Stage 1 Report on the Bankruptcy (Scotland) Bill
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The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the
      Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to
determine whether the attention of the Parliament should be drawn to any of the
matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed
   legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should
   be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the
   2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the
   Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary
   Bureau in accordance with Rule 9.18.3.

www.scottish.parliament.uk/delegated-powers

DPLR.Committee@scottish.parliament.uk

0131 348 5175
Committee Membership

**Convener**
Nigel Don
Scottish National Party

**Deputy Convener**
John Mason
Scottish National Party

**John Scott**
Scottish Conservative and Unionist Party

**Stewart Stevenson**
Scottish National Party
Introduction

1. The Bankruptcy (Scotland) Bill (“the Bill”) was introduced in the Scottish Parliament on 30 October 2015 by the Lord Advocate, Frank Mullholland QC.

2. The Bill is a consolidation bill. The aim of the Bill is to consolidate the legislation relating to bankruptcy law in Scotland by bringing together enactments of bankruptcy into one statute.

3. The Delegated Powers and Law Reform Committee (“the Committee”) was designated as lead committee for Stage 1 consideration of the Bill.

4. This is the first consolidation bill to be referred to the Committee. The Committee’s remit was changed by the Parliament on 27 October 2015 on the recommendation of the Standards, Procedures and Public Appointments (“SPPA”) Committee to allow it to consider consolidation bills.

5. As the first consolidation bill to be considered by this Committee, the Committee offers some reflections on the process at Annexe C.

6. In addition to carrying out the role of lead committee, under rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill which confer power to make subordinate legislation. Accordingly, the Committee considered the delegated powers within the Bill and reported upon them in its 76th Report of 2015.¹
Executive Summary

Need for consolidation

7. It appears to the Committee that there is a strong argument in favour of consolidating bankruptcy legislation.

8. There was unanimity amongst those who gave evidence to the Committee that bankruptcy legislation in its current form is unwieldy and that consolidation is needed.

9. The Committee notes the challenges the legislation presents even to professionals and those who use the legislation on a regular basis; and it appears to the Committee that the challenges it would present to a member of the public seeking to use it would be almost insurmountable.

10. This is of considerable concern to the Committee.

11. In the Committee’s view bankruptcy legislation should therefore be consolidated.

12. While the Scottish Government could wait for further developments before consolidating the legislation, this could run the risk of the work already done on the consolidation exercise becoming out of date. There is a pressing need for the legislation to be consolidated and accordingly the Committee considers that now is an appropriate time for consolidation.

Consolidation of enactments and Scottish Law Commission recommendations

13. The Committee is content that the relevant enactments have been included within the Bill.

14. The Committee is therefore satisfied with the approach taken to which enactments have been, and have not been, included within the consolidation. This means that the Committee is content that the Debt Arrangement Scheme is not included within the consolidation.

15. The Committee agrees that the Scottish Law Commission (‘SLC’) recommendations included within the Bill are necessary for the purpose of producing a satisfactory consolidation.

16. The Committee welcomes the Scottish Government’s decision to make consequential amendments to the Bankruptcy (Scotland) Act 1985 (required as a result of the implementation of SLC recommendations 4 and 5 by the Bankruptcy and Diligence etc. (Scotland) 2014 Act), through a separate legal instrument, rather than adding these for the first time through the Bill.

17. The Committee notes the section 104 Order.
18. With reference to paragraph 7 of schedule 4 to the Scotland Act, the Committee is satisfied that the relevant provisions are restated in the Bill with only minimal modifications required for the purposes of the consolidation; as such the law on reserved matters is not modified as a result of the consolidation.

19. The Committee agrees that the recommendations of the SLC are clearly and appropriately given effect in the Bill, subject to minor changes listed in Annexe A.

Correctness and clarity of consolidation

20. The Committee welcomes the indication from the drafter to retain “forthwith” throughout and encourages the Scottish Government to bring forward amendments at Stage 2 to make this change.

21. The Committee welcomes the drafter’s intention to re-visit the approach taken to abbreviations used in certain sections of the Bill.

22. One of the primary purposes of consolidating legislation is to make the law clearer and more accessible.

23. Stakeholders have suggested that the use of abbreviations in a number of sections has had a negative effect on the clarity and accessibility of those sections.

24. The Committee encourages the Scottish Government to bring forward amendments at Stage 2 to remove the abbreviations where appropriate and provide for drafting that is clearer for the user of the legislation.

25. Committee notes the concerns highlighted by some stakeholders about the structure of the Bill. The Committee equally notes the view expressed by the drafter that whatever structure is chosen it is unlikely to meet everyone’s wishes.

26. The Committee would concur with these sentiments.

27. The drafter has provided the Committee with a reasoned explanation for the structure he has adopted and the Committee would not be minded to support a radical re-structuring of the Bill at this late juncture.

28. The Committee welcomes the drafter’s willingness to address the points raised by the Committee about the location within the Bill of the definition of “debt advice and information package”.

29. While noting the concerns expressed by stakeholders about the term “fall asleep”, the Committee understands the position taken by the drafter in terms of retaining the term.

30. The Committee accepts that this term (“fall asleep”) should be retained in the Bill.

31. The Committee recommends that the Bill, through the consolidation process, should not introduce ambiguity.
The Committee supports the removal of the word “or” where this word has been inserted between specific delegated powers provisions in the Bill.

Overall conclusion

The Committee recommends to the Parliament that it agrees that the Bill should proceed as a consolidation bill.
Background

Consolidation bills

34. This is the first consolidation bill to be referred to the Committee.

35. This is the first consolidation bill to be considered by the Parliament since 2003.

What is a consolidation bill?

36. A consolidation bill brings together various enactments into one piece of legislation, making the law clearer and more accessible. A consolidation bill preserves the effect of the existing law but expresses it coherently and in a modern drafting style and removes redundant clauses.

37. A consolidation bill is generally initiated by the Scottish Law Commission (“SLC”), as it is in this case, following a SLC report into a particular area of law. The Scottish Government then decides whether to take the SLC report forward and to introduce a consolidation bill. A consolidation bill can, however, be introduced by any member of the Scottish Parliament.

38. As well as bringing together existing legislation, consolidation bills can also give effect to SLC recommendations (contained in the relevant SLC report) to improve, simplify and update the law in that area. Beyond that, consolidation bills cannot make changes to the substance of the law or make policy changes.

39. Consolidation bills may consolidate both primary and secondary legislation. Legislation covered by a consolidation exercise must clearly relate to the area of law being consolidated.

40. The Committee has produced the following video to explain consolidation bills— https://www.youtube.com/watch?v=9W0WeAwf9YA

What has been the Scottish Parliament’s experience of consolidation bills?

41. To date the Scottish Parliament has only considered one consolidation bill; the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Bill (“the Salmon Bill”)² in 2002/03.

42. The Salmon Bill was introduced on 27 November 2002. The Bill followed a recommendation of the Scottish Salmon Strategy Task Force that the law on fishing of salmon and other freshwater fish should be consolidated. Before the passing of this Bill, Victorian and even Georgian legislation on salmon fishing was still in force. The Bill also implemented all 29 recommendations made by the SLC in this area.
43. An ad hoc consolidation committee (“the Salmon Committee”) was formed to consider the Salmon Bill, supported by a legal adviser. The Salmon Committee at Stage 1 was charged with reporting to the Parliament on the question “whether the law which is restated in the Bill should be restated”.

44. No consolidation bills have been introduced since then.

45. In 2015 the SPPA Committee recommended to the Parliament that the Standing Orders around the referral of consolidation bills be changed.

46. It had previously been the case that an ad hoc committee had to be established for the purpose of considering a consolidation bill.

47. The SPPA Committee’s recommendation was prompted by correspondence from the Scottish Government who invited the SPPA Committee to consider whether the rules around the referral of consolidation bills should be changed. In that correspondence the Government suggested that given the Delegated Powers and Law Reform Committee’s existing role in relation to Scottish Law Commission bills, the Committee was well equipped to consider consolidation bills and the SPPA Committee should consider providing for consolidation bills to be referred to that Committee.

48. The SPPA Committee was minded to agree with the Scottish Government’s suggestion, but also allowed for consolidation bills to still be referred to ad hoc committees.

49. It is suggested, however, in the SPPA Committee’s report that removing the obligation to refer a consolidation bill to an ad hoc committee whilst at the same time enabling the Delegated Powers and Law Reform Committee to consider consolidation bills may encourage more consolidation bills to be introduced as an existing committee would be in place to consider them.

**What is the role of a Committee in considering a consolidation bill?**

50. All of the law contained within a consolidation bill has been scrutinised and approved when originally enacted. The policy behind the law does not, therefore, need to be re-considered. The Committee’s role is to consider whether the consolidation is accurate, clear and complete.

51. At Stage 1 the question for the Committee to consider and report on is: “whether the Bill should proceed as a consolidation bill.” (Standing Orders 9.18.5). The Guidance on Public Bills provides further information: “the question is not whether the committee approves of the law that the Bill consolidates, but only whether it approves of its being consolidated.”

52. Unlike other Bills, the Committee does not consider the general principles of the Bill. It is however expected that, in arriving at a conclusion as to whether the Bill
should proceed as a consolidation bill, the lead Committee will need to be confident that the consolidation is necessary, accurate, clear and complete. It is also expected that the lead Committee will consider the SLC recommendations, whether these are necessary for consolidation and how these have been implemented in the Bill. The Committee could undertake this task by considering both the general approach to the Bill and the detail of the Bill, section by section.

53. The Committee reports to the Parliament on the question of whether the Bill should proceed as a consolidation bill.
The Bill

54. The Bill consolidates the Bankruptcy (Scotland) Act 1985 ("the 1985 Act") and the subsequent amending legislation, principally the Bankruptcy (Scotland) Act 1993; the Bankruptcy and Diligence etc. (Scotland) Act 2007 and the Bankruptcy and Debt Advice (Scotland) Act 2014 ("the 2014 Act"). It also consolidates the substantive provisions of the Protected Trust Deeds (Scotland) Regulations 2013.

Consideration of the Bill

55. In formulating its approach the Committee drew upon the approach taken by the Salmon Committee. This approach was supported by the then Procedures Committee when it reviewed the procedures for consolidation bills in 2006.

56. Mindful of this previous experience, and with a view to seeking to answer the question as to whether this Bill should proceed as a consolidation bill, the Committee agreed to focus on the following questions:

Committee’s Questions

1. Whether the law of bankruptcy should be consolidated?

2. Whether the Committee is satisfied with the approach taken to which enactments have been, and have not been, included within the consolidation?

3. Whether the Bill correctly consolidates the enactments or changes their substantive legal effect only to the extent of giving effect to the SLC’s recommendations?

4. Whether the Bill consolidates the law clearly, coherently and consistently?

5. Whether the recommendations of the SLC are clearly and appropriately given effect in the Bill?

6. Whether the SLC recommendations are necessary for the purpose of producing a satisfactory consolidation?

57. In some cases, a consolidation bill may give effect to SLC recommendations and, as such, potentially makes new provision (although even then such provision should be confined to technical changes in connection with the consolidation).

58. The SLC Report on the Consolidation of Bankruptcy Legislation in Scotland (2013) ("SLC Report") informs this Bill, however, almost all of the SLC recommendations were implemented by the 2014 Act. As a result, the Committee’s role was largely confined to satisfying itself that the Bill restates the existing law; and as such the Committee’s questions relating to the SLC recommendations (questions 5 and 6 above) involved relatively little consideration on the part of the Committee.
59. In order to answer these questions the Committee received briefings from its legal adviser on both the general issues in respect of the consolidation (whether it is desirable that the law of bankruptcy should be consolidated, which enactments are/are not included in the consolidation and consideration of the SLC recommendations) and on the specific Parts of the Bill (as to whether the law has been correctly consolidated, and whether that consolidation is clear, coherent and consistent).

60. Each week the Committee considered different Parts of the Bill in detail and agreed questions on the consolidation to put to the drafter in writing. The drafter then responded to these points ahead of the next meeting of the Committee. In addition, the Committee took oral evidence from the drafter at its meeting on 1 December 2015 and on 5 January 2016.

61. The support provided by the Committee’s legal advisers was essential in enabling the Committee to apply effective scrutiny to the Bill. That support was of the highest quality and the Committee would wish to take this opportunity to thank its legal advisers for the support they provided to the Committee.

Evidence gathering

62. To inform its consideration of the Bill and to assist the Committee in answering the six questions identified above, the Committee issued a call for evidence on the Bill. Nine submissions were received (listed at Annexe G).

63. The Committee also held oral evidence sessions on 17 November, 1 December and 15 December 2015 and 5 January 2016. Evidence was taken from the drafter, the Accountant in Bankruptcy (“the AiB”), the Scottish Government, legal practitioners and accountancy practitioners.

64. The Committee thanks those who informed its consideration of the Bill. In particular the Committee would wish to thank the drafter and those who supported him in producing a Bill that was fit for purpose. This clearly involved a very considerable amount of work and the small number of issues highlighted by the Committee is testament to the high quality of that work.

Need for consolidation (Committee’s Question 1)

65. Before considering the detail of the Bill, the Committee considered “whether the law of bankruptcy should be consolidated” (Question 1).

66. The SLC Report sets out the arguments in favour of consolidation, noting that although most of the law proposed for consolidation is already contained in a single Act (i.e. the 1985 Act) that Act “has been so heavily amended, on so many occasions, that it has lost coherence and rational structure”. Many provisions of the 1985 Act are “inordinately long, and numbering has become complex and unwieldy”. The SLC Report also notes that “the primary aim of consolidation is to
make the legislation on a particular area of law more accessible for practitioners and those affected by it”\textsuperscript{6}.

67. There was unanimous support for the consolidation of bankruptcy legislation in the evidence the Committee received.

68. Witnesses highlighted the considerable challenges of using the current legislation as referred to by the SLC.

69. These concerns about the “unwieldy” nature of bankruptcy law in its current form were echoed across the evidence received by the Committee including from the Minister for Business, Energy and Tourism.

70. Rachel Grant, giving evidence on behalf of R3 Association of Business Recovery Professionals (“R3”), captured these sentiments—

\begin{quote}
You have only to look at the Bankruptcy (Scotland) Act 1985 to see that it is very unwieldy. Having to find provisions named something like 5(A)(c)(ii)(d) makes it very difficult to follow. That is the first reason for consolidation—it sets things out in a proper, flowing way, with no duplication of capital letters and section numbers and so on.

The second reason is that the legislation has changed over the years. For example, recently, the Bankruptcy and Debt Advice (Scotland) Act 2014 introduced a specific requirement for a debtor to co-operate. There had always been a requirement to co-operate, but it was not spelled out. The current legislation has the duty to co-operate set out all over the place. If we pulled that together into one specific part of a new act, it would be easier for stakeholders to follow.

It is not just lawyers and insolvency practitioners—IPs—who deal with the legislation; it is also the general public, and it has to be accessible to them. I am not suggesting that everybody wants to sit down and read the acts, but they should not be exclusively for lawyers and accountants.\textsuperscript{7}
\end{quote}

71. In welcoming the consolidation, it was however noted by some witnesses that there may be some additional costs flowing from the consolidation exercise.

72. The Institute of Chartered Accountants of Scotland (“ICAS”) highlighted that practitioners may face costs as a result of the legislation – for example, in updating software, standard-form letters and publications, and in training staff – but reflected that the benefits of the Bill far outweigh any challenges it might present.

73. The Committee also explored whether this is the right time to consolidate bankruptcy legislation.

74. Richard Dennis, the Accountant in Bankruptcy, argued that now was the best time for consolidation—
Given that we have just completed what might be the most radical reforms to personal insolvency this century, now is a particularly good time for consolidation. The bill, which is about ease of use and modernisation, will be available in future years and, as I said, after a period of major reform is a good time rather than a bad time to consolidate.  

75. Rachel Grant, concurred with Richard Dennis—

The fact that new legislation dating from 2014 has just come into force this year makes it better to introduce the consolidation act now, simply because people have only started becoming familiar with the new legislation or perhaps are not even familiar with it yet. That means that there will be a one-stop shop, if you like, and people will just learn the new provisions and new section numbers. I think that that is a good idea and that the 2014 act should not delay the new bill coming into force.  

76. However, several respondents to the call for written evidence noted that the changes made by the 2014 Act were still bedding in. These were expected to be formally reviewed by AiB in 2016 and it was noted that this process may identify matters requiring amendment. Other areas where further changes to the bankruptcy law would be needed were also highlighted, including amendments to reflect forthcoming changes to European Union law in this area.

77. Several respondents were also keen to stress that they would welcome future changes to bankruptcy law, so that the Bill should not been seen as the final word on the matter. However, no organisation felt that the consolidation exercise should be delayed as a result of these issues. Money Advice Scotland summed up the general view that “now is as good a time as any” to consolidate the law. 

78. Graham Fisher of the Scottish Government’s Legal Directorate, explained why it was important that the consolidation was pursued without further delay—

We had the Scottish Law Commission report in 2013 and then the series of changes in the 2014 act. An issue about the preparation of a consolidation is that, if the work is not done, it can end up being lost. The drafter has to do a lot of detailed technical work to put the consolidation bill together, but with such bills there is always a danger that that work will be lost because of further changes and updates to the law from a range of different areas—in this case, not just Scottish Government proposals to change bankruptcy law, but ad hoc consequential amendments that are made by legislation in other areas. There is always a danger in waiting for the next set of policy reforms. 

79. Given that the SLC report was published in 2013, the Committee queried why an exercise to consolidate the legislation had not been undertaken at the time of the 2014 Act. Alex Reid, giving evidence on behalf of AiB, explained why—
Consolidation was an option at the time of the Bankruptcy and Debt Advice (Scotland) Act 2014 because it implemented almost all the SLC recommendations. However, the decision was made to allow those changes to be implemented and to settle in before consolidation. That is the reason why consolidation is being done now. 

80. None of those who gave evidence to the Committee suggested that the consolidation exercise should have been conducted as part of the 2014 Act.

81. It appears to the Committee that there is a strong argument in favour of consolidating bankruptcy legislation.

82. There was unanimity amongst those who gave evidence to the Committee that bankruptcy legislation in its current form is unwieldy and that consolidation is needed.

83. The Committee notes the challenges the legislation presents even to professionals and those who use the legislation on a regular basis; and it appears to the Committee that the challenges it would present to a member of the public seeking to use it would be almost insurmountable.

84. This is of considerable concern to the Committee.

85. In the Committee’s view bankruptcy legislation should therefore be consolidated.

86. While the Scottish Government could wait for further developments before consolidating the legislation, this could run the risk of the work already done on the consolidation exercise becoming out of date. There is a pressing need for the legislation to be consolidated and accordingly the Committee considers that now is an appropriate time for consolidation.
Consolidation of enactments and Scottish Law Commission recommendations (Committee’s Questions 2, 5 and 6)

Scope of the Bill

87. The Committee considered the following questions:

Whether the Committee is satisfied with the approach taken to which enactments have been, and have not been, included within the consolidation? (Question 2)

Whether the recommendations of the SLC are clearly and appropriately given effect in the Bill? (Question 5)

Whether the SLC recommendations are necessary for the purpose of producing a satisfactory consolidation? (Question 6)

88. The Committee considered the scope of the consolidation, in terms of the enactments consolidated, and whether this was satisfactory. As part of this exercise, the Committee also explored the implementation of the SLC recommendations, and the necessity of including these within the Bill.

89. The Scottish Government described the scope of the Bill as follows:

Principally, the bill consolidates the material in the Bankruptcy (Scotland) Act 1985 and its amendments in other legislation. … it also adds in the protected trust deeds regulations.\(^{13}\)

90. The Committee explored with the drafter how the list of enactments was arrived at, to ensure its completeness. The drafter outlined the approach taken:

The starting point was always the 1985 act. Where the 1985 act is supplemented in some way, we have tried to take account of whatever it is that supplements it … Nothing has emerged in any way that we have missed – we have worked through a lot of acts and subordinate legislation. … I am confident that we have the bankruptcy law of Scotland expressed in the document.\(^{14}\)

91. There was broad agreement amongst respondents to the Committee’s call for evidence that the Bill had consolidated all relevant legislation. The only dissenter was ICAS. It argued that legislation dealing with the Debt Arrangement Scheme (“DAS”) should also feature in the consolidation.

Debt Arrangement Scheme

92. In oral evidence ICAS focused on the argument that debt advice, bankruptcy and protected trust deeds have been harmonised and deliver the same end product (debt relief); “it would make more sense to have all three procedures within one piece of legislation.”\(^{15}\)
93. R3 disagreed. It concluded that DAS can be distinguished from the bankruptcy process, whilst stating that its inclusion may be appropriate at a later date.

94. Money Advice Scotland also opposed the inclusion of DAS within the Bill—

We do not wish to see DAS form part of bankruptcy legislation. In our view, this would act as a further barrier to people who cannot access bankruptcy or Protected Trust Deed because these are insolvency solutions that are precluded by certain types of employment. The inclusion of DAS in the Bankruptcy (Scotland) Bill would effectively leave people in that situation with a burden of debt as it would be considered overall as a bankruptcy remedy that is unavailable to them.16

95. The Minister for Business, Energy and Tourism articulated the view that DAS was sufficiently different to bankruptcy legislation to warrant its exclusion—

I fully understand, from a practitioner’s point of view, why [ICAS] made that argument, because there is a certain rationale for it. However, that is substantially overwritten by the fact that the debt arrangement scheme is not bankruptcy law. The debt arrangement scheme was introduced by Parliament in 2005 and has been highly successful in allowing people to pay off their debts in full, or nearly in full. That is entirely different from bankruptcy. The concept of bankruptcy is to provide a process whereby people have relief from their debts. In other words, DAS as a mechanism is a species of debt law, not bankruptcy law.17

96. The Committee is content that the relevant enactments have been included within the Bill.

97. The Committee is therefore satisfied with the approach taken to which enactments have been, and have not been, included within the consolidation. This means that the Committee is content that the Debt Arrangement Scheme is not included within the consolidation.

Scottish Law Commission recommendations: Protected Trust Deeds

98. The Committee considered that only SLC Recommendation No. 38 (from the SLC Report) formally falls within the Committee’s scrutiny remit. This recommendation is that the law concerning Protected Trust Deeds (“PTDs”) should be enacted in primary legislation and should be integrated with provisions on voluntary trust deeds for creditors. As identified earlier in the report, almost all of the remaining SLC recommendations have already been taken forward in the 2014 Act.

99. The Committee explored the few remaining exceptions in the evidence session on 17 November 2015, with Scottish Government officials and AiB. The remaining SLC recommendations were identified as being either no longer relevant or not supported by the Scottish Government, or as being outside the scope of this Bill
(the recommendations outside the scope of this Bill are explored at paragraph 76). The Committee were satisfied with the reasons provided.

100. At the evidence session on 17 November 2015, the Scottish Government outlined some of the SLC’s reasoning for including PTDs within the Bill—

…the SLC noted the Law Society of Scotland’s view that the protected trust deeds regulations are core to the daily practice of insolvency law… It might also be worth saying that provision for protected trust deeds has always been made under the bankruptcy statute. In the past, schedule 5 of the 1985 act contained more detailed provision on protected trust deeds. Under the bill, that is kept in the main bankruptcy statute. It fits well within the framework of the material that is consolidated in the bill. 18

101. The Committee explored with the Scottish Government why PTDs had been included in primary legislation given that provision for them is currently made in secondary legislation. Scottish Government officials provided the following rationale—

...protected trust deeds are considered to be a major alternative route into insolvency protection, and they are sufficiently important to warrant inclusion in the primary legislation.19

102. The Committee agrees that the Scottish Law Commission recommendations included within the Bill are necessary for the purpose of producing a satisfactory consolidation.

103. In correspondence with the drafter, the Committee raised some issues relating to whether the SLC recommendation to include the law on PTDs within the consolidation is clearly and appropriately given effect to in the Bill. Some minor amendments relating to the restatement of the Protected Trust Deed (Scotland) Regulations 2013 (and other legislation) are recommended by the Committee, and are set out in Annexe A.

Consequential amendments

104. The Committee identified an issue in section 16(6) and (7) of the Bill. These sections of the Bill make consequential amendments, the need for which was overlooked, when SLC recommendations 4 and 5 were implemented by the 2014 Act (amending the 1985 Act). However, these changes could arguably fall outside the scope of the consolidation, as recommendations 4 and 5 make no express mention of such consequential amendments.

105. The Scottish Government, in correspondence with the Committee, confirmed its intention to use an alternative legislative route to achieve these changes, by inserting the required consequential amendments directly into the 1985 Act. Given
that these amendments to the 1985 Act would by default flow through into the Bill, no further changes to the Bill would be required.

106. The drafter explained to the Committee why this was the clearest way to make the change—

"The changes will be made in an order under the 2014 act to take account of things that ought to have been done in that act to the 1985 act. That is clearly the sounder way to go because, apart from anything else, the provisions of the 1985 act will still have some application in relation to transitional provisions and proceedings that are continuing."

107. On 21 December the Scottish Government laid an affirmative SSI: The Bankruptcy and Debt Advice (Scotland) Act 2014 (Consequential Provisions) Order 2016 [draft], to bring about the required consequential amendments. If approved by the Parliament, it will come into force on 9 March 2016.

Section 104 order

108. The Committee was provided, for information, with a draft of the section 104 order ("the Order") which is proposed to be made by the Secretary of State under section 104 of the Scotland Act 1998 ("the Scotland Act") in connection with the Bankruptcy (Scotland) Bill ("the Bill").

109. Although the vast majority of the provisions of the 1985 Act relate only to the law of Scotland, some limited provisions extend to the rest of the UK. Under section 29(2)(a) of the Scotland Act, a provision of an Act of the Scottish Parliament is outside the legislative competence of the Scottish Parliament (and is not law) so far as that provision would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland. Due to this restriction in the Scotland Act, the provisions of the 1985 Act which extend beyond Scotland cannot be restated in the Bill.

110. Section 104 of the Scotland Act allows subordinate legislation to make such provision as is considered necessary or expedient in consequence of any provision made by or under any Act of the Scottish Parliament. Such orders are commonly used to make provision in UK law which the Scottish Parliament is unable to make, but which is necessary to complete a particular Bill project. It is intended therefore that these limited provisions of the 1985 Act which apply beyond Scotland will be restated in the Order made under section 104.

111. It is noted that, under section 115(1) of and paragraphs 1, 2 and 3 of schedule 7 to the Scotland Act, the draft Order requires to be laid before and approved by each House of the Westminster Parliament. The draft Order does not require to be laid before or approved by the Scottish Parliament. The Committee’s scrutiny of the draft Order was therefore undertaken on an informal basis, in connection with the Committee’s wider scrutiny of the Bill.
112. In oral evidence to the Committee, the Scottish Government indicated that it is intended that the commencement of the Order will be coordinated with that of the Bill, as part of the package of measures required to restate and consolidate the law of bankruptcy in Scotland. Scottish Government officials confirmed that they have been working closely with UK Government counterparts as regards the timescale for this package of measures, to ensure that this works effectively.

**Paragraph 7 of schedule 4 to the Scotland Act**

113. Section 29(2)(b) of and schedule 4 to the Scotland Act provide that a provision of an Act of the Scottish Parliament is outside the legislative competence of the Scottish Parliament (and is not law) so far as it relates to a reserved matter or modifies, or confers power to modify, the law on reserved matters.

114. Paragraph 7 of schedule 4 to the Scotland Act allows an Act of the Scottish Parliament to restate reserved law and to repeal spent enactments, notwithstanding the restrictions discussed above. The law on reserved matters so restated remains reserved, and may not be modified in any way which would amount to a modification of the law on reserved matters.

115. The Committee considered that various provisions of the Bill relate to or touch on the law on reserved matters. Examples include provisions which relate to or touch on pensions, preferred debts, child and social security benefits, and bank accounts. The Committee considers, however, that these provisions may be restated in the Bill pursuant to the specific saving in paragraph 7 of schedule 4 to the Scotland Act. The Committee is satisfied that the relevant provisions are restated in the Bill with only minimal modifications required for the purposes of the consolidation; as such the law on reserved matters is not modified as a result of the consolidation.

116. The Committee welcomes the Scottish Government’s decision to make consequential amendments to the 1985 Act (required as a result of the implementation of SLC recommendations 4 and 5 by the 2014 Act), through a separate legal instrument, rather than adding these for the first time through the Bill.

117. The Committee notes the section 104 Order.

118. With reference to paragraph 7 of schedule 4 to the Scotland Act, the Committee is satisfied that the relevant provisions are restated in the Bill with only minimal modifications required for the purposes of the consolidation; as such the law on reserved matters is not modified as a result of the consolidation.

119. The Committee agrees that the recommendations of the SLC are clearly and appropriately given effect in the Bill, subject to minor changes listed in Annexe A.
Correctness and clarity of consolidation (Committee’s Questions 3 and 4)

120. In informing its conclusions on the Bill the Committee sought to answer the following questions—

- Whether the Bill correctly consolidates the enactments or changes their substantive legal effect only to the extent of giving effect to the Commission’s recommendations? (Question 3)
- Whether the Bill consolidates the law clearly, coherently and consistently? (Question 4)

121. These questions were explored in the context of the Committee’s detailed section-by-section scrutiny of the Bill.

122. As previously described, the Committee undertook scrutiny of the Bill by considering it in Parts, agreeing questions to put to the drafter. The matters raised in these questions varied in their significance.

123. The drafter responded to these questions and either provided a justification as to why the Committee might be satisfied with the approach taken in the Bill or noted the matter raised and agreed to amend the Bill accordingly.

124. Points raised by the Committee where the drafter agreed to amend the Bill, but which were relatively minor are set out at Annexe A.

125. Minor points raised by the Committee where the Committee was satisfied with the drafter’s response are set out at Annexe B.

126. There were, however, a number of more significant matters and these are discussed over the following paragraphs.

“Forthwith”

127. The Committee explored the use of this term “forthwith” in the Bill. In most cases, the Bill has replaced the word “forthwith”, which is used consistently throughout the 1985 Act, with “without delay”, but in section 22 “forthwith” has been retained.

128. The drafter explained to the Committee that he had sought to modernise the drafting by replacing “forthwith” wherever possible, but had felt obliged to retain it at section 22 in light of litigation on this matter that considered the meaning of the word in the context of that section.

129. The Committee was, however, concerned about this lack of consistency.

130. R3 echoed the Committee’s concerns about the use of “forthwith”. In its written evidence it suggested that “A lack of consistency may be perceived as a change of meaning.”

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131. The Committee explored this issue further with the drafter. The drafter again reiterated his concerns that “forthwith” is no longer used in modern English.

132. The Committee, however, argued that it would prefer “forthwith” to be retained as it would enable consistency to be achieved in the Bill and would also retain the necessary ambiguity of meaning that the word carries with it in the 1985 Act.

133. In the course of the exchange with the Committee the drafter conceded that there would be advantages to reverting to “forthwith” and indicated that he would be content for the Bill to be amended in this way.

134. The Committee welcomes this indication from the drafter and encourages the Scottish Government to bring forward amendments at Stage 2 to make this change.

Abbreviations

135. A number of abbreviations are used within the Bill. The Law Society of Scotland, R3 and ICAS all identified issues with some of these, particularly in terms of accessibility.

136. Rachel Grant explained why R3 was concerned about the use of abbreviations—

   We also have concerns about the use of abbreviations that are not helpful and do not aid understanding at all. We suggest, therefore, that abbreviations be removed, with the exception of AIB, which is well known to mean the Accountant in Bankruptcy, and perhaps PTD, which stands for protected trust deed. Other shorthands such as “OC” for other creditor—and sometimes any other creditor—just add to the complexities.  

137. The Law Society of Scotland highlighted concerns about “designatory letters” used in sections 10, 14, 46, 47, 63, 69 to 73, 104 to 106 and 113 of the Bill.

138. The drafter explained to the Committee that he had used abbreviations as a means to achieve gender neutral drafting and to avoid unnecessary repetition.

139. One of the sections highlighted by the Law Society of Scotland (section 70) was drawn to the drafter’s attention by the Convener—

   I am looking at section 70, as Mr Clark suggested. At the end of section 70(4)(a) I find the letter “T”, which makes perfectly good sense if you know to refer back to the right place, which I think is section 70(1), where the first line defines what “T” is. I must confess that what worries me is that if someone just pulled out section 70(4), they would not know where “T” was defined. I encourage you to think about how we might handle that.
140. In response, the drafter conceded that this section could be drafted more clearly and agreed to re-visit the approach taken to abbreviations in this section and in sections 14, 63 and 113. The drafter also accepted the approach taken to abbreviations in sections 69 to 73 could also be revisited.

141. The Committee welcomes the drafter’s intention to re-visit the approach taken to abbreviations used in certain sections of the Bill.

142. One of the primary purposes of consolidating legislation is to make the law clearer and more accessible.

143. Stakeholders have suggested that the use of abbreviations in a number of sections has had a negative effect on the clarity and accessibility of those sections.

144. The Committee encourages the Scottish Government to bring forward amendments at Stage 2 to remove the abbreviations where appropriate and provide for drafting that is clearer for the user of the legislation.

Structure

145. Concerns were also raised by some stakeholders about the structure of the Bill.

146. ICAS and R3 argued that improvements could be made to the order the sections of the Bill appear in. Specifically they argued that a structure that more closely mirrors the process as followed by practitioners would be more logical.

147. Set out below are a series of suggestions from ICAS and R3 as to how the Bill could be re-structured.

Opening sections of the Bill

148. It was suggested that Part 15 (moratorium on diligence) should appear at the beginning of the Bill. These provisions would be applied before a debtor had decided whether to declare themselves bankrupt or to enter a protected trust deed.

149. R3 also argued that section 16 (meaning of apparent insolvency) should appear at the beginning of the Bill.

150. The Committee explored these suggestions with the drafter in oral evidence. The drafter contended that the approach taken largely followed the pattern of the 1985 Act and had been developed in consultation with others. Furthermore, he argued that whatever approach was taken would never please everyone. In his view, while sections could be moved around he queried whether it would improve the Bill.
Debtor responsibilities

151. Both ICAS and R3 noted that a debtor’s duty to co-operate with the trustee is fundamental to the bankruptcy process. Therefore, they argued that section 215, in which this is outlined, should not be “buried” in the Miscellaneous part at the end of the Bill. They both favoured creating a new part, dealing with “Debtor responsibilities”. This would incorporate section 215 and Part 9 (Examination of the Debtor). ICAS also suggested including sections 218 and 219, dealing with “General offences by the debtor etc.”

152. The Committee explored this suggestion with the drafter in oral evidence at its meeting on 5 January 2016. The drafter was not minded, however, to amend the Bill in this manner, suggesting that he could not see the particular advantages of such an approach.

Extortionate credit transactions

153. Under bankruptcy law, a trustee has wide ranging powers to challenge a credit transaction entered into by the debtor on the basis that the deal was extortionate.

154. These powers are currently contained in section 209 in Part 17 (Miscellaneous) of the Bill. ICAS and R3 argued that it would be better placed in Part 7, alongside other powers to safeguard the interests of a bankrupt’s creditors.

155. The drafter wrote to the Committee to explain why he continued to believe that the powers should be in section 109—

Sections such as section 98 (gratuitous alienations) and section 99 (unfair preferences) in Part 7 are very clearly directed at a debtor’s own improper conduct and at protecting the rights of creditors from the actions of the debtor. Section 209 is directed at avoiding creditors charging exorbitant rates of interest at the expense of other creditors in the bankruptcy but does so by drawing on the model of sections 137 to 139 of the Consumer Credit Act 1974 to discourage those who might seek to exploit the debtor’s vulnerability. Though it is conceded that the distinction is a narrow one, section 209 is therefore rather less directly about protecting the rights of all creditors.

In other words, there is considerably more to section 209 than simply protecting those rights.²⁴

Interpretation

156. Both ICAS and R3 made a number of comments on the way interpretation is dealt with in the Bill. The Committee has also raised concerns about an inconsistent approach to locating definitions in the Bill.

157. R3 suggested that there should be an Interpretation section or part at the beginning of the Bill, incorporating definitions which appear in other parts of the
Bill. ICAS argued that all the definitions used in the Bill should appear in the Interpretation section, rather than being scattered throughout.

158. The drafter was not minded to make such a change in approach.

159. The Committee also explored why the approach had been taken of moving the definition of “debt advice and information package” to the interpretation section of the Bill as compared with the approach taken to other definitions used in Parts 1 to 4, which are restated as they appear in the 1985 Act.

160. The drafter agreed to address this concern—

…that definition should be plucked out of the interpretation section and put in a separate subsection under section 3. I am happy with that; it makes sense. As I think I already said, the definition was put into the interpretation originally because section 3 was part of a very large section 5 of the 1985 act. I was so intent on whittling down section 5 that I may have gone too far. Section 3 probably would read better if the definition was taken from the interpretation section and put into section 3 and there was simply a cross-reference to it in the interpretation section.25

161. The Committee notes the concerns highlighted by some stakeholders about the structure of the Bill.

162. The Committee equally notes the view expressed by the drafter that whatever structure is chosen it is unlikely to meet everyone’s wishes.

163. The Committee would concur with these sentiments.

164. The drafter has provided the Committee with a reasoned explanation for the structure he has adopted and the Committee would not be minded to support a radical re-structuring of the Bill at this late juncture.

165. The Committee welcomes the drafter’s willingness to address the points raised by the Committee about the location within the Bill of the definition of “debt advice and information package”.

“Fall asleep”

166. The Committee brought the drafter’s attention to the use of the term “fall asleep” in section 27 of the Bill. It did not consider the term’s meaning to be sufficiently clear. The drafter, however, argued that—

The concept of falling asleep is believed to be well understood by insolvency practitioners. 26
167. However, ICAS suggested that it is “not otherwise a used phrase in legal or insolvency matters”. ICAS contended that the use of the phrase diverges from the approach to language elsewhere in the Bill.

168. In oral evidence Rachel Grant argued that the term is redundant—

Falling asleep means that if something has not happened with a piece of litigation for a year and any party to that litigation wants to take action, they have to give more than the normal period of notice. For example, if a person wants to enrol a motion in court, the usual notice period is 24 or 36 hours or possibly seven days; with actions that have fallen asleep, there will have to be a longer period of notice to give people the opportunity to think about things.

The concept of falling asleep was repealed in the sheriff courts in 1907, but it continued in the Court of Session for a longer period. More recently, however, the concept of falling asleep has been updated to refer to a case in which no order has been made for a period of a year. I realise that I am giving you a bit of a history lesson here, but I should point out that, when the 1985 act was drafted, the Court of Session and the sheriff court could deal with sequestrations. Now that only the sheriff court can do so, the concept is not relevant.

169. The Committee pursued the matter further with the Minister and his officials in oral evidence on 5 January 2016. Graham Fisher of the Scottish Government’s Legal Directorate explained to the Committee that a consolidation bill is not the place to amend this procedure, since any efforts to improve on the understanding of this provision may affect the meaning. He contended that, while it is thought the legal concept of “falling asleep” no longer has any currency, it would be wrong in a piece of consolidating legislation to change the approach taken in the 1985 Act and to put the matter beyond doubt.

170. While noting the concerns expressed by stakeholders, the Committee understands the position taken by the drafter in terms of retaining the term.

171. The Committee accepts that this term should be retained in the Bill.

“Ands” and “ors”

172. The Committee raised concerns about the use of “ands” and “ors” with the drafter of the Bill pointing to some inconsistencies across the Bill in the way these words are used in lists. In particular, the Committee noted that the word “or” has been introduced at the end of certain paragraphs and sub-paragraphs of the Bill, where this word did not appear in the equivalent source legislation.

173. The Committee noted that there are a number of ways in which the use of “ands” and “ors” in lists can be approached in legal drafting. The drafter argued:
I regard it as being a matter of standard English. If one strips out the paragraphing and has a continuous line of text, the “ands” and “ors” are needed. That is how one would construct large complex sentences. One certainly would not have repeated “ors” and “ands” with every item. The “and” or “or” in the list in a long and complex English sentence tends to come only between the final two items.”  

The Committee Convener pointed out that lists could be separated by semi colons and highlighted the practical implications of the drafter’s approach: “in a list of three or four things if you put an “or” at the end, the items above go together and it is only the last one that is the “or””.  

Where an “or” has being added between specific delegated powers provisions in the Bill, this was identified as particularly problematic by the Committee, given it has the potential to introduce ambiguity where none exists in the source legislation.  

The drafter agreed that amendments could be made to the Bill to remove the “ors” which have been added into delegated powers provisions, where these do not appear in the source legislation, as it would have no material effect on the meaning of those provisions:  

It is not considered that removing them will alter the meaning of the provisions in which they occur in any way.  

The Committee recommends that the Bill, through the consolidation process, should not introduce ambiguity.  

The Committee supports the removal of the word “or” where this word has been inserted between specific delegated powers provisions in the Bill.

Delegated powers provisions  

The Committee scrutinised both those delegated powers which are restated unchanged in the consolidation and those which have been modified as a consequence of the consolidation.  

The Committee reported on these delegated powers in its 76th Report of 2015.  

The Committee concluded that it was content with all of the delegated powers contained within the Bill.
Tables of derivations and destinations

182. A consolidation bill does not require to be accompanied by a Financial Memorandum, Explanatory Notes or a Policy Memorandum. However, it must instead be accompanied by tables of derivations and destinations. A table of derivations shows which currently enacted legislation a consolidation bill’s provisions derive from. A table of destinations shows where existing legislative provisions will appear in the consolidation bill.

183. Such tables were provided and the Committee found them of considerable assistance in enabling it to scrutinise the Bill effectively.
Conclusions: should the Bill proceed as a consolidation bill?

184. At the outset of this process the Committee agreed six questions it would seek to answer in order to inform its decision as to whether the Bill should proceed as a consolidation bill.

185. The Committee has thoroughly explored these questions.

186. The Committee agrees that there is a need to consolidate bankruptcy legislation. Consolidating bankruptcy legislation will be of benefit to stakeholders and also members of the public more generally.

187. The Committee is satisfied with the approach taken to which enactments have been, and have not been, included within the consolidation.

188. The Committee considers that the Bill correctly consolidates the enactments or changes their substantive legal effect only to the extent of giving effect to the SLC’s recommendation.

189. In the Committee’s view, the Bill consolidates the law clearly, coherently and consistently.

190. The one relevant SLC recommendation falling to be scrutinised by the Committee has been clearly and appropriately given effect to in the Bill (subject to certain minor amendments) and the Committee agrees that this recommendation is necessary for the purpose of producing a satisfactory consolidation.

191. The Committee has identified certain changes requiring to be made to the Bill and a small number of areas where the drafting could be clearer, and has welcomed the commitment on the part of the drafter to amend these accordingly.

192. In proportion to the size of the Bill, however, there have been very few such required amendments or areas which could be clearer.

193. This is to the immense credit of the drafter and those who supported him.

194. The Committee recommends to the Parliament that it agrees that the Bill should proceed as a consolidation bill.
Annexe A

RECOMMENDATIONS: MINOR AMENDMENTS TO THE BILL

1. The Committee considered each Part of the Bill (including the Schedules); examining whether the Parts correctly restated the enactments being consolidated (subject only to minor drafting amendments required in the context of the consolidation). As part of this process, the Committee also considered whether the consolidation in each Part was clear, coherent and consistent. Where any issues or queries were identified by the Committee, these were followed up with the drafter in writing (see Annexe C).

2. This Annexe lists matters identified in the Bill where the Committee recommends amendments should be made. In each instance the drafter has either agreed that a change is required or has recognised that a change could be made. The recommended amendments are listed under the relevant Parts and sections of the Bill.

Part 1

Section 12(1)

3. The Committee noted that section 12(1) makes almost identical provision to section 11(1) and (2), but a different drafting approach is taken. The Committee suggested that in the interests of consistency it would be preferable for the same drafting approach to be taken. The drafter replied that these sections “could be brought more closely in line”, although stated that the differences would not give rise to any uncertainty.

4. The Committee recommends that the same drafting approach be taken in section 12(1) and section 11(1) and (2).

Part 2

Section 22(5)

5. Section 22(5) of the Bill provides that a sheriff must forthwith award sequestration on a petition (presented under this section) if satisfied on a number of points. The Committee wrote to the drafter for explanation of why section 22(5)(d) requires the sheriff to be satisfied on both points set out in this subsection, while the equivalent provision of the 1985 Act appears to require the sheriff to be satisfied on one or other point (but not both). The drafter replied that section 22(5) should be amended.
6. The Committee recommends that the conjunction between the sub-paragraphs in section 22(5)(d)(i) and (ii) be amended to “or” rather than “and”.

Section 24(7)

7. In this section the Committee identified that the name of the Debtors (Scotland) Act 1987 is incorrectly given as the “Debtor’s (Scotland) Act 1987”. The drafter agreed that this should be changed.

8. The Committee recommends that the reference to the “Debtor’s (Scotland) Act 1987” in section 24(7) be amended to the “Debtors (Scotland) Act 1987”.

Section 32

9. Section 32 of the Bill restates section 17B(1) to (8) of the 1985 Act. The Committee raised with the drafter the apparent omission of subsection (9) of section 17B. The drafter agreed this was an oversight.

10. The Committee recommends that subsection 17B(9) of the 1985 Act be restated in the Bill.

Part 3

Section 48(5)

11. The Committee wrote to the drafter to seek explanation of why the words “as soon as possible” in section 23 of the 1985 Act are restated “as soon as may be” in section 48(5) of the Bill. The drafter proposed “that the words “as soon as possible” be restored for whatever meaning the courts might assign to them”.

12. The Committee recommends that the words “as soon as may be” in section 48(5) be amended to “as soon as possible”, in line with the original wording in the 1985 Act.

Part 5

Section 86(8)

13. Section 86(8) of the Bill is derived from section 32(6) of the 1985 Act. Section 32(6) provides that the trustee is not entitled to any remedy against a bank before the relevant notice is received “whether or not the bank is aware of the sequestration.” The Committee observed that this wording is not restated in
section 86(8) of the Bill. The drafter explained that this wording was not considered to have any practical effect on the operation of the section and was omitted to keep the provision concise; however, the drafter identified that “that probably went too far and therefore it seems appropriate to reintroduce” the wording.

14. The Committee recommends that section 86(8) restates the words “whether or not the bank is aware of the sequestration” from section 32(6) of the 1985 Act.

Section 87(1)

15. Section 87(1) of the Bill is derived from section 32(7) of the 1985 Act. Section 32(7) provides that the debtor must immediately notify the trustee of any assets acquired by the debtor on a relevant date, or of any other “substantial” change in the debtor’s financial circumstances. The Committee noted that the word “substantial” is not restated in section 87(1) of the Bill. The drafter explained that this omission was inadvertent and agreed that this word needs to be included.

16. The Committee recommends that section 87(1) restates the word “substantial” from section 32(7) of the 1985 Act.

Part 6

Section 89(3)

17. The Committee highlighted that a bracket is missing from the end of this section; which the drafter acknowledged.

18. The Committee recommends that a bracket is added to the end of section 89(3).

Section 96(5)

19. The Committee observed that the word “payment” in section 96(5) should be “payments”. The drafter agreed that the second “payment” could be changed to “payments”, in line with section 32G(5) of the 1985 Act.

20. The Committee recommends that the word “payment” is changed to “payments” in section 96(5), where it appears the second time, in line with section 32G(5) of the 1985 Act.
Section 103(2)(c)

21. The Committee raised with the drafter that the word “arrangements” in section 103(2)(c) should be “arrangement”; the drafter agreed that this should be changed, in line with section 36C(2)(c) of the 1985 Act.

22. The Committee recommends that the word “arrangements” is changed to “arrangement” in section 103(2)(c), in line with section 36C(2)(c) of the 1985 Act.

Part 9

Section 119(7)

23. The Committee wrote to the drafter highlighting that the reference in section 119(7) to “subsection 75(a)” should be to “subsection (6)(a)”; the drafter agreed.

24. The Committee recommends that the reference in section 119(7) to “subsection 75(a)” be amended to “subsection (6)(a)”.

Part 14

Section 168

25. Section 168 of the Bill derives from regulation 8 of the Protected Trust Deeds (Scotland) Regulations 2013 (“the 2013 Regulations”). Regulation 8 refers in two places to “a living individual”. The Committee noted that in section 168 one such reference is changed to “an individual” (see section 168(1)), while the other reference to “a living individual” is retained (see section 168(4)). The drafter replied to the Committee that “individual” would be suitable for both references and that the section should be amended accordingly.

26. The Committee recommends that the reference in section 168(4) to “a living individual” be amended to “an individual”.

Section 170(1)

27. The Committee noted that the words “not later than 7 days after registration” in regulation 10 of the 2013 Regulations have been changed to “not later than 7 days after the date of publication” in section 170(1) of the Bill. The drafter explained that the change did not alter the meaning, but proposed that the original wording be used.
28. The Committee recommends that “not later than 7 days after the date of publication” in section 170(1) be amended to “not later than 7 days after registration”, in line with regulation 10 of the 2013 Regulations.

Section 184(6)(d)

29. The Committee observed that section 184(6) contains a drafting error, and the drafter agreed that the formatting of the section requires to be adjusted. Section 184(6) provides that:

“[t]he letter of discharge does not discharge the debtor from…

(d) affect the rights of a secured creditor.”

30. The Committee recommends that section 184(6) be amended so that section 184(6)(d) flows from the sentence introducing the subsection.

Section 186(8)

31. The Committee asked the drafter why the words “within 28 days of the date of discharge” in regulation 25(7) of the 2013 Regulations are changed to “without delay” in section 186(8) of the Bill. The drafter agreed that the original wording from the 2013 Regulations should be restated.

32. The Committee recommends that the words “without delay” be changed to “within 28 days of the date of discharge” in section 186(8); in line with regulation 25(7) of the 2013 Regulations.

Part 16

Section 200(3)(a)

33. Section 200(3)(a) of the Bill derives from section 1A(1)(c)(i) of the 1985 Act. In section 1A(1)(c)(i), the words “of which particulars have been registered in the register of insolvencies during the year to which the report relates” appear to apply to both “the state of all sequestrations” and to “the winding up and receivership of business associations.” The Committee noted that in section 200(3)(a) the same words apply only to “the winding up and receivership of business associations.” The drafter agreed that section 200(3)(a) needs to be re-formatted.
34. The Committee recommends that section 200(3)(a) be amended so that the words “of which particulars have been registered in the register of insolvencies during the year to which the report relates” apply to both “the state of all sequestrations” and to “the winding up and receivership of business associations”, in line with section 1A(1)(c)(i) of the 1985 Act.

Section 200(5)

35. Section 200(5)(a) of the Bill derives from section 1A(3)(a) of the 1985 Act. The Committee observed that the words “in the performance of his functions under this Act or any other enactment or any rule of law” from section 1A(3)(a) of the 1985 Act have not been restated in section 200(5)(a) of the Bill. The drafter noted that the changes had been made to make the section more concise, however conceded that a form of wording (albeit shortened) could be added to section 200(5)(a) to cover this point.

36. The Committee recommends that section 200(5)(a) be amended to include wording to reflect the meaning of the phrase “in the performance of his functions under this Act or any other enactment or any rule of law” in section 1A(3)(a) of the 1985 Act.

37. The Committee also asked the drafter why the word “suspect” in section 1A(3) of the 1985 Act has been changed to “suppose” in section 200(5); the drafter replied that this was a typing error.

38. The Committee recommends that “suppose” be changed to “suspect” in section 200(5).

Part 17

Section 223(2)

39. Section 223(2) provides that a disqualification provision is a provision which disqualifies (whether permanently or temporarily) a debtor from holding a relevant office. The Committee observed that the equivalent section of the 1985 Act (section 71B) provided that a disqualification provision is a provision which disqualifies (whether permanently or temporarily and whether absolutely or conditionally) a debtor from holding a relevant office. The words “and whether absolutely or conditionally” are not restated in the Bill. The drafter agreed this should be amended.
40. The Committee recommends that the words “and whether absolutely or conditionally” are restated in section 223(2), in line with the equivalent section 71B of the 1985 Act.

Schedule 1, paragraph 5(4)

41. The Committee wrote to the drafter to query why the words “on the expiry of the period of 6 months” in paragraph 5(4) of Schedule A1 to the 1985 Act had been changed to “within 6 months” in paragraph 5(4) of Schedule 1 to the Bill. The drafter agreed that the “words “on the expiry of” should be substituted for the word “within” … to ensure that the law remains unchanged”.

42. The Committee recommends that the word “within” should be changed to “on the expiry of” in paragraph 5(4) of Schedule 1 to the Bill, in line with paragraph 5(4) of Schedule A1 to the 1985 Act.

Schedule 3, paragraph 10(3)

43. The Committee identified a typographical error, in that the word “or” in line 4 should be “of”; the drafter agreed.

44. The Committee recommends that in paragraph 10(3) of Schedule 3 “by virtue or” should be amended to “by virtue of”.

Schedule 5, paragraph 27

45. The Committee observed that the reference in paragraph 27 to “section 129” should be to “section 127”; the drafter agreed.

46. The Committee recommends that in paragraph 27 of Schedule 5 the reference to “section 129” should be amended to “section 127”.

Schedule 7, paragraph 1(4)

47. The Committee noted that the words “or receives payment in respect of an attached article upon its redemption” in paragraph 24(3) of Schedule 7 to the 1985 Act have not been restated in paragraph 1(4) of Schedule 7 to the Bill. The drafter observed that amendments to paragraph 24(3) of Schedule 7 to the 1985 Act, by the Debt Arrangement and Attachment (Scotland) Act 2002 and other Acts, have not been fully given effect to in the Bill, and suggested an amendment to paragraph 1(4)(b) of Schedule 7 to address this matter.
48. The Committee recommends that paragraph 1(4) of Schedule 7 be amended to take fully into account changes made to the equivalent source paragraph 24(3) of Schedule 7 to the 1985 Act.

Schedule 8, paragraph 27

49. The Committee identified that the reference at paragraph 27 of Schedule 8 to the “Further and Higher Education (Scotland) Act 2013” should be to the “Further and Higher Education (Scotland) Act 2005”. The drafter agreed that this needs to be changed in the Bill and that the chronological order of the entries in Schedule 8 will need to be amended accordingly.

50. The Committee recommends that reference to the “Further and Higher Education (Scotland) Act 2013” be amended to the “Further and Higher Education (Scotland) Act 2005” in paragraph 27 to Schedule 8.

Schedule 9, Part 2

51. Part 2 of Schedule 9 lists the enactments to be revoked by the Bill. The Committee noted that regulation 45 of the Debt Arrangement Scheme (Scotland) Regulations 2011 is listed. However, regulation 45 has been revoked by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014. The drafter identified that as a result, reference to regulation 45 in Schedule 9 needs to be removed.

52. The Committee recommends that reference to regulation 45 of the Debt Arrangement Scheme (Scotland) Regulations 2011 is removed from Part 2 of Schedule 9, as regulation 45 has been revoked.
RESOLVED ISSUES ON THE BILL

1. This Annexe lists issues identified in the Bill, where, after correspondence with the drafter, the Committee is content. The resolved issues are listed under the relevant Part and section of the Bill.

Part 1

Section 2(1)(b)(i)

2. Section 2(1)(b)(i) of the Bill is derived from section 5(2)(b)(i) of the 1985 Act. The Committee noted that section 5(2)(b)(i) of the 1985 Act explicitly states that the right of qualified creditors to make a petition under that section is “subject to” the requirement to provide debt advice, and a cross-reference to subsection (2D) of section 5, which deals with debt advice, is provided. The explicit “subject to” wording is not restated in section 2(1)(b)(i) of the Bill, and no cross-reference to the relevant restated provision on debt advice is given.

3. The drafter explained that a cross-reference was not considered to be required given that the Bill shortens and simplifies the relevant provision and restates subsection (2D) as a separate section, which puts the matter beyond doubt. The drafter also pointed out that the removal of the cross-reference “has no legal effect”. The Committee was content with this explanation.

Section 7(1)

4. Section 7 defines “qualified creditor” and “qualified creditors” for the purposes of section 2 of the Bill. The Committee wrote to invite the drafter to consider whether the phrases “at the date of the presentation of the petition, or as the case may be at the date the debtor application is made” and “at the date in question”, in those definitions, could be replaced with a defined term, to aid clarity.

5. The drafter replied that the phrase “at the date in question” is “believed to be well understood”, and argued that the introduction of a defined term would complicate the section, would “take considerably more words and would be further from the [1985 Act] text. The Committee on balance accepted the drafter’s approach, given the minor benefits of changing the section for the reader.

Section 8(1)

6. Section 8(1) restates section 5(4B) of the 1985 Act. The Committee sought explanation from the drafter on why section 8(1) restates the words “a debtor application” from the 1985 Act as “any debtor application.”
7. The drafter explained that this change was intended to draw out the true sense of the provision, and therefore to “aid the reader”. The Committee accepted this explanation, noting that the change has no practical or legal implication.

Section 13

8. The Committee pointed out that there is a lack of consistency in drafting style between subsections (2), (3) and (4) of section 13 which otherwise make very similar provision.

9. The drafter agreed that these subsections make very similar provision and acknowledged that there is some internal drafting inconsistency across this section. The drafter explained that “[i]t is not thought that the inconsistency gives rise to any difficulty.” The Committee accepted the approach taken to the drafting of this section, noting that the inconsistency does not affect the legal meaning of the provision.

Part 3

Section 46(4)(a)

10. The Committee wrote to the drafter suggesting that the word “have” in section 46(4)(a) may be an error and should instead be “has”.

11. The drafter replied that this was not thought to be an error “since the preceding “does” qualifies both “reside” and “have a place of business””. The Committee accepted this explanation.

Part 4

Section 71(2)

12. The Committee drew the drafter’s attention to the wording of section 71(2) of the Bill, which restates the words “an application” from the 1985 Act as “any application”.

13. The drafter explained that this change was intended to draw out the true sense of the provision, and therefore to “aid the reader”. The Committee accepted this explanation, noting that the change has no practical or legal implication.

Part 5

Section 78(5)

14. Section 78(5) deals with the exercise by the trustee of any power conferred on the trustee by the Bill, in respect of any heritable estate vested in the trustee by virtue of that person’s appointment. The Committee invited the drafter to consider whether replacing the words “that person’s” with the words “the trustee’s” would enhance the clarity of this provision.
15. The drafter explained that the trustee is the only person to whom the words “that person” could relate and that the use of this phrase is intended to improve the readability of the section. The drafter also noted that the suggested change “would make no difference to the meaning of the provision”. The Committee accepted this explanation, given the minimal effect the change would have.

Section 78(11)

16. The Committee invited the drafter to consider whether making explicit the requirement in section 78(11) for the applicant to serve a copy of the application on the trustee (phrased as “a copy of the application being served on the trustee”), would enhance the clarity of the provision.

17. The drafter replied that the current wording is faithful to the 1985 Act provision, which carries with it an element of uncertainty about who is to serve the application on the trustee. The drafter suggested that to eliminate this uncertainty would “go beyond what is appropriate in this consolidation”. The Committee accepted the drafter’s position, noting that a change could have the potential to affect the legal meaning of the provision.

Part 7

Section 101(9), 106(7) and 103(7)

18. The Committee identified that the term the “recovery provisions” is defined in section 103, rather than in section 101, where the term is first used. In sections 106(7) and 103(7) the Committee also queried with the drafter why it is appropriate to use the term “recovery provisions” to refer to different sections of the Bill.

19. The drafter explained that the relevant sections of the 1985 Act, from which these sections derive, were substantially changed by the Welfare Reform and Pensions Act 1999, and that sections 101 to 107 of the Bill follow that Act very closely, including the use of the expression “recovery provisions” which is defined differently according to which set of sections it occurs in. The Committee accepted this explanation noting that the drafter’s approach seeks closely to follow the source legislation.

Part 17

Section 206

20. Section 206 of the Bill derives from section 60 of the 1985 Act. The Committee noted that the definition of “co-obligant” is not restated in section 206 of the Bill and throughout section 206 the word “obligant” has been used in place of “co-obligant” where that word occurs in section 60 of the Act. The Committee queried with the drafter why one reference to “co-obligant” is retained at sub-section (5).
21. The drafter replied that both the debtor and obligant are co-obligants so there is no need to call the “obligant” the “co-obligant”. However, subsection 5 is different as “it refers to any right under any rule of law and in terms of any such right the debtor and obligant are both co-obligants”. The Committee accepted this explanation, noting that the drafting seeks to provide clarity through its use of both terms.

Schedule 7

22. The Committee noted that paragraph 24(7) of Schedule 7 to the 1985 Act has not been restated in Schedule 7 to the Bill.

23. The drafter replied that paragraph 24(7) of Schedule 7 to the 1985 Act is considered to be spent “relating as it does to the consequences, for the equalisation of arrestments and poindings, of the constitution of notour bankruptcy under the Bankruptcy (Scotland) Act 1913”. The Committee was content with this explanation.
Annexe C

REFLECTIONS ON THE PROCESS

1. As noted earlier, this is the first consolidation bill to be considered by the Committee and also the first consolidation bill to be considered by the Parliament in twelve years.

2. When the Salmon Committee considered the previous consolidation bill it highlighted a number of concerns which to some extent the Committee wishes to reiterate.

3. Firstly, the Salmon Committee expressed concern about the lack of guidance as to what its role was and how it was to conduct its consideration of the Bill. The Committee appreciates that, in consequence of these concerns, in session 2 the Procedures Committee developed new rules to reflect this experience.

4. Nonetheless, the Committee suggests the successor to the current Standards Procedures and Public Appointments Committee may wish to reflect on this Committee’s approach to the consideration of the Bill and in particular the questions the Committee agreed it should focus upon. That committee may wish to consider whether there would be merit in expanding on the current rules for consolidation bills to make explicit mention of the questions a committee considering a consolidation bill is seeking to answer.

5. The Salmon Committee also expressed concern about the timing of the introduction of consolidation bills. The Salmon Bill was introduced with only five months of session 1 remaining. It was suggested that in future consolidation bills should not be introduced at such a late juncture in the session.

6. Obviously, however, the Bankruptcy (Scotland) Bill was introduced at a similarly late juncture in the session. In this instance the Committee found that it was able to undertake the necessary scrutiny of the Bill in this short timescale. It should be noted, however, that this may in part be a consequence of the fact the Committee was not required to consider a large number of SLC recommendations.

7. Had a consolidation bill been introduced at this point in the session containing large numbers of amendments resulting from SLC recommendations, then the Committee may have found it more challenging to scrutinise such a bill in a limited timescale.

8. Even in the context of this bill had more time been available then the Committee might have been more minded to consider issues around the structure of the Bill. In the limited time available to the Committee consideration of a radical restructuring of the Bill was not practicable.
9. It is with that in mind, that the Committee reiterates the view expressed by the Salmon Committee that consolidation bills should normally not be introduced so late in the session.

10. In its scrutiny of the Bill, the Committee benefited from the tables of destinations and derivations. The Scottish Government is obliged to provide them to accompany a consolidation bill. The Committee also found the drafter’s note helpful in its scrutiny of the Bill. It was particularly useful to the Committee in understanding the drafter’s approach to consolidation of particular provisions. There is no obligation to provide such a note but, mindful of the benefits it provided to the Committee in terms of scrutiny, the Committee suggests that the provision of such a note should be mandatory.

11. Notwithstanding these points, the Committee has found that the process has worked well.

12. As noted earlier the Committee greatly benefited from the support of its legal advisers. This support is critical to the effective scrutiny of a consolidation bill.

13. The Committee considers that its background in work of a technical nature served it well when it came to scrutinising this consolidation bill. The Committee considers that consolidation should be undertaken more frequently.

14. The Committee would encourage future administrations to bring forward more consolidation bills. It is of considerable importance that the statute book is clear and accessible for users of the law and consolidation plays a critical part in delivering that accessibility.

15. Mindful of its experience of this Bill the Committee considers that its successor committee will be well placed to undertake scrutiny of such bills.
Annexe D

CORRESPONDENCE WITH THE DRAFTER

Parts 1-4 of the Bill

Letter from the Clerk to the drafter of the Bill following Committee consideration of Parts 1-4 (319KB pdf)

Response from the drafter of the Bill (176KB pdf)

Parts 5-8 of the Bill

Letter from the Clerk to the drafter of the Bill following Committee consideration of Parts 5-8 (301KB pdf)

Response from the drafter of the Bill (140KB pdf)

Parts 9-14 of the Bill

Letter from the Clerk to the drafter of the Bill following Committee consideration of Parts 9-14 (184KB pdf)

Response from the drafter of the Bill (127KB pdf)

Parts 15-18 of the Bill

Letter from the Clerk to the drafter of the Bill following Committee consideration of Parts 15-18 and Schedules (210KB pdf)

Response from the drafter of the Bill (137KB pdf)

Letter from the Clerk to the Scottish Government regarding consequential amendments (92KB pdf)

Response from the Scottish Government (109KB pdf)

Part 17, section 206 and Schedule 1, paragraph 5(4) of the Bill

Letter from the Clerk to the drafter of the Bill following the Committee meeting on 15 December 2015 (142KB pdf)

Response from the drafter of the Bill (127KB pdf)

Part 17, section 209

Letter from the drafter of the Bill following the Committee meeting on 5 January 2016 (131KB pdf)
Annexe E

EXTRACTS FROM MINUTES OF THE DELEGATED POWERS AND LAW REFORM COMMITTEE

31st Meeting, 2015 (Session 4), Tuesday 10 November 2015

Decision on taking business in private: The Committee agreed to take item 8 in private.

Bankruptcy (Scotland) Bill (in private): The Committee agreed its approach to the scrutiny of the Bill at Stage 1 (subject to formal referral of the Bill to the Committee by the Parliament).

32nd Meeting, 2015 (Session 4), Tuesday 17 November 2015

Bankruptcy (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Richard Dennis, Chief Executive Officer and the Accountant in Bankruptcy; Alex Reid, Head of Policy Development, Accountant in Bankruptcy; Graham Fisher, Head of Branch 1, Constitutional and Civil Law Division, Scottish Government Legal Directorate, Scottish Government.

Bankruptcy (Scotland) Bill: The Committee considered the Scottish Law Commission Recommendations in relation to the consolidation.

Bankruptcy (Scotland) Bill: The Committee considered whether the consolidation in Parts 1-4 of the Bill correctly restates the enactments being consolidated, and whether the consolidation is clear, coherent and consistent.

Bankruptcy (Scotland) Bill (in private): The Committee considered the evidence it heard earlier in the meeting.

33rd Meeting, 2015 (Session 4), Tuesday 24 November 2015

Bankruptcy (Scotland) Bill: The Committee considered whether the consolidation in Parts 5-8 of the Bill correctly restates the enactments being consolidated, and whether the consolidation is clear, coherent and consistent.

Bankruptcy (Scotland) Bill: The Committee considered correspondence from the Scottish Government on the Bill.
34th Meeting, 2015 (Session 4), Tuesday 1 December 2015

**Bankruptcy (Scotland) Bill:** The Committee considered correspondence from the Scottish Government on the Bill.

**Bankruptcy (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Gregor Clark, Parliamentary Counsel, Scottish Law Commission; Graham Fisher, Head of Branch 1, Civil and Constitutional Law Division, Scottish Government Legal Directorate, Scottish Government.

**Bankruptcy (Scotland) Bill:** The Committee considered whether the consolidation in Parts 9-14 of the Bill correctly restates the enactments being consolidated, and whether the consolidation is clear, coherent and consistent.

**Bankruptcy (Scotland) Bill:** The Committee considered the delegated powers provisions in this Bill at Stage 1 and agreed the contents of a report.

**Bankruptcy (Scotland) Bill (in private):** The Committee considered the evidence it heard earlier in the meeting.

35th Meeting, 2015 (Session 4), Tuesday 8 December 2015

**Bankruptcy (Scotland) Bill:** The Committee considered correspondence from the Scottish Government on the Bill.

**Bankruptcy (Scotland) Bill:** The Committee considered whether the consolidation in Parts 15-18 of the Bill correctly restates the enactments being consolidated, and whether the consolidation of both these Parts and the Schedules to the Bill is clear, coherent and consistent.

36th Meeting, 2015 (Session 4), Tuesday 15 December 2015

**Bankruptcy (Scotland) Bill:** The Committee considered correspondence from the Scottish Government on the Bill.

**Bankruptcy (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

David Menzies, Director of Insolvency, Institute of Chartered Accountants Scotland (ICAS); Rachel Grant, Member and former Chair of the R3 Association of Business Recovery Professionals’ Scottish Technical Committee.

**Bankruptcy (Scotland) Bill:** The Committee considered the draft section 104 Order provided to the Committee and the provisions relating to or touching on reserved matters which are restated in the Bill and agreed to pursue these issues with the Scottish Government when the Committee next meets on 5 January 2016.

**Bankruptcy (Scotland) Bill (in private):** The Committee considered the evidence it heard earlier in the meeting.
1st Meeting, 2016 (Session 4), Tuesday 5 January 2016

Bankruptcy (Scotland) Bill: The Committee considered correspondence from the Scottish Government on the Bill.

Bankruptcy (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Fergus Ewing, Minister for Business, Energy and Tourism; Graham Fisher, Head of Branch 1, Civil and Constitutional Law Division, Scottish Government Legal Directorate, Scottish Government; Gregor Clark, Parliamentary Counsel, Scottish Law Commission; Alex Reid, Head of Operational Policy & Compliance, Accountant in Bankruptcy.

Bankruptcy (Scotland) Bill (in private): The Committee considered the evidence it has received on the Bill.

3rd Meeting, 2016 (Session 4), Tuesday 19 January 2016

Bankruptcy (Scotland) Bill (in private): The Committee agreed its Stage 1 report.
Annexe F

INDEX OF ORAL EVIDENCE

32nd Meeting, 2015 (Session 4), Tuesday 17 November 2015
Richard Dennis, Chief Executive Officer and the Accountant in Bankruptcy; Alex Reid, Head of Policy Development, Accountant in Bankruptcy; Graham Fisher, Head of Branch 1, Constitutional and Civil Law Division, Scottish Government Legal Directorate, Scottish Government.

34th Meeting, 2015 (Session 4), Tuesday 1 December 2015
Gregor Clark, Parliamentary Counsel, Scottish Law Commission; Graham Fisher, Head of Branch 1, Civil and Constitutional Law Division, Scottish Government Legal Directorate, Scottish Government.

36th Meeting, 2015 (Session 4), Tuesday 15 December 2015
David Menzies, Director of Insolvency, Institute of Chartered Accountants Scotland (ICAS); Rachel Grant, Member and former Chair of the R3 Association of Business Recovery Professionals’ Scottish Technical Committee.

1st Meeting, 2016 (Session 4), Tuesday 5 January 2016
Fergus Ewing, Minister for Business, Energy and Tourism; Graham Fisher, Head of Branch 1, Civil and Constitutional Law Division, Scottish Government Legal Directorate, Scottish Government; Gregor Clark, Parliamentary Counsel, Scottish Law Commission; Alex Reid, Head of Operational Policy & Compliance, Accountant in Bankruptcy.
Annexe G

INDEX OF WRITTEN EVIDENCE

Submissions received on the Bankruptcy (Scotland) Bill

Chartered Institute of Credit Management (88KB pdf)

R3 Association of Business Recovery Professionals’ Scottish Technical Committee (209KB pdf)

Institute of Chartered Accountants of Scotland (ICAS) (228KB pdf)

Yuill + Kyle (98KB pdf)

Money Advice Scotland (188KB pdf)

The Law Society of Scotland (398KB pdf)

StepChange Debt Charity (29KB pdf)

Anonymous (154KB pdf)

Money Advice Scotland (additional submission) (123KB pdf)

Additional information and correspondence

Letter from the Clerk to the drafter of the Bill following Committee consideration of Parts 1-4 (319KB pdf)

Response from the drafter of the Bill (176KB pdf)

Letter from the Clerk to the drafter of the Bill following Committee consideration of Parts 5-8 (301KB pdf)

Response from the drafter of the Bill (140KB pdf)

Letter from the Clerk to the drafter of the Bill following Committee consideration of Parts 9-14 (184KB pdf)

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Response from the Scottish Government (109KB pdf)

Letter from the Clerk to the drafter of the Bill following the Committee meeting on 15 December 2015 (142KB pdf)

Response from the drafter of the Bill (127KB pdf)
An “or” has been inserted into the following delegated powers provisions in the Bill:

- Section 89(2), between subsections (c) and (d);
- Section 103(4), between subsections (a) and (b)
- Section 106(4), between subsections (a) and (b)
- Section 223(6), between subsections (a) and (b)
- Section 224(1), between subsections (b) and (c)
- Schedule 1, paragraph 2(7), between subsections (a) and (b)