which can be excluded from a protected trust deed are those owed to a secured creditor, where the secured creditor has agreed in advance not to claim under the protected trust deed
- it removes Scottish Ministers’ power to exclude other classes of property from a protected trust deed by statutory instrument

In correspondence to the Committee, the Institute of Chartered Accountants of Scotland (ICAS) raised concerns that the amendment does not remove the confusion around how this provision will operate. They also remain concerned that the process will be open to abuse by the debtor (ICAS 2010).
Non-Government amendment 59 proposed that section 10 be removed altogether. David McLetchie MSP, proposing the amendment, argued that, even as amended, section 10 did not command the support of all stakeholders (col 2777). The matters it covered were better dealt with as part of the forthcoming consultation on personal insolvency. He pointed out that the section conferred no new legally enforceable rights on debtors and as the process of exclusion required the consent of creditors the measure was not an additional protection to homeowners (col 2777). After division, amendment 50 was agreed to with seven in favour and one against. Amendment 59 was rejected, with one vote in favour and seven against (col 2748).

**After section 11**

Non-Government amendment 51 proposed to limit the remuneration of trustees under the Bankruptcy (Scotland) Act 1985 (c. 66) so that payment would be proportionate to the original debt. Pauline McNeill MSP, proposing the amendment, highlighted the case of a constituent with an initial debt of £4,000 who had ended up with a total liability of £27,000 as a result of work by an insolvency practitioner. The Scottish Government argued that capping fees payable to insolvency practitioners was not a practical solution as small debts could be complicated and require significant work. Ms McNeill withdrew the amendment after the Minister agreed to discuss the issue further (col 2790).

Stage 3 proceedings in relation to the Home Owner and Debtor Protection (Scotland) Bill are scheduled to take place on 11 February 2010.
SOURCES


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RELATED BRIEFINGS

SB 09-73 Home Owner and Debtor Protection (Scotland) Bill

SB 09-46 Debt

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