This briefing looks at Stage 1 and Stage 2 consideration of the Bankruptcy (Scotland) Bill. The Bill is a consolidation bill. It therefore makes no changes to the substantive law in this area.

Scrubtiny of a consolidation bill follows a different parliamentary process to other legislation. In particular, the Scottish Parliament can be asked to indicate its agreement with the Bill at Stage 3 by voting on a motion only.

The Delegated Powers and Law Reform Committee considered the Bill at Stage 1. It agreed that the Bill should proceed as a consolidation bill. However, it made a number of recommendations designed to improve the clarity, coherence and consistency of the text of the Bill. These were taken forward by the Scottish Government as amendments at Stage 2.
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INTRODUCTION

The Bankruptcy (Scotland) Bill is a consolidation bill. It was introduced in the Scottish Parliament on 30 October 2015. It is a Scottish Government Bill, although it was drafted by the Scottish Law Commission. It consolidates existing legislation in relation to bankruptcy.

This briefing looks at parliamentary scrutiny of the Bill prior to Stage 3.

Consolidation bills bring together existing legislation in a more logical and coherent form, so that the law is easier to understand. They do not change the substantive law on the subject. It is, however, possible for consolidation bills to take forward Scottish Law Commission recommendations which make minor changes to the existing law or modernise the language used.

Consolidation bills are considered under a special parliamentary procedure which differs significantly from the usual way the Scottish Parliament scrutinises bills. In particular, they are considered by a specially created committee, or by the Delegated Powers and Law Reform Committee.

Consolidation bills do not require a policy memorandum and explanatory notes. Instead, they are accompanied by tables of derivations and destinations and statements on legislative competency. Tables of derivations and destinations show which existing legislative provisions the bill’s sections come from, as well as where to find the previous law in the new bill.

Amendments are only admissible if they do not cause the bill to cease to be a consolidation bill. This means that amendments which seek to change the substantive law are not permissible.

BANKRUPTCY

Individuals and some other entities – such as partnerships and trusts – can enter bankruptcy. Different insolvency procedures apply to companies and limited liability partnerships. These are mainly reserved to the UK Parliament.

When a person or entity becomes bankrupt, their estate is administered by a trustee for the benefit of their creditors. Their estate is all their non-essential assets, including land and buildings (such as a family home).

The trustee is usually a Scottish Government agency called the Accountant in Bankruptcy. However, it can also be an insolvency practitioner in private practice.

The Accountant in Bankruptcy is an officer of the court with responsibility for supervising the bankruptcy process. The current Accountant is Richard Dennis. He heads up an executive agency of the Scottish Government – also known as the Accountant in Bankruptcy – with various responsibilities in relation to bankruptcy.

When a debtor becomes bankrupt, ownership of their non-essential assets passes to the trustee. The trustee will usually sell these, but he or she can continue the debtor’s business if this is considered to be a better option for creditors. A debtor will also be expected to make a contribution to the bankruptcy from any income they have.

A debtor will normally be expected to contribute to the bankruptcy for four years. They must continue to contribute even where they are formally discharged from bankruptcy before this. At the end of the bankruptcy, almost all remaining debts are written off so that the debtor is no longer liable for them.
There are several other options for debtors who wish to deal with their debt situation. These include: an informal repayment arrangement with their creditors; the Debt Arrangement Scheme; and a protected trust deed.

The Debt Arrangement Scheme allows debtors to pay their debts in full over a longer period of time. A protected trust deed is a voluntary agreement between a debtor and their creditors which is administered in a very similar manner to bankruptcy.

CONTENTS OF BILL

The Bill is a consolidation bill and therefore makes no changes to the law of bankruptcy.

The Scottish Law Commission published a Report on the Consolidation of Bankruptcy Legislation in Scotland in 2013. The report made a number of recommendations designed to improve the law in this area.

The relevant legislative changes were taken forward through the Bankruptcy and Debt Advice (Scotland) Act 2014. Thus, there has been no need for even minor legislative changes in this Bill.

One outstanding recommendation from the Scottish Law Commission report was to consolidate regulations in relation to protected trust deeds into primary legislation. This is being taken forward in the Bill.

The Scottish Law Commission report also commented on the need for consolidation in this area. In relation to the Bankruptcy (Scotland) Act 1985, it stated (2013, paragraph 1.1):

“...that Act has been so heavily amended, on so many occasions, that it has lost coherence and rational structure. Many of its provisions (whether sections, subsections or paragraphs) are inordinately long; and numbering has become complex and unwieldy.”

PARLIAMENTARY CONSIDERATION

STAGE 1

The Delegated Powers and Law Reform Committee (DPLRC) undertook Stage 1 scrutiny of the Bill. The relevant question for a committee to consider during Stage 1 scrutiny of a consolidation bill is whether the bill should proceed as a consolidation bill.

DPLRC issued a call for evidence, which was responded to by several organisations with an interest in bankruptcy. DPLRC discussed the Bill at a number of its meetings between November 2015 and January 2016. Full details are available from the Committee’s Bankruptcy (Scotland) Bill webpage.

In particular, DPLRC engaged in a substantial amount of correspondence with the Bill drafter on the contents of the Bill and the drafting styles used. These letters informed the Committee’s Stage 1 recommendations, and the amendments brought forward by the Scottish Government at Stage 2.

DPLRC issued its Stage 1 Report on the Bill on 20 January 2016. This concluded that the Bill should proceed as a consolidation bill. It made a number of recommendations regarding amendments to the Bill to ensure the language was “clear, coherent and consistent” (Annexe A, paragraph 1). These can be found at Annexe A to the Stage 1 Report.
The Minister for Business, Energy and Tourism responded (2016) to the DPLRC’s Stage 1 Report on behalf of the Scottish Government. He accepted, broadly, the Committee’s recommendations.

Stage 1 debates are not required as part of the procedure for dealing with a consolidation bill. Instead, the Parliament can be asked to indicate its agreement by way of a motion. Such a motion was taken in the Chamber on 27 January 2016.

STAGE 2

Stage 2 consideration took place at the DPLRC’s meeting on 23 February 2016. The Scottish Government brought forward a number of amendments which addressed the Committee’s concerns at Stage 1.

In addition, the Scottish Government brought forward two amendments which changed the commencement arrangements for the Bill. After amendment, the Bill’s provisions would apply to any petitions or applications for sequestration lodged after the commencement date. The amendments were intended to simplify the arrangements for the benefit of the Scottish Courts and Tribunals Service.

The Bill as amended at Stage 2 was published on 24 February 2016.

KEY ISSUES

As noted above, a consolidation bill does not change the substantive law on a subject. Instead, it restates the existing law in a more accessible and understandable way. Therefore, there have been no policy concerns in relation to the Bill prior to Stage 3.

DPLRC did consider the language of the Bill in considerable detail and made recommendations for amendments at Stage 2 to improve its clarity, coherence and consistency. Those recommendations were taken forward by the Scottish Government.

The main concerns in relation to the Bill as introduced are discussed below.

Inclusion of Debt Arrangement Scheme legislation in the Bill

The Bill would consolidate existing legislation on bankruptcy and protected trust deeds. However, legislation governing the Debt Arrangement Scheme (DAS) has not been included.

The Institute of Chartered Accountants of Scotland (ICAS) argued that it would be appropriate to include DAS in the consolidation exercise. It considered that all three options would usually be discussed and considered with debtors. Therefore “it would make more sense to have all three procedures within one piece of legislation” (Scottish Parliament Delegated Powers and Law Reform Committee 2015, col 29).

The Scottish Government maintained the view that DAS was not a personal insolvency procedure and therefore should not form part of the consolidation. Most other respondents to the call for evidence agreed. The Committee supported this view in its Stage 1 Report.
Use of the term “forthwith”

The term “forthwith” is used in various places in the Bankruptcy (Scotland) Act 1985. It was replaced in the Bill as introduced by “without delay”, except in one section, where existing court judgments had further defined its meaning.

DPLRC was concerned that this lack of consistency may be interpreted as a change of meaning in relation to the term. The Association of Business Recovery Professionals’ Scottish Technical Committee echoed this concern in its response to DPLRC’s call for evidence.

The Scottish Government brought forward amendments at Stage 2 to re-instate the term “forthwith”.

Abbreviations

The Bill as introduced uses abbreviations for key terms in a number of provisions. For example, “other creditor” may be shortened to “OC”. This is a drafting technique used to cut down on the repetitiveness associated with gender neutral drafting.

Some respondents to the call for evidence raised concerns that the use of abbreviations sometimes made the wording of provisions difficult to understand. DPLRC recommended changes.

The Scottish Government brought forward a number of amendments at Stage 2 to remove abbreviations where they were thought to interfere with the clarity of the text. Some abbreviations remain in the Bill, but the DPLRC is content that these examples do not contribute to lack of clarity.

Structure

In their responses to DPLRC’s call for evidence, ICAS and the Association of Business Recovery Professionals’ Scottish Technical Committee made several suggestions to improve the structure of the Bill. The overall thrust was that the structure of the Bill should more closely follow the order that insolvency practitioners and debtors would deal with issues.

The Scottish Government noted that the Bill followed the structure of previous legislation. The Committee supported the current Bill structure in its Stage 1 Report, accepting that there was unlikely to be a model which satisfied everyone.

Use of “ands” and “ors” in lists

The Committee discussed at length the possible ambiguities created by using “ands” and “ors” to join lists of powers in legislation. For example, if “or” was used, was it that one power had to be used to the exclusion of others?

The Scottish Government did not accept that the meanings of the relevant Bill provisions were unclear. However, it brought forward amendments at Stage 2 to remove the term “or” from lists of delegated powers.

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1 Traditionally, legislation used the terms he and him to refer to anyone, whether they were male or female. Gender neutral drafting ends this practice.
SOURCES


