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Pàrlamaid na h-Alba

Official Report

DELEGATED POWERS AND LAW REFORM COMMITTEE

Tuesday 5 January 2016

Session 4

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DELEGATED POWERS AND LAW REFORM COMMITTEE
1st Meeting 2016, Session 4

CONVENER

*Nigel Don (Angus North and Mearns) (SNP)

DEPUTY CONVENER

*John Mason (Glasgow Shettleston) (SNP)

COMMITTEE MEMBERS

*Richard Baker (North East Scotland) (Lab)
*John Scott (Ayr) (Con)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Gregor Clark (Scottish Law Commission)
Fergus Ewing (Minister for Business, Energy and Tourism)
Graham Fisher (Scottish Government)
Alex Reid (Accountant in Bankruptcy)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 5 January 2016

[The Convener opened the meeting at 11:01]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the first meeting in 2016 of the Delegated Powers and Law Reform Committee. As always, I ask members, please, to switch off mobile phones.

Agenda item 1 is a decision on taking business in private. Our taking item 8 in private will enable the committee to consider further the delegated powers provisions in the Burial and Cremation (Scotland) Bill at stage 1. Is the committee happy to take item 8 in private?

Members *indicated agreement.*

Bankruptcy (Scotland) Bill: Stage 1

11:01

The Convener: Item 2 is the Bankruptcy (Scotland) Bill. This item of business is for the committee to consider the drafters' response to the committee's questions on matters relating to the bill. As members have no comments, is the committee content to note the drafters' response?

Members *indicated agreement.*

The Convener: Thank you. That takes us to agenda item 3—also the Bankruptcy (Scotland) Bill, on which we will take oral evidence.

It is a great pleasure to welcome the Minister for Business, Energy and Tourism, Fergus Ewing MSP; Alex Reid, who is the head of operational policy and compliance for the Accountant in Bankruptcy; Graham Fisher, who is the head of branch 1 in the civil and constitutional law division of the Scottish Government legal directorate; and Gregor Clark, who is parliamentary counsel for the Scottish Law Commission. Good morning, gentlemen—it is good to see you all. I understand that the minister has an opening statement.

The Minister for Business, Energy and Tourism (Fergus Ewing): Thank you very much, convener, and a good new year to you and everyone else who is gathered here this morning.

I will make a few brief opening remarks, just to set the context. First, I thank the SLC, which is represented by Gregor Clark today, for the enormous amount of work that it has done in our getting to this stage—probably 99 per cent of the work—and I thank all the members of the SLC who are not here but who contributed to that work.

As the committee knows, the main legislation for consolidation is the Bankruptcy (Scotland) Act 1985, which has been heavily amended and has, as a result, lost coherence and structure. Many provisions are inordinately long and numbering has become complex and unwieldy.

The time is right to bring Scotland's bankruptcy legislation into one place—in the bill, which will aid accessibility and understanding of bankruptcy law for practitioners and people who are affected by it, which will in turn save a great deal of time and resource for everyone using the legislation.

The substantive changes to bankruptcy law as a result of the Bankruptcy and Debt Advice (Scotland) Act 2014 have been fully implemented and have been in effect from 1 April last year. That has provided a good opportunity to bring together the existing legislation. Further delay would waste an opportunity if the consolidating work that has

been done by the SLC is superseded as the law is gradually amended over time.

As well as being grateful to the SLC, we are very grateful for the time that members of the committee, its clerks and the Scottish Parliament have spent scrutinising the bill, and for the approach that has been taken in communicating relevant issues to the drafters and the Scottish Government. It is fair to characterise the feedback from stakeholders as having been broadly positive. There is a wide consensus in which it is recognised that bringing together in one document what is currently on the statute book is necessary and timely.

The Convener: Thank you very much, minister. You have outlined the rationale for the consolidation. I am sure that John Scott, who will start our questions, will want to know how that fits into wider policy.

John Scott (Ayr) (Con): Good morning, minister. I wish you and your officials a good new year.

How does the bill relate to the Scottish Government's wider policy objectives on bankruptcy?

Fergus Ewing: The bill is a consolidation bill, so its purpose is to bring the law into one document. Its purpose also relates to the wider purpose of our bankruptcy law in reflecting a balance between the interests of debtors and those of creditors.

Having the provisions in one document will do a couple of things. First, as I have said, it will provide much-needed simplicity for people who need to refer to the law. Secondly, the fact that we are devoting quite a lot of time and effort to the task demonstrates the importance that the Scottish Government attaches to bankruptcy law and to making it accessible. If that were a fringe activity, we would not be here—we would not be legislating as we are.

When I was in private practice, I spent countless hours poring over the Bankruptcy (Scotland) Act 1985, which, as I recall, followed from a royal commission. When the Bankruptcy (Scotland) Act 1993 came in, things became a little more complicated. Fortunately, I had escaped from private practice by the time the Bankruptcy and Diligence etc (Scotland) Act 2007 came in, which was followed by the Home Owner and Debtor Protection (Scotland) Act 2010 and, bringing up the rear, the BADAS act, as it is known on the streets. To have so many pieces of legislation that, between them, constitute the law in Scotland relating to bankruptcy makes no sense at all. Providing simplicity and accessibility of the law for everybody in Scotland—not only practitioners, but users—is inherently a good and sensible thing.

John Scott: Excellent. Thank you very much.

Richard Baker (North East Scotland) (Lab): Good morning, minister.

We have heard about the difficulties that users of the current bankruptcy legislation face, given the wide-ranging reforms that have been introduced by the Bankruptcy and Debt (Advice) (Scotland) Act 2014—BADAS, as it is known on the streets—and by other amending legislation over the years. You referred to your travails with that legislation. Would users of the bankruptcy legislation not have benefited from a consolidation exercise taking place earlier as part of the Bankruptcy and Debt (Advice) (Scotland) Bill in 2013?

Fergus Ewing: I think that we have proceeded in the correct way. It was necessary for us to introduce the Bankruptcy and Debt (Advice) (Scotland) Bill—it was sensible that that was done first. It had been planned for a long time, the reforms were necessary and they had widespread cross-party support. If we had brought in a consolidation bill before that, it would immediately have become out of date to some extent, and would have had to have been reformed by the Bankruptcy and Debt (Advice) (Scotland) Act.

The process has not been as quick as some people—including me, as minister—might have liked, but there is a reason for that. Consolidation of legislation is a highly complex thing to do, and there are many aspects to it, some of which we will undoubtedly come on to, including relations with the United Kingdom in relation to the law of debt.

Although it has been a long time coming, the sequence of law reform first, then consolidation, was the correct one. Perhaps I can add that that point has further validity when one reflects that although several ways in which the bankruptcy law needs to be further reformed have been identified, I would describe none of those as being particularly significant. In other words, what we will do by passing consolidated legislation should be to leave a bequest or a legacy that will have utility for some time to come. Although, of course, there will be amendments to the legislation, as far as I am aware, none is being contemplated that would be what I would categorise as being major or hugely significant.

I have answered the question as I think appropriate. Mr Clark or Mr Fisher may have something to add on timing.

Gregor Clark (Scottish Law Commission): There comes a point when you have to decide to go for it. In recent years, there have been a lot of changes in this area of law. I am surprised that practitioners can manage to use the existing law efficiently; it must take a great deal of their time

just to construct text for themselves. Therefore, this was very much the moment for the bill. Obviously, the consolidation could not immediately follow the 2014 act, because so much work was still to be done to bring that material into the bulk of the consolidation. We have progressed with considerable speed, considering the scale of the changes.

Richard Baker: Thank you, Mr Clark. To follow up that matter, the minister explained the reasoning behind the approach that he had taken and the consequential approach on legislation. Is there still a danger that stakeholders will be confused, given the recent changes that were introduced through the 2014 act and this bill following hot on its heels?

Fergus Ewing: All the changes in the 2014 act were, as I understand it, brought into force by April 2015.

Graham Fisher (Scottish Government): Yes—that is right. The 2014 act was brought into force on 1 April 2015.

Fergus Ewing: Therefore, given that the intention is that the bill, when enacted, will commence in April next year, there will be sufficient time for insolvency practitioners, for example, to accommodate in their work the practical changes in their applications and procedures that are consequential on the 2014 act prior to the consolidation legislation coming in.

As Mr Clark said, working out what the law is and piecing it all together when it is contained in six or seven different documents is hugely difficult. That huge effort occupies an enormous amount of practitioners' time, particularly where there is an element of interpretation or difficulty rather than there just being, if you like, routine matters. All that time will be saved. The advantages will substantially outweigh any notional problem. As I said, the BADAS act has been implemented in full and will have been so for a full two years prior to the expected commencement date of the consolidating legislation.

I will check with my colleagues whether I have that all correct.

Alex Reid (Accountant in Bankruptcy): The consolidation legislation's commencement is anticipated for November this year rather than April next year. There will have been a significant period for the BADAS changes to have bedded in with practitioners, and to have communicated fully with stakeholders on the impending consolidating act.

Richard Baker: Thank you. The committee has also heard from officials about what was described as a "marginal hole" that would be created in the law of England and Wales should a section 104 order not be made. That issue has been part of the committee's consideration around the timescale for consolidation. Are you are aware how that order is progressing? What dialogue have you and your team had in respect of that progress?

11:15

Fergus Ewing: I have been briefed about some of the issues, but I am not aware of where we currently stand in relation to practice. With the convener's permission, Mr Fisher will answer that question.

The Convener: Yes.

Graham Fisher: We are in on-going discussions with the UK Government to try to agree the detail of the section 104 order. That is proceeding in line with the timetables that have been set down, as I indicated previously, by the Scotland Office. Obviously, there are a lot of departments whose legislation will be impacted on by the bill simply because it will make straightforward technical changes to update legislation in all those different areas—for instance, in the Department for Work and Pensions. However, there is a host of departments whose legislation is being amended, which obviously takes some time. There are no anticipated difficulties in having the order agreed—it will probably be done in the next couple of weeks. We will keep the committee updated on that as the bill proceeds.

Richard Baker: Thank you. I think that we would like to be reassured that the section 104 order is on track. However, as you have described the situation, that appears to be so.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Mr Fisher referred to "a lot of departments"—the Westminster departments that will be impacted by the bill. I am sure that there is goodwill and willingness among them to work with the Scottish Parliament. However, what would be the practical effect of there being a gap between implementation of the Bankruptcy (Scotland) Bill's provisions as law in Scotland and the section 104 order's implementation?

Graham Fisher: I think that I mentioned before in evidence that the intention is very much that there will not be a gap in timing and that the section 104 order will take effect, as planned and scheduled, in the same timescale as the Bankruptcy (Scotland) Bill. There is no intention to commence the bill before those arrangements are in place.

Stewart Stevenson: Do forgive me, because although I am absolutely certain that what you say is correct today, schedules are schedules and

implementation is another matter. I really must press you on whether there would be a practical effect, and what it would be, if there was discontinuity between the commencement of the act and the section 104 order. Would the matter simply be resolved by the commencement order for the bill being aligned with the process for the section 104 order?

Graham Fisher: Yes. You are right that in the event of discontinuity such as that to which you referred happening—which I do not think is a significant possibility—it would be taken into account in the commencement of the Bankruptcy (Scotland) Bill, which would mean that there would be no difficulty.

Richard Baker: This is my final question. The committee heard at its evidence session on 17 November about the Scottish Government's plans to lay a package of secondary legislation in the autumn, having involved stakeholders. Can you, or a member of your team, minister, enlighten the committee with an update on the Scottish Government's intentions to work with stakeholders on the development of that package of secondary legislation?

Fergus Ewing: I can tell you that we work closely with stakeholders, including the money advice sector, ICAS and bodies such as R3 Association of Business Recovery Professionals. I had the pleasure of addressing ICAS not so long ago at its conference in Gleneagles. We have frequent and deep engagement with the relevant stakeholders, and that has been the case for some time. Alex Reid can address the detail on the subordinate legislation package.

Alex Reid: We will be working on bringing in subordinate legislation along with the consolidation legislation. Within that there will be the opportunity to consolidate further some of the regulations that support the existing legislation. That is being worked through just now. The schedule will be, after due consultation of stakeholders, to introduce the regulations in the next session of Parliament, which will allow the legislation to be introduced for the commencement of the bill.

Richard Baker: Thank you.

John Mason (Glasgow Shettleston) (SNP): There have clearly been quite a lot of significant changes in bankruptcy law in recent years, which is why we have reached the point of consolidation. Minister, you said that you were fairly confident that there would not be more significant changes to legislation, at least in the near future. Is there a reason why you think that we have concluded the major changes and that such changes will not reappear in the next couple of years?

Fergus Ewing: The basis for reaching the conclusion that it is unlikely that there will be changes that are as significant in the next few years as those that have been made in the past few years is that we have already made substantial changes, after careful reflection and discussion with stakeholders, many of whom—especially in the money advice sector—sought those changes. Although some issues are extant and need to be dealt with, I do not think that, in bankruptcy law, as opposed to the law of debt, there are necessarily a huge number of issues that would be regarded as significant—I think that that was the word that I used earlier. In other words, we have done most of the heavy lifting on the main issues of concern, particularly in relation to measures to protect the family home. Therefore, most of the major changes have already been encapsulated, if you like, in the pieces of legislation that I outlined earlier.

Of course, that is simply my view. Others may disagree—that is absolutely fine—but even if I am wrong, the consolidation bill will, if it goes ahead, still provide clarity, simplicity and accessibility. It will be simpler and more accessible, and it will enable those who perhaps have more radical views and who seek to reform bankruptcy law to look at it in one place—in one document—rather than having to look at a whole plethora of documents. Even if I am wrong, that is not an argument against the approach that we are taking.

John Mason: One of the arguments for the consolidation is that it will provide a very clear structure to something that has been very piecemeal. Are you confident that that clear structure can be maintained, even if there are some minor amendments to it—assuming that there will be only minor changes going forward?

Fergus Ewing: Yes, I am absolutely confident that that is the case. The structure of the bill is that it starts with the application for sequestration and then covers the award of sequestration. In that, it follows a long-established pattern, as I understand it, which dates back to the Bankruptcy (Scotland) Act 1913, if memory serves me correctly, and the 1985 act, which follows the same model. It starts at the beginning and works through to the end of the process. It is logical. There are various minor points about that, but the basic structure of the bill is that it starts at the beginning and works through to the end. ICAS or R3 suggested putting the definitions at the beginning. That would be possible, but it is not a fundamental change that is required.

The bill will provide a working tool for all those who need it to advise clients and will be useful for those who want to do a bit of research for themselves and those who have a reforming mien, as it will encapsulate the law of Scotland in one

place. However, I would be very surprised indeed if changes were not brought in fairly swiftly. One example of that, to which ICAS has quite rightly drawn attention, is that certain changes were introduced through the Small Business, Enterprise and Employment Act 2015, which has extended the scope of essential supplies to insolvent businesses to include information technology and communication equipment. As a consequence, there will be a need to consider whether changes will be required in order to bring clarity to the law in Scotland on that specific matter.

I must admit that I am very sympathetic to those changes being made, perhaps in the Scottish Parliament's next session, if the legislators then, whoever they may be, think that that would be a good idea—I certainly do. However, that is not a reason for not doing what we are doing now; it is a relatively minor change. I do not know whether it will require primary legislation—I have not looked into it. I suspect that it probably will, but it can be an amendment to the bill once enacted. Sadly—or not; it does not really matter—law reform is not a static process. It is a dynamic process—it goes on. The bill, when we pass it, will probably be amended quite quickly but that does not in any way detract from the force of the arguments for having this consolidation bill.

John Mason: Thank you. I think that some of my colleagues will return to the issue of structure so I will leave that for now.

One of the things that we have been looking at is whether all the relevant legislation has been brought together in the bill. Some witnesses thought that it had been but others, such as ICAS, have suggested that the debt arrangement scheme should be included in the bill. I should say that I am a member of ICAS but do not consider myself bound by all its views. The point has been made by you and others that part of the reason for consolidation is to make matters easier for users. ICAS argues that a user might consider the debt arrangement scheme and therefore it should be in the bill, too, even though it is not technically bankruptcy law. What are your thoughts on that?

Fergus Ewing: I acknowledge the argument and, in preparing for this meeting, was interested to read ICAS's presentation of it. I fully understand, from a practitioner's point of view, why it 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.

Were we to conclude that DAS should be part of bankruptcy law, the argument would be that the whole of debt law should become part of the consolidation bill. Plainly, that would be an enormous task and one that would conflate the law of debt with the law of bankruptcy. If one subscribes to the view, as I do, that we should take steps—in fact, we have taken such steps—to make it relatively easy for people to pay off their debts in full rather than seek to have relief of their debts and be discharged from them without paying them, it is logical to say that debt law is entirely different in principle from bankruptcy law and should not be treated as if it were part of bankruptcy law. Although I understand ICAS's arguments, that is the primary reason why I think that it may want to reflect further on the issue.

I think that I am correct in saying—officials will correct me if this is not the case—that R3 took a somewhat different view and did not think that DAS should be part of the consolidation. Moreover, I would be bound to reflect on the fact that, in the recent members' business debate on DAS, in which a considerable number of opinions were expressed from the back benches, a variety of parties considered that further major reform of DAS could be contemplated. I would be astonished were there not serious discussion about further serious amendments to DAS. That is very much a live issue of a significant nature that is all designed to try to help people pay off their debts in full.

I have given the major reason, but I ask Alex Reid whether he wants to add anything.

Alex Reid: I do not think so. As well as R3's views, it might be worth highlighting the views of Money Advice Scotland, which, from a money advice perspective, was quite strongly in favour of keeping DAS separate from the consolidation bill.

Stewart Stevenson: Minister, you made the point that debt law is a very large subject. Can you tell us—I do not know the answer—whether all debt law is devolved? I was thinking in particular of commercial debt law as opposed to personal debt law. I recognise, of course, that if we were restating undevolved matters, we would be able to do that in a consolidation bill, but I put that to one side and ask the general question whether all debt law is devolved. It might create an issue if one were to bring the whole of debt law together.

11:30

Fergus Ewing: I suppose that the answer to that lies in schedule 5 to the Scotland Act 1998. My understanding is that personal debt law is substantially devolved and corporate insolvency is

substantially not. Broadly speaking, that is the distinction, but there is a slight blurring at the edges, as is often the case.

The point that I was trying to make was not really about reserved versus devolved matters; it was that the law of debt encompasses a very wide range of issues. We can give the committee a long list if it wants. It is a long time—decades, happily—since I read the textbooks, but the law of debt is a much wider topic, and it includes areas such as the various types of diligence that, obviously, precede bankruptcy. It also includes the law of obligations—gratuitous and onerous obligations—gifts and contracts. It is a very wide area of law.

DAS is really one vehicle or species of statute. It is a scheme in which people are protected from diligence and are given the surety of being free from the worry of the sheriff officer arriving at their door or the threat of action being taken to use the full force of the law. I think that the idea that it should be part of a bankruptcy bill would in principle offend most traditionally educated Scottish lawyers.

Coming to a traditionally educated Scottish lawyer, I do not know whether there is anything else to add.

Graham Fisher: I think that that covers most of it. I agree that there are some specific reserved matters that are impacted on by the general law of debt and that that is a relevant consideration.

The Convener: Thank you very much. John Scott will now take us on to the Scottish Law Commission recommendations.

John Scott: Two consequential amendments are needed to the Bankruptcy (Scotland) Act 1985, which were lost sight of when two SLC recommendations were implemented by the 2014 act. Those consequential amendments are proposed to be made via the bill. However, the consequential amendments are not mentioned in the SLC recommendations, so they could be viewed as being outside the scope of a consolidation bill. Does the minister intend to explore the alternative route of making those consequential amendments via an order under section 55 of the 2014 act?

Fergus Ewing: I have the full briefing with me and have looked at it, but it would probably be simpler if Mr Fisher answered that question, if that is permissible.

Graham Fisher: Basically, we laid the order on 21 December, so it is now before and subject to consideration by the Parliament. It will be through in time for the end of the parliamentary session, assuming that the Parliament agrees to approve it.

John Scott: The matter has been dealt with then.

Graham Fisher: Yes.

John Scott: Thanks very much.

What was the Scottish Government's approach to assessing European convention on human rights considerations in respect of the provisions of the bill that remain substantially unchanged since their introduction pre-devolution?

Graham Fisher: That question is probably for me, as well.

The bill, like any other bill, obviously has to meet the tests that section 29 of the Scotland Act 1998 sets for assessing competence. Part of that is the assessment of compliance with the European convention on human rights.

We were conscious that this was the first time that many of the provisions had been laid before Parliament, so we had to consider the European convention on human rights competence of the bill in the same way as we would in relation to any other provision. As I mentioned before, we see the section 104 order as part of the package, although those measures will be scrutinised and approved at Westminster. They are part of the current law and in so far as gaps are filled in for the rest of UK law, they only replicate the structure of the bill, so the whole thing as a package must be compliant with ECHR.

The bill, as with any bill, has achieved a certificate of competence from ministers and the Presiding Officer. The section 104 order reflects the same structure and considerations as the bill. The Lord Advocate signed the certificate of competence for the bill, so we can say that the bill and the order have both been scrutinised to ensure that they are both within competence on the basis of ECHR and that we are satisfied with that.

John Scott: Thank you. That is very clear. I am sure that you understand that this is an area of great interest to the committee and we welcome your absolute reassurance. To be honest, I wish that we could find such reassurance when other bills are put before us.

The Convener: Minister, I would like to pick over individual words in the bill, beginning with "forthwith", which is in the 1985 act but has been changed in most sections of the bill—for reasons that we understand—to "without delay". R3 has argued that those changes lack consistency and could be perceived as "a change in meaning". Do you think that that might be a risk?

Fergus Ewing: We discussed that issue before the meeting, but it might be imprudent of me to relay that conversation, particularly in the context of the time that it takes ministers to do things. I will pass the question over to Mr Clark.

Gregor Clark: It was felt that it was better to replace the word "forthwith", given that it is not really modern English and rules about plain language apply here. The trouble is that although everybody knows what forthwith means, no two people can agree. The "Oxford English Dictionary" gives two meanings: "immediately" and "without delay". For me as the draftsman considering the process of bankruptcy as a whole, the idea of immediacy at every point in the administrative process seemed too strict a test, whereas "without delay", which would encourage people to get on and not waste time, seemed a better choice of phrase.

The 1985 act does not use "forthwith" consistently: there are all manner of ways in which immediacy is expressed throughout the act. I was trying to find some sort of consistency.

The term "forthwith" has been the subject of litigation. In most places in the bill it does not matter terribly much, but in the one place where "forthwith" was thought to be of real importance, it has been retained; that is in section 22, on "When sequestration is awarded", because so many things hinge on that. There is no doubt that there are a variety of opinions about what forthwith means in that section and therefore it was thought that to try to resolve that issue in the bill would amount to interference with on-going processes.

My preference would be to have a single expression for such situations that are immediate, but not that immediate. Other people will have other ideas.

The Convener: The committee will have to discuss the matter, but our brief discussions have left me with the impression that we do not have any problem with the word "forthwith". It may not be the language of the pub or the coffee shop, but it is plainly understood by people who have to think about such things. No doubt we will return to that issue.

Stewart Stevenson: I will pick over some of the words that you used, Mr Clark. You pointed out that, where "forthwith" has been retained, that has been done because there is variation of opinion as to what it means in the context in which you have retained it, but in your earlier remarks you made the more general point that no two people agree on the interpretation of the dictionary definition of "forthwith".

Given that you made that as a general remark and did not restrict it to the one place where you have retained "forthwith", does replacing it in other places, where you contend that there is less debate, not create a danger that, at the benefit of achieving internal consistency in the consolidation bill that is before us, we will create inconsistency with the preceding legislation, which is precisely what we seek to avoid doing in a consolidation bill? If the word "forthwith" was previously used in the legislation that is now being consolidated but, in your drafting, you replace it with "without delay", is there not a real danger that we will end up with a consolidation that some people may argue, with legal force, is inconsistent with the underlying legislation that is being consolidated?

Gregor Clark: You make a good point. My initial concern was just that the word "forthwith" was no longer acceptable in modern English. If the committee is happy with the word and the people who give evidence are also content with it and have a desire to retain it, I would not be greatly unhappy about putting it back in. I very much had the feeling that it was just not a modern word.

Stewart Stevenson: I put it on record that "forthwith" remains part of my vocabulary, but perhaps that merely proves that I am a child of Edwardian parents and am not in connection with the modern world. There we are.

John Scott: Perhaps that reflects the age profile of the committee—I say that with due deference to the younger members. I, too, am content with the word "forthwith" in as much as it allows an almost deliberate flexibility of interpretation. It is a mistake often made to think that the generations that went before were stupid and that because, as the convener said, a certain word is no longer the language of the pub, it has lost its meaning. There is an elegance to "forthwith" that allows an interpretation that is suitable to the circumstances wherein it is required to be used.

Gregor Clark: I certainly concede that "forthwith" allows for a certain ambiguity. Its two meanings are obviously distinct and have been followed by different lawyers on different occasions. I would not seek to defend changing the word, but I must say that I thought that there would have been far more protest if I had retained it.

John Scott: Forgive me for butting in on you, but Stewart Stevenson made the point that, by changing the word, we might inadvertently change the meaning of the legislation, which is not what we should seek to achieve in a consolidation.

Gregor Clark: Yes. There is a clash here. Consolidation should modernise language, but, as you say, where there is a genuine ambiguity about what a word means, it probably ought to be retained in a consolidation. I am happy to concede the point. It depends on what decisions are made subsequently about whether the bill should be amended, but I would be happy to go back to using "forthwith". I explained why I tried to replace it in the first instance and why it ought to be retained in section 22.

11:45

The Convener: I am grateful for that and I think that, forthwith, we can go to John Mason, who will discuss another term, which is "to fall asleep".

John Mason: You have just asked my question, in a sense, convener.

The question concerns plain language. Section 27(12) says:

"Where sequestration has been awarded the process of sequestration is not to fall asleep."

I am familiar with the term, "to fall asleep", but, as a layperson, it strikes me as a little odd to see it appear in legislation. Do you think that it could be improved on and clarified?

Gregor Clark: I am certainly not sure that it could be improved upon. The question is: should it be there at all? Is it spent? Might we be justified in cutting it out altogether? We were not at all confident about that. Does it mean anything? It is in the 1985 act, and no one has thought about repealing it.

John Mason: I was not suggesting that the concept be repealed; I was asking whether the provision could be worded in a way that would be more consistent with the rest of the legislation. It jumps out as being almost a colloquial phrase. I am sure that it means something to some legal people, but I am not sure that it means something to all legal people.

Fergus Ewing: Mr Fisher is keen to share with us his knowledge of the term "to fall asleep" and perhaps his knowledge of the practice of falling asleep. I think that he should be allowed an opportunity to do so.

Graham Fisher: "Keen" might not be the right word.

As Gregor Clark suggested, we considered the issue quite carefully. Section 27(12) has been retained. I appreciate that the question was whether it might be possible to make it clearer but, because it concerns an outdated and archaic procedural artefact in the courts, whereby cases fall asleep and have to be reawakened through a procedural step, it is difficult to improve on that term without creating doubt that we are referring to or setting up a new kind of procedure. That is why we ended up simply retaining the provision.

I think that the committee has heard some evidence about this issue. The concept of falling asleep has vanished in the sheriff courts in respect of ordinary cases. It is long gone. Because of that, we considered whether we could simply remove the provision altogether, as the concept no longer has any currency. However, because bankruptcy cases are not ordinary cases, we felt that, in a consolidating bill, it would be wrong to unpick the decision that was taken in 1985 to retain the provision and put the matter beyond doubt. If the provision in the 1985 act that says that cases do not fall asleep is the one that says that, as a matter of procedure, these cases do not fall asleep, it would be wrong to remove that in a piece of consolidating legislation. That is why we have left it in the bill in that form. I entirely appreciate that it looks unusual, but that is where we are.

John Mason: I take the point that, in a piece of consolidating legislation, we would not want to change the law. My question is: do you think that there is a clearer way of wording the provision?

Graham Fisher: I certainly cannot think of a clearer way to put it, because it refers to an archaic court procedure. To explain it in procedural terms would run the risk of confusing readers of the legislation further. However, I am of course happy to consider any suggestions.

The Convener: I want to explore this issue further, as I want to ensure that I have got my mind around it properly. Are you saying that, although the archaic process would never be used, the term "to fall asleep" is the term that would be applied if the process were ever to be used, so it needs to be referred to using that term precisely because that is the term that would be used in that situation?

Graham Fisher: Exactly.

The Convener: That is helpful. Mr Stevenson has a question about even more detail.

Stewart Stevenson: Thank you very much, convener. I will probably address the bulk of my remarks to Mr Clark, who is the drafter of the bill. I will start by focusing on the use of abbreviations. Throughout the meeting thus far, we have managed to avoid telling anyone who is watching what "ICAS" means. We all know that it is the Institute of Chartered Accountants of Scotland—or is it the institution of chartered accountants?

John Mason: It is the institute.

Stewart Stevenson: There we are, you see—immediately, there is small doubt.

Perhaps as a matter of general principle we should spell out abbreviations in respect of designations. I wonder what consideration the drafter, Mr Clark, gave to striking the balance between keeping matters concise and making matters clear and unambiguous.

Gregor Clark: Certain abbreviated terms such as "AIB" are used throughout the bill. Nobody objects to those, because the references occur so frequently that the bill would be half as big again if we put them out in full.

Abbreviations are a device to give certainty in situations where there might be uncertainty but, more than anything else, they are a device that has been found useful in dealing with the question of gender-neutral drafting. If we cannot use the words "he", "she", "his", "her" and "him", it is at times difficult, without a great deal of prolixity, to set out a provision. Many provisions in the 1985 act are straightforward and I have noticed that, in evidence to the committee, people have said that we should go back to the wording of that act. That is fine, except that I cannot do so, because I have to avoid the use of "he" and "she".

Of course, that can be avoided by simply repeating a word, but it leads to mind-numbing dullness at times if a word is repeated too often. I refer you to section 46(4), which, if rewritten, would read: "Where the creditor neither resides, nor has a place of business, in the United Kingdom, the trustee must, if the trustee knows where the creditor does reside or have a place of business and if no notification has been given to the creditor under section 44(3), write to the creditor informing the creditor that the creditor may submit a claim under this section, and may allow the creditor to submit an informal claim in writing." It would go on: "The creditor commits an offence unless the creditor shows that the creditor neither knew nor had reason to believe that the statement of claim was false." We could get into situations like that.

Of course, in other situations, it would actually create uncertainty if we simply repeated the noun. For example, translating section 10(5), it would say: "Where, after a debtor application is made but before the sequestration is awarded, a creditor who concurs in the application withdraws or dies, any other creditor may, if the conditions mentioned in subsection (6) are met, notify AIB that the other creditor concurs in the application." What does the second occurrence of the phrase "other creditor" mean there? We have just repeated it, but does it mean that he is referring to his other creditor? We could get into some really quite horrible situations just by repeating nouns.

There has been certain confusion. It has been suggested that terms have been introduced for the purposes of the bill as a whole whereas, in fact, they were introduced for the purposes of the particular section that they are in, just as we might say, "Call him Bill and call her Agnes," and then use those names—they are just labels. However, the drafting is less than ideal, because there are at least two sections where I have not made that point clearly enough. For example, in section 10, I did not point out that "OC" means "other creditor" simply for the purposes of that section. If that were to be retained, the section as a whole would have to be adjusted.

There are other sections where the drafting is less than clear. In sections 69 to 73 there could be some rationalisation to make things clearer.

Perhaps the device of using abbreviations has been used rather too frequently in the bill. I would be content to see it disappear from sections 14(7), 63 and 113 and I certainly would not be offended if it were lost from sections 69 to 73. However, given that a whole lot of parties are involved—the trustee, the new trustee, the trustee's representative, the AIB, commissioners and debtors—having a precise label adds to the clarity of the provisions, so I would be reluctant to lose the device, although the same thing could be achieved without the ugliness of constant repetition.

I feel that the device has to be defended, because the drafter needs to have different ways of tackling problems. I concede that I probably overused it in the bill and that the bill could be adjusted, but, in most cases, I think that I was correct to use it. If you removed the possibility of using it, other problems would arise.

Stewart Stevenson: We will watch with interest how you deal with that issue as the bill progresses. My constituents have a similar issue with the Doric when Aberdeenshire farmers look at a pair of shoes and ask, "Fit fit fits fit fit?" I will leave that for you to consider.

The Convener: I want to pursue that issue, although not the point about the Doric. 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.

Gregor Clark: I agree entirely with what you have said. The same point occurred to me on rereading the bill. It could be much better drafted in that regard.

The Convener: Okay. The point has been made. We are in your hands. I will never claim to be a draftsman of anything.

Stewart Stevenson: I want to ask about a few other issues around how the bill is constructed. Are there advantages or disadvantages to reordering the bill so that certain aspects are drawn together? For example, would it be better if the provisions that deal with a moratorium on diligence or the definition of apparent insolvency appeared at the beginning, which could make the sequencing better, or is that such a major task that it is beyond contemplation at this stage?

Gregor Clark: It would certainly involve a lot of work, particularly in reconstructing the tables. The order that we pick will never please everyone. My choice of order was subjective and it was subject to others' comments while I was working on it. Everyone will have their own ideas about how to construct the bill and, although some of those ideas are no doubt excellent, if we changed it, other people who so far had been content with it would start protesting and asking why they were not listened to.

I do not think that I have done any damage at all to meaning in the arrangements that I have followed. I have come pretty close to following the existing pattern of the 1985 act. I have gone into the whole process much more urgently than by introducing the cast first. My basic feeling is that you will never please everyone and that you could play around a lot with the provisions and move them about, but you would not necessarily end up with a better bill as a result.

Stewart Stevenson: A couple of other things have been suggested. Is there a merit in having a new part in the bill that covers the debtor's duty to co-operate with the trustee and the other responsibilities of the debtor in the bankruptcy process? At the moment, those responsibilities are distributed around a bit.

12:00

Gregor Clark: I am not sure exactly what that would involve or what the actual proposal is, although I understand the general theme of what you are saying.

It would be one thing if an existing part could be split in two and given new headings and so on, but we are getting into the business of moving things—in a way—just for the sake of moving them. Nothing springs out for me as being an obvious advantage of proceeding in the way that you suggest.

Stewart Stevenson: Previously, you suggested moving the definition of "debt advice and information package" to the interpretation section. Are there other definitions that you would move?

Gregor Clark: I think that the suggestion has been that 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.

Stewart Stevenson: Finally, one thing that has been put to the committee is that the trustee's powers to challenge extortionate credit transactions that have been entered into by a bankrupt debtor are currently in section 209. It has been suggested that they would be better placed in part 7, which is on powers to safeguard the interests of creditors. Do you have a view on that point?

Gregor Clark: I would need time to consider that.

Stewart Stevenson: So be it.

Gregor Clark: I am not personally prepared at this moment to respond to that point.

Stewart Stevenson: Perhaps that is something that you would address and we will hear from you later.

The Convener: Super. Would John Scott like to take us on to the implementation of what is before us?

John Scott: Yes. Minister, what future plans are in place to communicate with stakeholders on the consolidation exercise?

Fergus Ewing: My understanding is that the Accountant in Bankruptcy from the Scottish Government—Richard Dennis, who is here in the gallery today—together with Mr Reid and others have been in lengthy and detailed discussion with the stakeholders to get to this point. Therefore widespread agreement has been secured on the need for the bill, the desirability of the bill and, broadly speaking, on the content, sequencing and other important issues that Mr Clark has just explained.

I think that we are in a fairly good place. The stakeholders are happy and content and have agreed that they want to go ahead. They have looked at some of the details—the fine-tuning.

Plainly, we want to do two things. We want to continue that engagement, so that if they have any further comments to offer—especially after this session today, in the light of having had the opportunity to read the *Official Report* in the next few days or weeks—they will have that opportunity to contribute to the process before it is completed. I will ask the Accountant in Bankruptcy to ensure that that happens, although I imagine that he will be ahead of me in planning to do that.

More important, once the bill is passed and becomes law, we want to ensure that there is full promulgation of its terms to all relevant parties.

In my experience, the engagement with the stakeholders is well established, it encompasses a large number of matters—of which this is simply part—and it is more or less a continuous process. I think that we have established quite a good

relationship with all the stakeholders and that will continue. Frankly, their view is mostly that, the sooner we can get this on to the statute book, the better.

John Scott: So we can take it that discussions have taken place with organisations such as the Scottish Courts and Tribunals Service about the implementation of the bill and that, if they have not, they are in hand to take place.

Alex Reid: A meeting with the Scottish Courts and Tribunals Service about court rules is imminent within—I think—the next two weeks. I would need to check the meeting date, but it is in the diary.

John Scott: What guidance on the bill will be available for stakeholders and members of the public? Will it be issued in due course?

Fergus Ewing: That is a good question, which Mr Reid will answer.

Alex Reid: We use the AIB website as a conduit to publish that type of information. We have already put information about the draft bill and relevant links on the website. I think that I mentioned the last time we gave evidence that we are now moving into a series of stakeholder events across Scotland. We will highlight the progress on the bill at that stage. Clearly, as the bill progresses and—I hope—comes into force, we will certainly put out announcements about that along with all the relevant publications at the time.

The Convener: I presume that there is a standard textbook on all this, which I have—mercifully—never had to read. Is anybody working with the current author—if that is the right word—of the standard textbook, to make sure that accurate information is out there?

Alex Reid: We have "Notes for Guidance for Trustees", which is guidance that accompanies the legislation. Clearly, the guidance will be updated because the references will change. A lot of work will be going on to ensure that the AIB's systems are updated in time for the commencement of the bill. One aspect of that will be the guidance notes that the AIB publishes for practitioners. The guidance will need to be overhauled and that work will continue in time for commencement of the bill.

John Scott: What discussions have taken place with stakeholders in the public, private and voluntary sectors to understand the financial impact of the consolidation exercise on their operations?

Fergus Ewing: I believe that the AIB has made a significant effort to make all stakeholders—including the ones to which Mr Scott alludes, who are perhaps not so directly affected as the bodies representing insolvency practitioners, who are of course intimately concerned with the minutiae and the detail of this in every respect—aware of the consolidation of the bankruptcy legislation. I am assured that the AIB reaches out to wider stakeholders. For example, the impending consolidation bill has been highlighted through a news release on the AIB website and in various stakeholder meetings with which the AIB is involved.

I stress that these are all very important matters and that it is right and helpful that the committee has raised them, because the law is just words on a page, so it has to be communicated to everybody effectively—whatever law it is—and there has to be practical guidance. In previous years, when I was in practice, I utilised the AIB's guidance notes for insolvency practitioners. They are extremely useful as they flesh out the principles that are set out in statute and turn them into a comprehensive tool. I think that practitioners value the guidance. Although there will need to be changes to it, much of that will be in the form of renumbering sections and renumbering references to sections in relation to, for example, debtors offences and the list of assets and liabilities. The numbering of the sections will change, so the standard pro forma documents, some of which I recall are set out in the guidance, will all have to be changed.

Although these are, in essence, administrative or clerical matters, they are nonetheless very important. Between the passing of the legislation and its commencement, there should be sufficient time for all this work to be done, but I stress that the AIB is on the case more or less all the time with the stakeholders. It is highly important that that should be the case, and I am satisfied that it is the case.

John Scott: Thank you.

The Convener: Stewart Stevenson has one final question.

Stewart Stevenson: Minister, this is only the second consolidation bill that the Parliament has dealt with since 1999 and I just wondered whether you have any reflections on the process to put on the record.

Fergus Ewing: I am very pleased that we are proceeding with this piece of legislation. I suppose that I am encumbered with experience, which always risks my professing to the possession of more knowledge than I, in fact, possess. Nevertheless, the bill is certainly needed in the area of bankruptcy. Indeed, I hope that, when such legislation is required in other areas of law, we will see more consolidation bills coming forward. The lion's share of the work has been carried out by the Law Commission and others working with it, and, although it has taken quite a long time to get here, this is not something that

can be rushed. As the discussion this morning has illustrated, there are many matters of importance that may appear arcane or of a technical nature to the public—I do not imagine that the *Official Report* of this meeting will hit anybody's bestseller list any time soon—but it is extremely important that the law is made accessible and available to the people of Scotland. I remember Donald Dewar saying that that role should be one of the workaday functions of the Parliament, and he was absolutely correct.

I hope that the procedure in the bill will provide a model for future bills and I am certainly satisfied that more consideration should be given to what next needs to be done, in which respect we will continue to be substantially guided by the Scottish Law Commission.

The Convener: Excellent. Thank you. That draws the discussion to a conclusion. I thank the minister and his advisers and I suspend the meeting briefly to allow them to leave us—unless the minister wants to say anything else. Forgive me, minister; I may be about to take that back.

Fergus Ewing: No, I am happy to leave. I thank all members of the committee, but I have other ministerial duties to which I must attend "forthwith".

12:13

Meeting suspended.

12:16

On resuming—

Instruments subject to Affirmative Procedure

Dog Fouling (Fixed Penalty) (Scotland) Order 2016 [Draft]

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Food Information (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/410)

12:16

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Public Service Vehicles (Registration of Local Services) (Scotland) Amendment Regulations 2015 (SSI 2015/420)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

Tribunals (Scotland) Act 2014 (Commencement No 3) Order 2015 (SSI 2015/422)

12:16

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Act of Sederunt (Sheriff Court Rules Amendment) (Miscellaneous) 2015 (SSI 2015/424)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Welfare Funds (Scotland) Act 2015 (Commencement) Order 2015 (SSI 2015/428)

The Convener: No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Enterprise Bill

12:17

The Convener: Under item 7, the committee is invited to consider the powers to make subordinate legislation that are conferred on the Scottish ministers in the Enterprise Bill, which is a United Kingdom Parliament bill. A briefing paper has been provided that sets out the relevant aspects of the bill and comments on their effect.

Does the committee agree to report to the lead committee that it is content with the delegated powers that are conferred on the Scottish ministers in the bill and with the procedure to which they are subject?

Members *indicated agreement.*

The Convener: Does the committee also agree to draw to the attention of the Economy, Energy and Tourism Committee the fact that the legislative consent memorandum does not explain why the regulations that may be made by the Scottish ministers under proposed new section 153A of the Small Business, Enterprise and Employment Act 2015 could extend to the Scottish Parliamentary Corporate Body as a "relevant Scottish authority" for the purposes of the regulations by virtue of the provision in new section 153B(5) of that act?

Members *indicated agreement.*

The Convener: That completes item 7, and I move the meeting into private.

12:18

Meeting continued in private until 12:35.

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