LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

Wednesday 28 October 2009

Session 3

£5.00

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

CONTENTS

Wednesday 28 October 2009

LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE
26th Meeting 2009, Session 3

CONVENER

*Duncan McNeil (Greenock and Inverclyde) (Lab)

DEPUTY CONVENER

*Alasdair Allan (Western Isles) (SNP)

COMMITTEE MEMBERS

*Bob Doris (Glasgow) (SNP)
*Patricia Ferguson (Glasgow Maryhill) (Lab)
*David McLetchie (Edinburgh Pentlands) (Con)
*Mary Mulligan (Linlithgow) (Lab)
*Jim Tolson (Dunfermline West) (LD)
*John Wilson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Paul Martin (Glasgow Springburn) (Lab)
Alison McInnes (North East Scotland) (LD)
Margaret Mitchell (Central Scotland) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

David Forrester (McClure Naismith)
Fiona Hoyle (Finance and Leasing Association)
Adrian Stalker (Repossessions Group)
Nicola Sturgeon (Deputy First Minister and Cabinet Secretary for Health and Wellbeing)
John Swinney (Cabinet Secretary for Finance and Sustainable Growth)

CLERK TO THE COMMITTEE

Susan Duffy

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 2

Scottish Parliament

Local Government and Communities Committee

Wednesday 28 October 2009

[THE CONVENER *opened the meeting in private at 09:45*]

10:15

Meeting continued in public.

Subordinate Legislation

Public Appointments and Public Bodies etc (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2009 (Draft)

The Convener (Duncan McNeil): Agenda item 2 is oral evidence from the Cabinet Secretary for Finance and Sustainable Growth on a piece of subordinate legislation. The cabinet secretary is accompanied by two officials: Iain Morrison, who is policy and sponsorship manager in the Scottish Government's capital and risk division; and Paul McGhee, who is deputy director for capital and risk in the same division.

I welcome Mr Swinney, who has been busy elsewhere this morning—indeed, he is having a busy week; I am keeping an eye on his diary—and invite him to make a brief introductory statement.

The Cabinet Secretary for Finance and Sustainable Growth (John Swinney): It is a pleasure to be at the meeting this morning, and I am glad to hear that my welfare is being monitored by the convener, if by nobody else.

I welcome the opportunity to discuss the amendment to the Public Appointments and Public Bodies etc (Scotland) Act 2003 with the committee. The purpose of the order is to ensure that the appointments of the chair and directors of the Scottish Futures Trust are undertaken as part of the Office of the Commissioner for Public Appointments in Scotland system. OCPAS provides important scrutiny of the public appointments process, and it is essential to ensure that public confidence is assured in all aspects of the appointments process.

This is the appropriate opportunity for us to ensure that the OCPAS process is used for appointments to the board of the SFT. The order fulfils that purpose.

The committee will be aware that the current appointments have been made until 30 June 2010, and we want all subsequent appointments to be made under the OCPAS code. The order brings legal effect to ministerial commitments for SFT board appointments to come within the scope of OCPAS.

The Convener: As the committee has no questions for the cabinet secretary, I ask him to move motion S3M-4948.

Motion moved,

That the Local Government and Communities Committee recommends that the draft Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2009 be approved.—[*John Swinney.*]

Motion agreed to.

The Convener: As the witnesses for our next item have not yet arrived, I suspend the meeting.

10:18

Meeting suspended.

10:47

On resuming—

Home Owner and Debtor Protection (Scotland) Bill: Stage 1

The Convener: Item 4 is oral evidence on the Home Owner and Debtor Protection (Scotland) Bill at stage 1. Today, we will focus on the repossession aspects of the bill. I welcome Adrian Stalker, advocate and chair of the repossessions group; David Forrester, from McClure Naismith solicitors; and Fiona Hoyle, head of consumer finance and anti-fraud at the Finance and Leasing Association. I offer the panel an opportunity to make some introductory remarks before we move to questions from the committee.

Fiona Hoyle (Finance and Leasing Association): Thank you for the opportunity to provide oral evidence on the bill. We were pleased to be involved in the debt action forum and the repossessions group, as it allowed us to see at an early stage some of the proposals that the bill introduces.

I will start by giving a brief overview of the Finance and Leasing Association, which is a leading trade body in financial services. We cover motor finance and asset finance as well as consumer finance, which is the area that is most pertinent to our discussion this morning. Our members provide 30 per cent of all consumer finance in the United Kingdom, through credit cards, store cards, and unsecured and secured personal loans. With regard to the focus of part 1 of the bill, we represent 85 per cent of all second charge lenders in the UK. Our members are regulated under the Consumer Credit Act 2006 and by the Office of Fair Trading.

We are committed to helping customers in financial difficulties, and we view repossession very much as an action of last resort. We have put in place good-practice guidelines that set out how we will help customers in financial difficulties. More recently, in July, the OFT produced new guidance for second charge mortgage lenders, which includes a section on dealing with home owners who are experiencing difficulties in meeting their mortgage repayments, and touches on the position in Scotland.

The ways in which we are helping customers are reflected in our repossession statistics. In 2008, our members took 1,500 properties into possession, which was 200 fewer properties than our initial forecast suggested, and we expect the same sort of figure this year. There is a drive towards and an increased focus on how we can do even more to help customers who are experiencing difficulties.

We have commented via the repossessions group on certain aspects of the bill, and we hope that we can cover some of those today. Our headlines, if you like, in connection with the bill are to ensure that the changes that are being introduced are based on sound evidence, and that court procedures and processes are in place, as well as the necessary resources to ensure that there are no delays.

We are interested in the proposals on voluntary surrenders, which form an increasing part of what is happening in the market. Currently, in around 20 to 25 per cent of repossession cases, customers are essentially handing in the keys and walking away from the property. It would therefore be useful to discuss with the committee what the bill proposes and what is happening in practice.

A slightly separate issue—although it is also linked directly to the bill, as it could represent changes in the future—is the position of tenants, and what we do if there are tenants in a property that is being taken into possession. We need to balance the interests of the borrower and the tenants in such cases.

Adrian Stalker (Repossessions Group): I am here in my capacity as the chair of the working group that the Government set up to examine the law in relation to mortgage repossession actions. My role is to assist the committee in understanding the key provisions of the bill and how they connect to the work of the group.

I find the bill quite complicated and difficult to follow, even though I have been immersed in the subject for some time. The bill comprises a series of amendments to previous legislation, so it is difficult to see how it fits in with the existing law. The key provisions in section 2 set out two important changes to actions for mortgage repossessions of residential property in Scotland.

The first change is that when a lender applies for a warrant to exercise certain remedies under the legislation, and ultimately to evict the person who is occupying the property, the type of action that is raised will always call in court. Currently, in the majority of such cases, the action never calls in court if it is not defended; the process in which the sheriff grants decree is carried out in chambers and is, to some extent, a rubber-stamping exercise.

The second fundamental change is that lenders will be required to demonstrate to the sheriff that they have carried out certain steps before raising the action. The sheriff will consider that issue, irrespective of whether anyone appears for the debtor. It does not matter whether the debtor comes along to court or is even represented at all:

the sheriff must still consider whether those pre-action steps have been taken. A couple of those steps are in themselves quite important, and represent major changes to practice in such actions.

First, lenders will have to demonstrate that they have made "reasonable efforts" to reach an agreement with the debtor, or at least that they have taken steps to try to facilitate agreement—that is apparent from the bill. Secondly, lenders will be obliged not to refuse a reasonable offer from the debtor on, for example, payments of mortgage arrears.

Such an approach will set up the possibility that the debtor could defend proceedings by saying that, before the action was raised by the lenders, he made a reasonable offer to them, which they refused to accept. If the court agrees with that position, it will be able to dismiss the action. That will be quite a radical change from current practice.

Those are the key provisions that offer additional protection to debtors, which was the remit that was given to the repossessions group when the Government set it up. We can see the line from the work of the group to the provisions in the bill.

David Forrester (McClure Naismith): I represented the FLA on the repossessions group, so I echo what Fiona Hoyle said. I agree with what Adrian Stalker said about the fundamental changes that the bill will introduce. I am a solicitor in private practice and I act for many lenders in repossession cases throughout the country, so I will try to help the committee in its consideration of various aspects of the bill that the other witnesses highlighted.

The Convener: Thank you. We have spoken to the bill team and the minister, who went to great lengths to assure us that there is much consensus about the bill. However, I was surprised to learn from the committee's briefing paper that some issues were not discussed by the repossessions group and the debt action forum and remain unresolved.

There is an issue to do with the level and extent of consultation with various bodies outwith the groups. Has there been enough consultation to ensure that the proposals will not have unintended consequences?

Adrian Stalker: It is difficult for me to comment on that. The Government thought that, given the situation, it must act quickly, so the purpose of the repossessions group was to consider the issues in a short timespan—between February and May this year—and report quickly. As I understand it, the Government, which invited interested stakeholders to be on the group, regards that process as standing in place of a consultation and thinks that its approach was appropriate given the speed with which it wanted to act.

It is for other people to say whether the process was adequate, if, for example, they think that they were not properly consulted or have not had an opportunity to express a view.

Fiona Hoyle: The FLA was pleased to be represented on the repossessions group. As Adrian Stalker said, the process moved fairly quickly. In a standard consultation process, there is invariably a three-month consultation period, followed by a pause while people consider the responses. However, given the nature of the subject that we were covering, and given the objective, which was to bring forward change quickly, the process happened at a fair pace.

While we were represented on the group we had to respect the confidentiality of its discussions, so we were not in a position to consult widely among our members during the period when the group met regularly. Once that period finished, we had to step up and ensure that comments were put forward quickly.

The debt action forum report reflects the discussion that happened in that group. The report that flowed from the repossessions group's work set out a series of recommendations. When it was produced, we expressed our concern that not everybody on the group was fully behind those recommendations. We felt that it would have been useful to have more time so that people could consider them in more detail. However, we now have a bill and a consultation on it of just over a month.

It is recognised that the bill is fairly complicated. It would be great if we had the time for a consolidation bill so that we could bring all the legislation on the matter together under one act. I do not know whether there is time for that, but this is an important area of law. There seems to be a theme: we have a short period of consultation on the bill and a short period of consultation on the consultation paper that deals with tenants. These are important issues, so we plead for a wee bit more time.

11:00

The Convener: Does David Forrester have any response on that?

David Forrester: No, I have no additional comments.

The Convener: We have heard that the bill is complicated and that it proposes fundamental, radical change. However, none of you believes that the lack of consultation will result in unintended consequences, given the complexity of the bill and the radical changes that it proposes. You are relaxed about that. Is that correct?

Adrian Stalker: It depends what you mean by "unintended consequences". It is difficult for legislators to work out everything that will result from how any significant piece of legislation is framed and the wording that is used in it.

The Government invited interested parties to a meeting on the bill a couple of weeks ago. At that meeting, I indicated that certain points in the drafting ought to be changed—I emphasise that they are minor, technical issues—and I found that the civil servants were receptive to that. I had a meeting with the bill's drafters and I understand that they will also meet other people.

The Government is considering the technical aspects of the bill's drafting. It is also talking to other people. There is still a process going on.

Fiona Hoyle: There is potential for a number of unintended consequences to flow from the bill. I touched on the proposals on voluntary repossession. Currently, if somebody wants to voluntarily surrender their property, it may happen in a variety of ways. We may get a letter or they may simply come into a branch and hand over the keys. We encourage such customers to speak to their lenders as soon as they experience difficulties because we do not know how many of the borrowers in that 20 per cent of repossession cases could have stayed in their homes if they had spoken to their lenders and put repayment plans in place.

The bill suggests that, if somebody decided to hand their keys in, they would have to sign an affidavit. Others who live in the property, perhaps the person's partner, would also have to sign. The borrower would have to have the affidavit witnessed by a solicitor and there is a question about who would pay for that. Most borrowers who decide to hand in the keys will not go through that process. They just want to move on and the last thing that they want to do is to go to a lawyer and sign an affidavit. We need to be careful that we do not introduce a provision in the bill that will never be used.

Voluntary surrenders happen in a high proportion of cases. It would be useful if there was a period of time as part of the consultation on the bill—again, it is incumbent on us to come back to you too—to reiterate what happens in practice so that the bill can build on that rather than create procedures that borrowers will not use. That applies also to abandoned properties. Some people do not even hand in the keys—they just walk away completely and we might not know that they have gone until some time later. We try to contact them, but we do not want to make the situation worse for them.

David McLetchie (Edinburgh Pentlands) (Con): If the affidavit procedure is a bit of a nonsense and, as Fiona Hoyle describes, is not likely to be utilised in practice, who recommended that it should be part of the bill? Was it one of the recommendations of the repossessions group?

David Forrester: I can answer that, as I was on the group. There was discussion of voluntary surrenders and abandonments of properties. Initially, the view was expressed that all such cases should have to come to court. That was discussed, but I thought that it had been agreed that such cases would not have to come to court. Certainly, as far as I can recollect, there was no proposal in the report that affidavits should be required for voluntary surrenders. As some members might know, the present process is that a borrower who wishes to surrender possession can sign a calling-up notice and hand it over with the keys to the lender. When a property is definitely abandoned, a lender can seek to serve the notice in various ways and then take possession of the property. The costs of those procedures are relatively limited. The idea that a person who voluntarily surrenders possession of their property should have to get the borrower, their partner and perhaps others to sign an affidavit—perhaps with a different solicitor from the one who is acting for the lender—is not practical. As far as I remember, that was not one of the group's recommendations.

Adrian Stalker: No, it was not.

David McLetchie: So it was just dreamt up by the Government.

David Forrester: Yes.

David McLetchie: That is fine. We can ask ministers why they dreamt that up when they come to give evidence.

We have heard about the necessity for the bill and the imperative for action, and we are told that that is why the bill has been introduced now, separately from other proposed legislation that is the subject of wider consideration. What evidence is there that lenders have thrown people out of their homes in the past two years as a result of gaps or deficiencies in the existing law or in the procedures that lenders deploy when they deal with customers who have mortgage arrears? What evidence is there of events in the past two years that have happened as a result of a deficiency in the law and which make action imperative?

Adrian Stalker: There is very little evidence. One difficulty that was identified from the outset of the process is that the Government and the relevant agencies operate somewhat in the dark as to the scale of repossessions in Scotland. They have difficulty extrapolating figures from UK-wide agencies to discover the extent to which people in Scotland are involved. The process was prompted by figures from the Council of Mortgage Lenders,

which estimated that there would be a total of 75,000 repossessions. An extrapolation was made to give the number of those repossessions that would take place in Scotland—the information that the Government and agencies have is as crude as that. You are asking for detail about the perception of the deficiencies in the existing law, but we are not even close to getting that sophistication of analysis or information.

David McLetchie: I am one of those people who think that we should not change the existing law unless we find that it is deficient. I am trying to tease out what in practice is deficient in the existing law and processes, including the Mortgage Rights (Scotland) Act 2001? We are told that the bill is urgent and that it must be considered instantly and separately from and in advance of proposed legislation in relation to the family home. Can you give any evidence, other than anticipation that the number of repossessions might increase, that there is anything at all wrong with the existing law and processes?

David Forrester: It would be anecdotal evidence. The 2001 act took a little time to bed in, as new law inevitably does. Generally speaking, though, sheriffs throughout the country take a pretty uniform approach to dealing with the act, and their approach to borrowers in arrears is fairly favourable. A borrower who brings an application under the act will not be evicted from his or her home until most eventualities have been followed through. This is a personal opinion, but one aspect of the 2001 act that is perhaps missing is a requirement for repossession actions to automatically call in court, rather than borrowers having to bring their own court application. I am not sure whether that was felt to be a long-term problem in our system, but it represents an anecdotal approach rather than one based on evidence.

David McLetchie: So we are being asked urgently to change the law of Scotland in this field on the basis of anecdotes or stories rather than evidence. Is that correct?

Adrian Stalker: I understood you to be asking what prompted the whole process in the first place. However, during the process, it became apparent, in speaking to the lenders, that when applications are made under the 2001 act, which is the existing system, they are successful in about 90 per cent of cases. When the process is utilised, the existing system works very well, but the problem is underutilisation. The difficulty is that too few people are applying, so the court is not seeing enough cases. The court is not getting the opportunity to use its powers.

I spoke to a solicitor who works for Aberdein Considine, which, as I understand it deals with the greatest volume of business and some of the biggest lenders. He said that, in his estimation, the process is used in only about 10 per cent of cases. That is backed up by the other lender representatives to whom I have spoken.

If you are asking what the deficiency is in the current system, I would say that it works well but that it is a matter of getting more people into court—getting more people applying. That is one of the main issues that the team tried to address, and it is one of the main issues that the report addresses.

David McLetchie: Given what has happened in the housing market in the past 18 months to two years, is it not the case that someone who applied to defer a repossession might have ended up in a significantly worse financial position because of falling house prices? They might have been left with a burden of debt that was not cleared by the sale of their home. Sound advice to such a person, at the time, would have dictated that the best thing in their situation would be not to hang on to their home but to clear their debts and try to make a fresh start. The focus on preventing repossessions is, in a sense, the wrong focus—in the past year or two, it might not necessarily have been in people's best interests.

Adrian Stalker: When I acted as a solicitor and advised people about applications under the 2001 act, it was critical to advise them to consider very carefully whether it was in their interests to make an application, because they may have been throwing good money after bad. Many people want to make an application because they will do anything to avoid losing their home, when it turns out that that is inevitable given their financial position.

I think that the purpose of the bill is to avoid a situation in which people could make an application that is in their interest but do not do so. It will give people an opportunity to put things right and, if their financial position improves, to make an application in circumstances in which they currently do not.

11:15

Fiona Hoyle: Under the proposals, taking possession action would be right at the end of the line. Lenders would spend a huge amount of time trying to put in place alternative payment plans with home owners so that they could stay in their own homes. I reiterate: possession is very much the last resort. When cases go to court, that should not be seen as the start of the process, as that is by no means the case. Possession action would be taken only when payment plans had not been met on a number of occasions and the borrower had refused to liaise with their lender and

speak to them about putting different procedures in place.

On David McLetchie's point about evidence, one of our concerns on the repossessions group was that we do not necessarily have robust evidence on which to base the changes, so we need to look at them in a careful and considered way. Currently, only 5 per cent of borrowers want to defend their cases. That may be because they have been through the process of trying every other option. There will be cases in which possession action is the best option. That is a hard message, but it could be the best option for some home owners who simply have no further opportunity to stay in their home and pay their mortgage—and we do not want to make their position worse by the procedures that are put in place. I agree that we need firm evidence on which to base change.

David McLetchie: What is the typical timescale between somebody getting into mortgage arrears and the end of the process, which is repossession?

Fiona Hoyle: The typical timescale can be up to 18 months.

We are trying to encourage customers to come and speak to us at an even earlier stage—even before they miss a payment. If a person knows that they are about to lose their job or if they are really struggling, even if they have not yet missed a repayment, we want them to come and talk to us, because the earlier they talk to the lender, the greater the opportunity of putting something in place to help them.

Adrian Stalker: I would like to add something to my response to Mr McLetchie's earlier question about why the changes are necessary.

One of the other motivators for the changes that are proposed in the bill is the comparison with the position in England. I understand that the Government has come under a certain amount of criticism as a result of points that have arisen from comparing Scots and English law in the area. Lenders in England are required to demonstrate that they have taken certain steps before they raise proceedings, whereas that is not currently the case in Scotland. There is a perception that, whereas UK-wide lenders are the same lenders on both sides of the border, the position of debtors in Scotland is not as good as it is in England in certain respects and there is a greater degree of protection in England. That is one of the things that prompted the Government to consider whether changing the law was necessary.

David Forrester: That is the technical position. In reality, lenders have applied the same criteria throughout the UK. The procedures that have been employed prior to bringing court actions in Scotland have, in effect, been the same as those in England.

Adrian Stalker: I entirely agree that lenders do the same thing if they are lenders who do what they are supposed to do, but the whole point of the process is to examine whether they have done what they were supposed to do.

Fiona Hoyle: It is interesting that our regulator, the Office of Fair Trading, said in its new guidance to second charge lenders in July that what is done in Scotland must reflect exactly the approach in England and Wales.

The Convener: Is it mortgage lenders who trigger repossessions? We have discussed that. It is not necessarily in the interests of the mortgage lender to trigger a repossession in a time of negative value. Sometimes credit card companies or whoever could be involved. Do other, wider debts trigger the process?

Fiona Hoyle: Charging orders are taken out on some unsecured debt. That said, it is very rare that they ever result in the sale of a property. Most of the repossessions that we are talking about relate to mortgages.

David Forrester: Charging orders is an English procedure; it does not apply in Scotland. We are talking only about secured debt, whether as a mortgage or secured debt in relation to some other form of borrowing.

The Convener: I seek clarification on the extent of the issue—the numbers. We have referred to the 65,000 UK figure and how that may be extrapolated to the Scottish situation. Is there any evidence on the number of repossessions, either by way of the court figures or notifications to local authorities under the homelessness legislation? Were figures presented to the repossessions group to substantiate the situation and clarify the problem down the line? When will the impact be felt, given that repossession can take 18 months to work through? Will we see a more visible impact next year as a result of the current recession? When will we feel the hit?

Fiona Hoyle: I speak from our members' perspective. Our primary objective is to help people to stay in their own home. Irrespective of anything else that may be happening in the marketplace, we are concentrating on that. Looking at the broader economy, we know that more and more people are losing their jobs, which has an impact on whether people can meet mortgage repayments.

Overall, we are trying to do more to put in place payment plans. We do not have a crystal ball that allows us to say that actions will shoot up within a given period of time, although we know that the

broader economy has an impact on whether people can pay off their debts.

Adrian Stalker: I hold the view, which many lenders and people in the field share, that we will not see a sudden point-in-time impact but a long and sustained problem. People are in a difficult financial situation. At the moment, they can do certain things to keep themselves moving along—they can keep all the plates spinning—but in time, if their position does not improve, the plates will fall. There is a ripple effect to the credit crunch: it will take years for its impact to affect all those who will suffer. In some cases, the impact may not make itself felt for some time.

Fiona Hoyle: Hopefully, with an uptake in the economy, people will gain other employment. Things will not go only in one direction.

Jim Tolson (Dunfermline West) (LD): I have two main questions for the panel, one of which Ms Hoyle touched on earlier. The first is the short timescale for the bill. The Government is rushing through the legislation, and the concern of many members, whether in this or any other legislature, is that rushed legislation is bad legislation. Colleagues, including Mr McLetchie, have picked up on those concerns and questioned the need for the legislation. Is the bill being rushed through the Parliament, albeit for laudable reasons? If so, could key points be missed in the process?

Secondly, I turn to a key aspect of the bill—section 6 on the recall of decree. I am concerned about the impact of allowing only one family member—in effect, the debtor—to present themselves in court. The problem is that the debtor may not be the best person to do that; other family members may take a different view and the best case may not therefore be presented in court. Ms Hoyle emphasised that, for her and other organisations, a key aim is to help families to stay in the family home. Will the panel expand on those two points: the timescale for the legislation and the intention behind the recall of decree provision?

Fiona Hoyle: I will look at the provision as it stands. If we start from scratch, we see that we are providing another opportunity for representation at the end of the process. If all cases are to be called in court, we would like all the paperwork that the borrower and other interested representatives receive to be clear, so that people can present their position at the outset.

We talked about lining up all the pieces of paper that a borrower receives. Are we making absolutely clear to them the fact that they can go to a court and what the process looks like? We can do much more work to make the process more streamlined. If people can make representations as part of the possession proceedings, they should ideally be informed of that and make representations at the outset, because a recall is at the back end of the process. That point applies even more if we have worked directly with the borrower for a protracted time to prevent such an outcome.

We are unclear about the criteria that the bill applies. We are talking about only one option. We must not see it in isolation but take into account everything that happens before we reach the back end of the process, such as who makes representations at the outset when a case is initially called in court. We also need to ensure that the criteria that are taken into account are proportionate and fair for borrowers and lenders, so that people do not have the opportunity to abuse them later.

David Forrester: Fiona Hoyle touched on the fact that it might be better, if possible, to have a bill to consolidate all the pieces of legislation in one new act of Parliament. Instead, the bill will amend the Heritable Securities (Scotland) Act 1894 and the Conveyancing and Feudal Reform (Scotland) Act 1970—and, in effect, the provisions of those acts are replicated.

In practice, that means that many forms are served on the borrower with a repossession court action. Over the years, I have noticed that people often say, "I don't really understand all these forms." The forms are all statutory. The bill replicates the provisions of the Mortgage Rights (Scotland) Act 2001—they are very similar in that regard. The 1894 act might remain in place for a technical reason, but I would have thought that it would be possible to simplify the forms that are served on the borrower.

If more time had been available, it might have been better for Parliament to take the opportunity to review the legislation and put together the provisions in one act. That would make it easier for not just lay representatives, but lawyers and everyone else, to grasp the picture fully.

Mr Tolson mentioned recall of decree. I am not totally sure of the criteria for that. The sheriff court has discretion to recall a decree, whereas that is automatic in some circumstances in the Court of Session. The intention in the bill might be that recall will be automatic on one occasion, but I cannot tell what the proposal is from my reading of the bill.

Adrian Stalker: Given the bill's timescale, we are operating in a position in which, fundamentally, there is consensus. The repossessions group found consensus that the proposals that are fundamental to the bill are appropriate, such as the proposal to have a system in which actions would call in court and lenders would have to demonstrate that they had undertaken certain measures before proceedings were raised.

11:30

When there is such a consensus, it is a matter of ironing out the details on how to achieve the objectives. The process is perhaps slightly unusual in comparison with that of other bills, and the Government must be receptive to concerns that are expressed about technical aspects of the bill to ensure that there are no unintended consequences, as Mr McNeil said. So far, the Government has been receptive to points that I have raised about drafting and the need not to have major problems when the new arrangements are up and running.

Jim Tolson's specific point was a good one. There is an issue to do with whether only one recall application should be possible. There is a reasonable argument for an amendment that would provide that a second application could be made if the court was satisfied that it was being made on a different basis. We cannot have a situation in which everyone in the family—all the entitled residents—can apply for recall, because the process could go on and on. The court would have to be satisfied that a different point or argument was being made.

Fiona Hoyle: I do not want to labour this point, but, although we sat on the repossessions group and were involved in all the discussions, I would not want the committee to think that all the proposals in the bill in their current form have the full support of all the people on the group.

If we consider the bill and issues that have been raised—voluntary surrender has been mentioned—we can see that a number of points need to be thought through very carefully. It is not the case that everyone on the group rubber-stamped all the proposals as they are set out.

David Forrester: That was because of the issue to do with consultation, which Fiona Hoyle mentioned. She and I could discuss the proposals, but she could not discuss them with individual member companies. To that extent, there was a limitation on the degree of consensus.

Adrian Stalker: There is a difference between consensus on the bill and consensus on what the group discussed. As Mr McLetchie ascertained, the group discussed matters, and the proposals in the bill bring out the detail of what the group agreed in principle. The group had very limited time, much of which was spent on discussing matters such as the provision of advice and the need to make the process easier for borrowers. A lot of emphasis was placed on the need to get more borrowers into court and to make the experience less intimidating for them.

David Forrester mentioned the voluntary surrender process, about which lenders have a degree of concern. There was fundamental agreement on the group that it is necessary to have a process that is different from the in-court process whereby lenders seek repossession and debtors oppose the action. The group agreed that if a debtor does not oppose repossession and wants to hand over the keys, that should be allowed to happen.

However, the detail of the affidavit procedure that is in the bill was not discussed in the group. If lenders have difficulty with the proposed procedure, they must make a case for why it would be unworkable and might not be used, thereby leading to unnecessary actions being raised, which would not be in the interests of borrowers who want to surrender their keys. Lenders will have to make that case, but that does not indicate a lack of consensus in the group.

David Forrester: I was trying to make the point that every aspect of the proposals in the group's report was not subject to consensus, because groups such as the FLA and the CML could not discuss every aspect with their members.

The proposals on voluntary surrender and abandoned properties are quite retrograde and will lead to greatly increased costs, which will ultimately be passed on to borrowers. If a lender can take possession of an abandoned property only by jumping through many more hoops, including bringing a court action, trying to serve notice on someone who has disappeared and appearing before the court, costs will increase. Ultimately, of course, those costs will be added to the borrower's account. That is an example of an aspect of the bill with which I disagree.

The Convener: The issue is certainly complicated. In the past half hour, we have fleshed out some of the unintended consequences, which we questioned earlier. I am a bit frightened to ask about this, but you mentioned two issues that might need questions and answers.

First, with regard to the Mortgage Rights (Scotland) Act 2001 and the need for a consolidation bill, as I understand it from our briefings, the bill will all but repeal the 2001 act. The question that follows from that is whether the protections that are provided in that act are adequately replicated in the bill. Secondly, are the Scottish Government's estimates of the bill's impact on court time and resources accurate? The ambition is to get 25 per cent of people who lose their homes into the court system. Will an unintended consequence be that, if the bill is successful, the court system will not be able to handle that?

Fiona Hoyle: We are carrying out an impact assessment as part of our response on the bill. One of our concerns is that, if we introduce

procedures under which all cases are called to court, we must ensure that the courts have the necessary resources to deal with that. At present, 5 per cent of cases are defended, but the consultation said that the aim is to have 50 per cent, which is a significant increase. Therefore, our question is whether the courts are gearing up for that. Training, resources and time are required, and we must avoid delays. At the end of the process, when possession is being considered, protracted delays will not serve the customer—the borrower—well because the debt will continue to accrue on the mortgage account in the intervening period. We must therefore ensure that the infrastructure is in place.

We have talked about lay representation. We are pleased that the bill talks about an approved process, because in the initial discussions we were worried about the competency of the lay people. In other tribunals in which there is lay representation, it is a very mixed bag. In dealing with borrowers who are potentially about to lose their homes, we must ensure that lay representation is spot on. How many such people will we need and will there be enough of them to deal with the cases in which lay representation is required?

We must ensure that, when the measures are introduced, the resources are in place so that the system works properly and so that we do not have severe delays.

Adrian Stalker: I will deal first with the impact on the courts and the issue of resources. The repossessions group did not consider that, as we took our role to be to recommend changes that would have the effect of increasing protection for the debtor under the circumstances that we were told existed. We took it to be the Government's job to consider the impact of implementing those changes. I understand that the Government has had extensive discussions with the Scottish courts administration on the arrangements that will have to be in place so that the increase that the Government envisages will not have a detrimental effect on the operation of the courts. I cannot comment on the details but, as I understand it, the Government has already discussed and analysed that issue.

As for the suggestion that the bill virtually repeals the 2001 act, I point out that that particular act is very short and simply establishes an application process under which a debtor, who would under normal circumstances make payments towards the arrears, can go along to court and ask for the lender's rights to be suspended. That process is replicated in the current bill, although there are a couple of technical but not particularly major issues about the transfer that I have raised with the bill's draftsmen and civil servants.

David Forrester: Given that the bill replicates the relevant provisions of the 2001 act—for example, the criteria that the court must use in assessing a claim for repossession—I have no concerns in that respect.

The Convener: The bill also addresses the question whether the improvements that have already been made in England should be introduced in Scotland to help people here who are in the same situation.

Adrian Stalker: That element has still to be added. The provision was not in the 2001 act, so one might say that the bill is the 2001 act revamped.

The Convener: So it will give parity.

David Forrester: We are waiting to see at the moment.

The Convener: You are not sure about that either.

David Forrester: The pre-action criteria that the lender must have regard to are set out in the bill, but I imagine that the precise details will be fleshed out in a statutory instrument. Lenders want a checklist or something similar to ensure that they know exactly what they have to do and that they can demonstrate to the court what they have done when they first bring an action to court. As I understand it, in deciding whether to make an order in favour of the borrower, the court will take into account that checklist and the criteria in the 2001 act.

The Convener: Would it not make you more comfortable to know more about all of that before the bill is passed? Does it not make you uneasy that such detail will be set out in a statutory instrument?

David Forrester: We would certainly like to see the detail.

Alasdair Allan (Western Isles) (SNP): As you know, the committee has received quite a bit of written evidence on the bill, not all of which we take entirely at face value, and some of which is from people who have declared interests in the matter. Wilson Andrews Ltd, which as an insolvency practitioner is obviously involved, has made some trenchant points that Mr Stalker might want to rebut, including the claim that

> "The proposal to allow the complete exclusion of family homes is too extreme and the balance between the interests of the debtor and the creditors will be skewed. There is a real risk that where we currently have those who can and those who cannot pay we will be adding a third category of those who don't have to pay. The current proposals will invite debt abuse."

Adrian Stalker: I cannot really respond to that. My concerns centre on part 1, which relates to the repossessions group.

The changes that are proposed in part 2 were discussed by the debt action forum. Although I was a forum member, my role was largely to liaise between the two groups and to report back to the forum. My recollection, however, is that the forum had an intense debate over, and definitely did not reach consensus on, the family home proposals. I will say nothing further on the matter.

Fiona Hoyle: We will be making a response about the proposal, but I agree that no consensus was reached on it. At the end of the day, making it more difficult to recover debt will have an impact on the cost and availability of credit. As a result, any such changes must be very well thought out and must take into account some of the unintended consequences that we touched on earlier.

The Convener: Thank you for those initial remarks. We will focus on and pursue the matter at next week's evidence session.

Bob Doris (Glasgow) (SNP): I will ask one question on family homes—if it is not appropriate, that is fine. The point has been made to me, rightly or wrongly—I simply put it to the witnesses—that, if the family home of someone who is in bankruptcy is worth £600,000 or £700,000, the person who hopes to recover that money might decide that it would be sensible for the debtor to downsize the family home and realise some of the capital for the creditor. Might it be possible to define the family home and perhaps put a ceiling on its capital value in the bill?

11:45

Adrian Stalker: I think that that was discussed.

Fiona Hoyle: It comes back to the potential problems that might arise, how such a provision might be abused and the need to ensure that all those things are bottomed out within a short consultation period.

Bob Doris: We will come back to that with other witnesses.

There has been a lot of talk about pre-action requirements and the pre-action protocols that are used in England. How well used are pre-action protocols? How are they tested? What percentage of pre-action protocols have English courts found to be robust? Are they always tested by the courts?

Fiona Hoyle: The pre-action protocol for mortgages came in at the end of last year, so we are very much in the early stages. As David Forrester mentioned, we have just introduced a checklist of things that lenders need to demonstrate to the court that they have done. Different courts might take different approaches and different district judges in England and Wales might ask for different information, so we have put in place a single-page checklist that provides some certainty for lender and district judge that cases are being dealt with efficiently.

Generally, the protocol seems to work well. It will be reviewed in a couple of months' time and it is constantly being examined to determine whether other things might be included. Under the bill, there is an opportunity for further change, but we need a period of stability. We do not want too much change, and any change needs to be well thought through and must balance the interests of both parties.

The protocol sets out a clear framework for what needs to be done before a case comes to court; that certainty is good for the lender as well as for the borrower and the court. However, we are still in the early stages. I understand that all the protocols in England and Wales will be reviewed in the next year or two.

Bob Doris: What will that review cover?

Fiona Hoyle: It will cover how the protocols work in practice.

Bob Doris: Who will review them and how will we test that? Mr McLetchie talked about whether there is a need for the bill. I suggest that the only way that we can test whether creditors fulfil their obligations is to test that in court. If it is not tested in court, all we can do is get anecdotal information from creditors that they are doing the right thing. The bill will test in court whether pre-action requirements in Scotland—or pre-action protocols in England—are being carried out and whether that is being done professionally and compassionately. Is there any evidence, other than anecdotal evidence from the sector, to show that they work well?

Fiona Hoyle: There has been no formal study yet. We could consider various measures. We could say that there being fewer possession actions means that the protocol is working well because it shows that everything is being checked and the procedures are being followed before possession orders are granted. However, it is still early days. The feedback so far is that the pre-action protocol has been a positive development in that it has provided some certainty as to what district judges in England and Wales expect to see from lenders when considering a home owner's case.

David Forrester: The position in England is that, when a lender seeks a repossession order, it has to show the district judge that it has done so many different things to advise the borrower and to seek agreement. That is the kind of matter that the bill covers in general terms.

Fiona Hoyle: One of the requirements of the bill is to signpost home owners to advice and assistance. That is quite a broad requirement. What does it mean in practice? Does it involve the free, independent money advice sector? There are some provisions in the bill that could be sharpened up, as the situation could be different in different areas. What type of advice providers are we meant to be pointing people towards? Generally, it would be the recognised money advice groups, but the drafting of the bill leaves that slightly unclear.

Bob Doris: I want to come back to that point. Of course, some lenders will be more responsible than others—that is the way of things—but that will now be tested in court. Does that mean that more lenders are likely to be far more responsible in relation to repossessions?

Fiona Hoyle: In England and Wales, unless the pre-action protocol is followed a possession order may not be obtained.

Bob Doris: I think that is a yes.

As you have said, part of the "Pre-action requirements" section says that

"the creditor must have regard to any guidance issued by the Scottish Ministers."

That refers to guidance that will be issued by statutory instrument. There have been some concerns about what those Scottish statutory instruments will say. Are you reassured by the pledge that I think the minister has given that we will see a draft statutory instrument before the stage 1 debate? Indeed, it might be relatively imminent. Does that reassure you that you will be able to offer input on seeing that draft statutory instrument?

Fiona Hoyle: It would be very helpful to have sight of the instrument. We are only seeing part of the process, and there are various provisions in the bill under which other statutory instruments will be laid. This gets back to a point that David Forrester made: it would be great if everything was in one place, as we have a fairly piecemeal approach, and having early sight of such SSIs would be very welcome.

Adrian Stalker: The purpose of a pre-action protocol is to take the requirements that the lenders have effectively imposed on themselves—and which the financial services industry has agreed are reasonable—and to ensure that everyone is toeing the line. The larger, more responsible lenders will always tend to do that anyway, but there will be other operations where that is not done. The purpose of the exercise is to ensure that what is agreed is reasonable, that everybody follows it and that somebody—the court—checks that it is done. As I understand it, that is what goes on in England. Now that there are pre-action protocols there, the courts are told to do that, and they do it.

The extent to which that affords additional protection is a different question, and it is much more difficult to analyse. There will always be a view on the part of people who represent debtors that there could be more in the protocols—that lenders could be required to do more. That is an issue about what should be in the protocol.

Fiona Hoyle: The protocol in England and Wales is not simply about what lenders think they should be doing; it is broader than that. Consumer groups have an input, so it is not just a matter of the lending industry setting out what it will do; the industry is influenced by other parties.

Bob Doris: We need to see the draft statutory instruments, and I know that you are keen to see them as soon as possible in order to give the committee and stakeholders the chance to scrutinise them and to see whether they can be altered if they are seen as being inappropriate. As living and breathing legislation—with guidelines on best practice in debt management and debt recovery that will change from time to time—it is important that the provision for the statutory instruments be there for all time, so that Governments can reassess the situation from time to time. You would like to see the draft sooner, but is it a positive thing that the guidance will be issued by statutory instrument, which allows it to be amended and modernised to take account of whatever best practice becomes?

Fiona Hoyle: The flexibility angle is important. We do not know what is going to happen in the market. Judging from what is happening across the board, there will be changes to legislation and new schemes will be introduced. We are already examining the pre-action protocol in England and Wales to see what changes might be made to it. There is a need for flexibility in order to avoid having to change primary legislation every time.

I would advocate consultation, however. In England and Wales there is a lot of consultation of all parties concerned—including consumer groups, lenders and the Master of the Rolls—every time a change is made.

David Forrester: The problem with statutory instruments generally is that they are not debated, and law is changed without a parliamentary debate. That is a more general point, however.

Adrian Stalker: I would not be surprised if guidance made a significant departure from what is recognised as best practice for lenders. I do not see why the Government wants to do that. The important thing about guidance is that it is not just for the lenders but for everyone who might oppose a lender in a court action, and who would want to

be able to put before the court the fact that a lender has not followed the guidance. As Bob Doris says, the guidance has to be flexible because practice changes, as do people's opinions on what constitutes best practice.

Mary Mulligan (Linlithgow) (Lab): I want to ask about the position of tenants. I know that the Government is consulting on that, and Ms Hoyle raised the point in her opening comments. However, I want to give you an opportunity to say how, from discussions that you have had, your members see the position of tenants when landlords default on their mortgages.

Fiona Hoyle: Perhaps I could talk about our initial reactions to the consultation paper. We are aware that tenants can sometimes find themselves in the difficult position where notices have been sent to the property—and there is now a statutory basis for this—addressed to the occupier. Those notices try to encourage those who are living in the property to open them so that the occupiers can get early sight of the fact that proceedings might be being brought. That is our starting point.

The proposal in the consultation paper that presents a real challenge to us is the option that would allow the tenant to stay in the property for the remaining period of their tenancy agreement. From the home owner's point of view, they have just lost their home but a tenant is in the property. We do not know how long that tenancy arrangement might go on. There is a real chance that if a tenant knows that they are just there until the end of their agreement, they will not pay the rent. In the intervening period, the mortgage arrears will continue to accrue. The lender is under a duty to get the best price possible for that property for the borrower. All that becomes very difficult if a tenant is still living in the property.

A number of issues come into play. Yes—we need to consider the tenant's position, but we must also not forget the position of the borrower, who is still sitting behind the situation and is financially responsible until the property is sold and their debt is crystallised. If the lender's option is to sell the property with the tenant in it, that is going to affect the price. Will the tenant keep the property in a good state of repair? Will they pay the rent? Mortgage lenders are mortgage lenders, not landlords, so if there is a tenancy agreement for a period, are the lenders meant to step into the position of landlord? We will be coming back on lots of these issues.

David Forrester: My recollection is that the repossessions group made no recommendation in relation to tenants. Towards the end of the process, Adrian Stalker wrote a paper that discussed the issue in general, but the matter was not within the remit of the repossessions group.

Mr McLetchie asked about the evidence and basis for changing the existing law on repossession of property. I am not sure that evidence has been taken in relation to the situation of tenants, or how much discussion or inquiry there has been into that. At the moment, in general, most lenders will seek to co-operate and give tenants a reasonable time to depart. They will try to reach agreement voluntarily. Certain legal steps can be taken to remove a tenant and, since the Mortgage Rights (Scotland) Act 2001 came into force, there is a requirement to give advance notice to the occupier that a repossession action has been brought. Those provisions are replicated in the bill.

12:00

The issue has been covered in a number of places. It is quite a difficult area of law, which is—it is probably fair to say—not completely formed. The issue deserves greater scrutiny and consideration, whether by the Scottish Law Commission or someone else, before a final view is reached. Problems to do with the fact that mortgage lenders are not landlords, and other issues that the discussion paper threw up, such as the possibility of leaving tenants in the property for the remainder of the tenancy, could give lenders cause for concern.

Adrian Stalker: There is a technical issue and there is a policy issue. The technical issue is that the law as it stands is not in a satisfactory state. The Conveyancing and Feudal Reform (Scotland) Act 1970 allows lenders to recover possession and the Housing (Scotland) Act 1988 gives private tenants security of tenure, but there is no interrelationship between the two acts. Nothing in the 1970 act says what should happen if there is an assured tenant in the property, and nothing in the 1988 act properly deals with lenders' rights.

There is a widely held view in the profession that there is a lack of clarity about what is supposed to happen. Tenants who have been paying their rent and had no idea that there was a problem do not know what their rights are or what they are supposed to do if they receive an eviction notice from lenders. Reform to sort out the issue is long overdue.

Lenders currently have the power to take on tenants, if they want to do so. If they come on the scene and find a tenant, they can in effect act as a landlord to the tenant. The policy questions, which Fiona Hoyle identified, are: to what extent will we compel lenders to do that, and in whose interests would we be acting? It is a difficult issue. I favour a solution that strikes an appropriate balance between lenders' and tenants' rights and concerns. It should not be possible to eject tenants immediately; they should have some security,

although they should not have full security of tenure, which would impose too much obligation on lenders, in effect requiring them to become landlords, which might not be a good idea. I am not sure exactly where we find the point that strikes that balance.

Back in the early 1990s, during the previous financial crisis, it was not uncommon for lenders to take on tenants whom they found at properties. Lenders found that that made financial sense, because rather than sell the property and make a loss they were as well to keep the tenant and take the rental income until things got better. It might be in lenders' interests to do that, but the question is to what extent we compel them to do it.

Fiona Hoyle: We must also not lose sight of the borrower in such situations.

Mary Mulligan: Has there been a difference in approach between lenders who were aware that the mortgage was for a property that would be rented out and lenders to whom it came as news that there was a tenant in the property?

David Forrester: The short answer is that there can be a difference. The buy-to-let market grew greatly during the past few years and there are various provisions whereby borrowers are meant to advise lenders that the mortgage is for a buy-to-let property. In such situations, lenders are aware that there is a tenant, and when they repossess a property there are criteria under the 1988 act whereby the creditor can serve a notice on the tenant—whether or not an action has been raised against the borrower.

It is probably fair to say that situations in which a tenant is discovered in a property at the last minute, after a notice to quit has been served by the sheriff officer, tend to be played by ear. Albeit that the law is not in the best of conditions, there are procedures that can be followed.

Mary Mulligan: I hear what Mr Stalker says about the need to resolve the dilemma that arises from having two sets of legislation—the 1970 act and the 1988 act—but I also acknowledge Mr Forrester's point that a solution cannot be rushed. Reasonable consultation is needed, because there are, as you have all indicated, a number of possible implications attached to whichever route is finally chosen. Will there be sufficient consultation on the matter for it to be included in the bill, or will we have to come back to it?

Fiona Hoyle: It is a big subject for a one-month consultation period.

David Forrester: Yes, I agree. It needs more consideration.

Adrian Stalker: I am not sure.

Patricia Ferguson (Glasgow Maryhill) (Lab): Everyone on the committee understands that the Government is concerned to get the legislation through as quickly as possible, and that it has therefore considered having a slightly curtailed consultation period. However, if the Government's back-up for that consultation was the repossessions group that Mr Stalker chaired, and if the bill diverges from the group's recommendations, that might give us some cause for concern. We have heard this morning of at least two areas in which the provisions perhaps do not reflect—or reflect in a different way—the recommendations that were made by the group.

Can you quantify—although you may not agree on the number—the occasions on which that happens, and tell us whether those areas in which there is such divergence are substantial?

David Forrester: We have discussed two broad areas on which there was general consensus, if not agreement on all aspects of the detail: the pre-action criteria and the issue of cases calling in court. Those are, as I understand it, the basic aspects of the bill, and they are both recommendations that were made in the group's report.

We have touched on the areas that give me specific cause for concern: voluntary surrender and abandoned properties. I do not view the procedures on voluntary surrender, which involve affidavits and so on, as practical in reality. Even if they were, they would still add hugely to the cost and the delay in achieving an outcome that both sides would want in such cases. No evidence was put forward in the group to suggest that there was a problem with the existing system.

Similarly, it appears that the option of not having to raise a court action in relation to abandoned properties is not in the bill at all. A court action will have to be raised to get an order to allow the lender to sell, which was not what the group proposed. Both those measures will ultimately increase costs, to be borne by the borrower.

Those are the main areas in which the bill does not replicate the report. The issue of recall of decree, which Mr Tolson's question touched on, was discussed at the end of the group's report. I think that there was a paper on it, and that it was debated briefly, but I am not sure whether a specific recommendation was made on how it was to be carried through. However, I have no doubt that the Parliament or the Scottish courts would have examined that area in due course; it is a matter of civil procedure, which might have been changed in any event. The areas of voluntary surrenders and abandoned properties give me some concern.

Adrian Stalker: I am not sure that I agree with the characterisation that the bill is in conflict with the group's recommendations. The group made recommendations that, due to time constraints, were quite general in certain respects. It did not go into details because there simply was no time to do that, given the different things that we had to discuss. The bill nails down some of the detail of how those things will be achieved. However, as I said earlier, given the nature of the process, some of the bill will require to be amended because there is disagreement over whether it properly carries through what it is trying to achieve. The devil is in the detail, really. The bill does not conflict with what the group suggested; it simply takes the discussion to the next stage.

Fiona Hoyle: I agree with Adrian Stalker. We are only now seeing the detail—in some cases, only part of the detail—because we have still to see other SIs coming forward and because of the process. As I mentioned earlier, while we were represented on the group we respected confidentiality and did not consult our members broadly on it. We now have a bill, points are being raised about parts of it and there is still more information to come. Many lenders in our industry are having sight of it for the first time, so we need to ensure that there is sufficient time for everything to be looked at carefully.

Patricia Ferguson: But does Mr Stalker share Mr Forrester's concerns about the areas of the bill that he mentioned?

Adrian Stalker: David Forrester referred specifically to proposed new section 23A of the 1970 act, which will be inserted by section 1(3) and will be headed "Voluntary surrender of residential property following calling-up notice or notice of default". The concern is that that will impose a series of requirements on the lenders such that it will not be practical to require them to do these things. It is not just an affidavit concern; there is an issue surrounding how the lenders will satisfy themselves about whom they are supposed to be getting affidavits from, who will pay for that process and so on.

If that leads to a situation in which the procedure is not adopted, that is a legitimate concern. If the procedure is not adopted, the only thing that the lenders can do is to proceed under section 24 of the 1970 act, and that will not be in the interest of certain borrowers. As I said, it is for the lenders to make a case as to why the proposed procedure is unworkable and to have it changed so that it is easier for them to operate and can be used in cases in which that is appropriate.

Patricia Ferguson: That is helpful. Thank you.

The Convener: I will accept a bid for a late question while we wait for the cabinet secretary to arrive.

John Wilson (Central Scotland) (SNP): I have two quick questions, the first of which is on the last point that Mr Stalker made about the additional burdens on borrowers of taking the appropriate action. Has that been taken into consideration in the bill as it is drafted? We are talking about repossessions when borrowers are in financial difficulty. Does the panel think that additional financial burdens may be placed on those borrowers that will drive them further into financial difficulties?

Fiona Hoyle: We must take into account the fact that, if all cases are called to court, that will have an impact on the overall court costs. Evidence on that will be submitted as part of the written response. Every time that a case goes to court, that will have an impact on the cost.

Other things that flow through include the impact on the tenant position, which we have just touched on, and the courts' resources to deal with delays, which we have talked about. A number of factors could come into play that might affect the overall cost of proceedings. The real challenge will be to ensure that what is brought forward is well thought through and efficient, to ensure that those additional costs do not accrue to such a level that it becomes difficult to proceed.

Adrian Stalker: The concern that was uppermost in the minds of the people on the repossessions group was that if debtors are given additional rights, the vindication of those rights could cost them money. That matter must be taken up in considering advice provision. It is for people who advise and assist debtors in proceedings to help them to make a decision about whether it is in their best interest to make an application.

12:15

John Wilson: I congratulate Mr Stalker on chairing what must have been, given the evidence that we have received this morning, very enjoyable meetings.

I have a question for all the panel members. Has the process that the Government has carried out for the bill been the best possible process, particularly in light of Ms Hoyle's comments? Ms Hoyle has said a number of times that the members of the organisations that were represented were unable to be fully consulted on the discussions in the group. Issues such as tenants' rights when landlords have mortgage arrears are due for further consultation. Given Mr Stalker's comments about the 1970 act versus the 1988 act, should the Government have taken a little longer to ensure that all the loose ends were tied up, particularly as there is conflicting legislation, so that the bill was fit for purpose?

Fiona Hoyle: I have touched on that issue a couple of times. Overall, we would have liked a longer and more open consultation process during which we could have spoken to our members about the proposals in more depth. On the consultation periods that we are now being presented with on the bill and the consultation paper on tenants, there is an opportunity to ensure that the periods are longer so that all the points and unintended consequences can be put forward and to ensure that, if voluntary surrender provisions are to be included in the bill, they will be workable. I make a plea for more time now, please.

David Forrester: I represented the FLA on the repossessions group, so my position is the same as that of Fiona Hoyle. Ideally, we would have liked more time to consult on the group's on-going discussions, its report and the bill before giving evidence on the bill.

Adrian Stalker: I understand that the Government came under political pressure because it faced what could be reasonably understood to be a looming crisis towards the end of last year, the legitimate argument that people are not utilising the rights that they already have, and people down south having rights under the same lenders that people in Scotland do not have. In those circumstances, it seems to me to be reasonable that the Government should have wanted to act quickly. I think that the processes that it has adopted are appropriate.

I am not sure that the lack of consultation affected the work of the repossessions group on the more general level on which it operated. Since the report came out, I have not heard anybody suggesting that if they had been on the group or if they had had more time, they would have wanted to impact on the group's conclusions in a different way or that they would have wanted the conclusions to be different.

The Convener: I thank you all for your time and for the interesting evidence that you have provided. There will be a brief suspension while the witnesses change over.

12:19

Meeting suspended.

12:23

On resuming—

Child Poverty Bill

The Convener: Item 5 is oral evidence on a legislative consent memorandum, LCM(S3)22.1, on the Child Poverty Bill, which is UK legislation. I welcome the witness panel: Nicola Sturgeon MSP, Cabinet Secretary for Health and Wellbeing; Kay Blaikie, principal legal officer at the Scottish Government; and Samantha Coope, team leader of the Scottish Government's tackling poverty team. I offer the cabinet secretary an opportunity to make some opening remarks before we move to questions.

The Deputy First Minister and Cabinet Secretary for Health and Wellbeing (Nicola Sturgeon): Thank you, convener.

The draft legislative consent motion seeks approval for the UK Parliament to apply provisions in part 1 of the Child Poverty Bill to Scotland. The bill as a whole is intended to drive progress to eradicate child poverty throughout the UK by defining and setting in legislation targets to eradicate child poverty. The legislation is intended to support a co-ordinated approach within Scotland and throughout the UK, and to build consensus and momentum on tackling child poverty.

The committee will be aware that part 2 of the bill covers English local authorities and their partners, and that therefore the motion will relate only to part 1 of the bill. The particular provisions in part 1 that require legislative consent place strategic duties on the Scottish ministers. Members will have seen the draft motion.

To be more specific, the duties legally bind the Scottish ministers to developing a Scottish child poverty strategy within the first year following the bill's enactment and a revised strategy every three years after that. Those strategies have to set out the measures that the Scottish Government proposes to take to contribute to meeting the targets. The committee will also be aware that an amendment to the bill has now been tabled to introduce a requirement on the Scottish ministers to report annually on progress on the most current child poverty strategy and to lay the report before the Scottish Parliament. That amendment will simply strengthen the duties on the Scottish ministers.

The bill also provides for a new child poverty commission, which will be made up of experts in the field, to advise on strategic and technical matters. The Scottish ministers will be required to seek and take heed of the commission's advice.

We will also have the right to appoint one of the commissioners. The secretary of state will be required to consult the Scottish ministers on the overall membership of the commission. Those arrangements are intended to ensure that our strategies are underpinned by the best evidence available and that we have as co-ordinated an approach as possible across the UK.

The provisions will help to strengthen our efforts to eradicate child poverty and galvanise our commitment. With both those aims in mind, I ask the committee to support the draft legislative consent motion.

The Convener: Thank you for those opening remarks. Do committee members have any questions?

David McLetchie: Good afternoon, cabinet secretary. You said in your opening remarks—and this was my understanding from the legislative consent memorandum and the other papers that we have been given—that the bill does not apply to local authorities in Scotland, in that it does not place obligations on them. However, other committee members and I got a letter yesterday from Councillor Harry McGuigan of the Convention of Scottish Local Authorities—I do not know whether he copied it to your office—which said that COSLA was

"opposed to a new duty"

being placed on local government in Scotland, and that doing so was contrary to the spirit and practices enshrined in the concordat and a retrograde step. I find it hard to square Councillor McGuigan's trenchant criticism of the bill, which he seems to suggest lays all these new onerous and inappropriate duties on local authorities in Scotland, with the proposition that the bill does not apply to local authorities in Scotland. What is the situation?

Nicola Sturgeon: The situation is as I outlined it in my opening remarks. I have not seen Councillor McGuigan's letter, so obviously I cannot comment directly on its contents.

Part 2 of the bill, which places duties on English local authorities, does not apply in Scotland, so no duties are placed on local authorities in Scotland by virtue of the bill or the legislative consent motion. Of course, that does not mean that local authorities will not have an important part to play in ensuring that we can meet the targets that the bill enshrines. In Scotland, local authorities will contribute through our arrangements with them, not through their having specific duties conferred on them. We have the national performance framework, the relevant national outcomes and indicators that set the direction that we have agreed already with COSLA, and the achieving our potential and equally well strategies, which will help us to meet the targets. Single outcome agreements can and do include indicators that are relevant to child poverty.

The difference between how the bill treats Scotland and England reflects the different relationships between central Government and local government that exist in Scotland and England. To be absolutely clear, the bill does not confer any statutory duties on Scottish local authorities.

David McLetchie: I am happy to send you the letter so that you can have a look at it. It appears that COSLA has got hold of the wrong end of the stick as far as the bill is concerned. To reassure Councillor McGuigan and his colleagues, perhaps you will also confirm that, on matters relating to child poverty, the Scottish Government has no intention of placing any additional statutory duties or responsibilities on Scottish councils.

Nicola Sturgeon: I am happy to give that assurance. There is no intention, whether through the legislative consent motion or through the bill, to confer such statutory duties on local authorities, and we are certainly not planning to confer any other new statutory duties on them at this stage. We are consulting on a separate piece of UK legislation around the socioeconomic duty in the Equality Bill, but that duty is obviously subject to consultation. In the context of the Child Poverty Bill, no statutory duties are being placed on Scottish local authorities.

12:30

Mary Mulligan: Following on from that, do you not think it odd that local authorities will be the only elected bodies on which there will be no duty to contribute positively to meeting child poverty targets?

Nicola Sturgeon: No, I do not, given the different relationship that we have with local government in Scotland. I make no judgment on the different relationships throughout the UK; I am simply explaining that we have a different relationship. In England, there is no concordat, historic or otherwise, between central and local government. We take the concordat approach in Scotland, which governs our relationship and sets in place the mechanisms by which we assess the performance of local authorities. The bill is simply a reflection of those different relationships. I do not mean that north and south of the border local authorities do not have a very big part to play in meeting child poverty targets. That has always been, and will continue to be, the case.

Mary Mulligan: It is clear that many services will be delivered by local authorities. Although I am conscious that you do not have responsibility for local government, will you tell us how many single

outcome agreements—or the other instruments to which you referred—presently include references to tackling child poverty? How can we ensure that local authorities are playing their part, as I am sure many of them are, and hold them to account so that we all meet the targets?

Nicola Sturgeon: That is a fair question. You are right to say, as I have said, that local authorities have a big part to play. If memory serves me correctly, Councillor McGuigan and I are joint signatories to our tackling poverty strategy in recognition of the fact that central and local government have to work together on that.

Fourteen single outcome agreements contain an explicit reference to child poverty, but our assessment of the single outcome agreements for 2009-10 leads us to think that all single outcome agreements give priority to what is a key challenge in every part of Scotland. Because of differing local circumstances, councils and community planning partnerships will choose to meet that challenge in different ways. It is important that we assess the success or otherwise of those approaches and look at outcomes and indicators that will tell us whether they are succeeding. Household median earnings or the proportion of a council's population who are on out-of-work benefits, for example, are outcome measures that will allow us to assess whether the approaches that have been taken are succeeding.

Mary Mulligan: Having developed your strategy, to which councils sign up, if at some point you feel that the outcomes are not as you want them to be, how would you redress that? Have you thought that far ahead?

Nicola Sturgeon: I am sure that you appreciate that that is a big hypothetical question. Obviously, it is likely that different issues will arise in different areas, and we will want to address them. It is premature to say that we will find ourselves in that position. However, the Child Poverty Bill enshrines the child poverty targets in legislation and puts the onus on us as Scottish ministers to set out a strategy for achieving those targets and to report annually against progress. If the bill is enacted, there will be a sharp focus on whoever is in government to demonstrate progress towards achieving those targets and to take corrective action if progress is not sufficient.

Mary Mulligan: I welcome your reference to the amendment to the bill that will allow for annual reporting, but I still have concerns about how we feed in the role of local authorities.

The Convener: It was unfortunate that the letter was circulated to members late yesterday so we did not have an opportunity to pass it on to you, cabinet secretary. We were surprised to receive it individually rather than through the clerks. There is no question of ambushing you with it—

Nicola Sturgeon: I was made aware only recently that the letter had been sent. I have not seen a copy of it.

The Convener: One phrase in the letter is of concern. We all recognise that the common objective of the Scottish Government and the UK Government is to tackle this serious issue. However, the letter says:

"the suggested targets themselves, all associated with income levels"—

which you mentioned earlier—

"are problematic. They do little to capture the quality of life issues and the experience of poverty of a child."

What is said in the letter goes beyond the issue of any duties or powers that may be imposed on local government. We have the new relationship in the concordat between the Scottish Government and local authorities, and I understand the importance of the issue for authorities. However, the letter fundamentally attacks the principles of the Child Poverty Bill, which is UK legislation that the Scottish Government has bought into. Given the role of local government in working with the Scottish Government and other partners to achieve common objectives, there are consequences. The letter is very worrying in that regard.

Nicola Sturgeon: As you will appreciate, it is difficult for me to comment on a letter that I have not seen. It may be that I was copied into the letter, but it has not found its way to me yet. Over the past couple of years, COSLA has always been a willing partner with us in addressing poverty. COSLA signed up to and was the co-author of "Achieving Our Potential: A Framework to tackle poverty and income inequality in Scotland". I do not want to suggest that COSLA has not been a willing partner, because it has been. Obviously, the committee will want to reflect on the contents of the letter.

I turn to the targets—targets to which the Scottish Government is very willing to sign up. The specifics of the targets that are to be enshrined in the bill were set by the UK Government. The legislative consent memorandum that the committee is discussing today does not cover the targets, which were decided by the UK Government.

The Convener: As there are no further questions, I thank the cabinet secretary and her officials for their attendance.

Are there any issues that members wish to raise in our report on the LCM? Given the short timeframe, I suggest that we do that by way of e-mail.

David McLetchie: I have no problem in recommending the motion to Parliament, but we should nail down the COSLA issue. If the letter is a complete irrelevance or was sent in error, that is fine. It should be noted, however.

The Convener: We can discuss and deal with the COSLA correspondence, which did not go through the clerks and is not on our agenda today. However, I think that we are all in general agreement on the LCM. I propose that we agree on our report on the LCM by e-mail.

We may want to discuss the correspondence at a later stage. I propose that we place the letter from Harry McGuigan on our website.

Mary Mulligan: From my questions, you know that I remain concerned that Scottish local authorities are the only elected bodies that do not have a duty to fulfil the targets placed on them. Obviously, I have the benefit of having read the letter, in which Councillor McGuigan says that councils will reach the targets in a series of ways. However, I do not understand why he does not feel that we all should be bound in the same way, to ensure that a partnership approach is taken to tackling child poverty. The committee has considered the issue in an inquiry and has real concerns about how it is being tackled. I seek advice on how to proceed on the LCM, as I want there to be a provision that says that we take on board the measures that I think the cabinet secretary said are in part 2 of the bill, as doing that would bring local authorities here within the limits of the bill.

The Convener: I propose that we proceed on the basis of circulating the draft report by e-mail for members' agreement.

Before I close the meeting, I ask members to remain behind for five minutes to discuss future agendas.

Meeting closed at 12:41.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

Members who wish to suggest corrections for the archive edition should mark them clearly in the report or send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP.

The deadline for corrections to this edition is:

Friday 6 November 2009

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Published in Edinburgh by RR Donnelley and available from:

Blackwell's Bookshop

53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

And through other good booksellers

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders, Subscriptions and standing orders
business.edinburgh@blackwell.co.uk

Scottish Parliament

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.co.uk

For more information on the Parliament, or if you have an inquiry about information in languages other than English or in alternative formats (for example, Braille; large print or audio), please contact:

Public Information Service
The Scottish Parliament
Edinburgh EH99 1SP

Telephone: 0131 348 5000
Fòn: 0131 348 5395 (Gàidhlig)
Textphone users may contact us on **0800 092 7100**
We also welcome calls using the RNID Typetalk service.
Fax: 0131 348 5601
E-mail: sp.info@scottish.parliament.uk

We welcome written correspondence in any language.