LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

Wednesday 11 November 2009

Session 3

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LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE
29th 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)
Margaret Curran (Glasgow Baillieston) (Lab)
Alison McInnes (North East Scotland) (LD)
Margaret Mitchell (Central Scotland) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

Colin Brown (Scottish Government Legal Directorate)
Fergus Ewing (Minister for Community Safety)
Alex Neil (Minister for Housing and Communities)
Stephen Sandham (Scottish Government Housing and Regeneration Directorate)
John St Clair (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Susan Duffy

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 6

Scottish Parliament

Local Government and Communities Committee

Wednesday 11 November 2009

[THE CONVENER *opened the meeting at 10:02*]

Decision on Taking Business in Private

The Convener (Duncan McNeil): Good morning, and welcome to the 29th meeting of the Local Government and Communities Committee in 2009. I remind committee members and members of the public to turn off all mobile phones and BlackBerrys.

Agenda item 1 is to consider taking in private agenda item 4, which is consideration of the main themes arising from oral evidence on the Home Owner and Debtor Protection (Scotland) Bill. Do members agree to take item 4 in private?

Members *indicated agreement*.

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

10:03

The Convener: Item 2 is oral evidence on the Home Owner and Debtor Protection (Scotland) Bill. I advise members and witnesses that at 11 o'clock we will hold a two-minute silence for remembrance day.

I welcome the first witness panel, which consists of Alex Neil MSP, Minister for Housing and Communities, and, in support of the minister, officials David Ferguson, Colin Brown and Stephen Sandham. I invite the minister to make some opening remarks.

The Minister for Housing and Communities (Alex Neil): Thank you for the opportunity to give evidence on part 1 of the bill. I know that Fergus Ewing is looking forward to assisting the committee on part 2.

It is important to remind ourselves what part 1 of the bill does, why the bill's provisions are necessary and urgently needed and why the bill must be progressed and implemented as quickly as possible. Part 1 implements the recommendations in the report of the repossessions group, which was chaired independently of the Government. The recommendations were agreed by all stakeholders, including lenders, advice agencies and legal experts.

The key provisions in part 1 are, first, to ensure that all repossessions call in court; and, secondly, to ensure proper court scrutiny of lender action to ensure that every alternative to repossession has been considered and to allow for lay representation. This morning, we will show that the provisions matter to people in Scotland.

There are seven main drivers and reasons for the bill. Number 1 is the significant rise in the number of repossessions. After a dip in 2004, there has been a steady increase in the past five years, particularly in the past two. Although the Council of Mortgage Lenders forecast has been downgraded from 75,000 to 65,000, and I am led to believe that it might be downgraded further tomorrow, over the piece there has still been a significant and dramatic increase in the number of repossessions in recent years.

The second reason is that the number of court actions for repossession in the sheriff courts has risen by 20 per cent between 2007-08 and 2008-09, from 7,364 to 8,861.

The third reason is the significant rise in mortgage arrears. There has been a 47 per cent increase in the number of people with mortgage arrears that are more than 2.5 per cent of the balance and a 77 per cent rise in mortgages that have been in arrears for more than three months. That is compared to a year ago, using the latest available figures, which are from quarter 2.

We must also remind ourselves of the need to meet the homelessness target for 2012. The fourth reason is that, without the bill, many people in Scotland would be added to the homelessness list.

The fifth reason for the bill is to deal with the unintended consequences of the Mortgage Rights (Scotland) Act 2001. Even if we did not have the urgency of recession, we would still have to deal with the problems with that act, under which only 5 per cent of all repossession cases are defended in Scottish courts, which is considerably lower than the figure south of the border. The repossessions group agreed unanimously that the application process under the Mortgage Rights (Scotland) Act 2001 does not provide adequate protection and that all cases should be subject to court scrutiny.

The sixth reason is that new powers are needed to require Scottish courts to check that lenders have considered every alternative to repossession. In effect, that will give legal force to the pre-action protocol, which has been in practice north and south of the border for the past year or so.

The final reason for the bill is the need for a new power to allow lay representation, which will make the court process less intimidating for people who are suffering the trauma of repossession proceedings. Again, that was agreed unanimously by the repossessions group and is in line with recommendations of the Gill report, which was published recently.

There have been suggestions that the pace of introduction of the bill was too fast and that the consultation has been inadequate. The bill was the product of four months of discussion in the repossessions group, between February and May this year, and has been the subject of substantive further discussions with stakeholders. Those discussions are on-going and will remain so throughout the process, right up to the approval of the statutory instruments that will be required to implement the bill. That represents a collaborative process, albeit not the standard one. Previously, the criticism of the Government was that we were too slow. We were under pressure to meet during the summer recess last year and to pass a bill in a day. As you know, we did not think that that would be wise. We had to strike a balance between the timeous passage of the bill and ensuring proper time to consult and to hammer out the details with stakeholders and the committee, in order to avoid ending up with unintended consequences, as we had with the Mortgage Rights (Scotland) Act 2001.

The important point is that every person who has given written and oral evidence to the committee has supported the principles of part 1 of the bill. There have been concerns about details of implementation, which I am happy to deal with. In particular, those relate to the recall of decree; voluntary surrender and abandonment; the impact on court time; and the proposals in our consultation on protection for tenants. There has also been an understandable desire to see the draft statutory instruments that will accompany the bill. I am glad to be able to report that all the draft statutory instruments for parts 1 and 2 will be given to the committee next Tuesday, so that you have time to review them before you start to write your stage 1 report.

We all share the desire to strike the correct balance between the rights of lenders, borrowers and those who live in a property. That is particularly crucial with regard to whether there is a need for greater protection for unauthorised tenants. Our consultation on that important issue finished only on Friday, and we will analyse the responses. We are happy to provide the committee with a copy of those responses, although some people have requested that their names not be publicised. The analysis, and our full report, will be available by 14 December.

As I said in the informal session with the committee earlier this year, there is an issue with regard to whether the provisions that arise from the consultation should go in this bill or in the proposed housing bill. At that time, I was minded to put the provisions in this bill but, given the timeframe, I am now more inclined to put them in the housing bill, to give us proper time to consider any responses on unauthorised tenancy. I would welcome the committee's recommendations on that.

Finally, having read the oral and written evidence and having listened to the stakeholders—I have met most of them once or twice—I believe that there is a consensus in favour of the proposed additional protection for home owners who are at risk of repossession and the need for the provisions to be enacted urgently. As I said, there are points of detail, and I am happy to try to answer the committee's questions on those as best I can this morning.

The Convener: I thank the minister for his opening statement.

In a previous evidence session, the Insolvency Practitioners Association stated:

"rushing through legislation … will potentially have … unintended consequences."

The Law Society of Scotland said:

"The bill deals with important issues that affect the fundamental rights of both debtors and creditors, and it should not be rushed through."—[*Official Report*, *Local Government and Communities Committee*, 4 November 2009; c 2547, 2548.]

The Govan Law Centre's written submission states:

"The Bill as presently drafted is not fit for purpose … as drafted it would cause significant detriment to consumers".

How do those views square with your statement this morning and with the Scottish Government's statement in the policy memorandum that support for early action had been secured?

Alex Neil: We should consider the timeframe for the bill. The repossessions group met earlier in the year and completed its work in the middle of the summer. We have subsequently held meetings with stakeholders, and the bill is now going through the committee process. By the time the committee produces its stage 1 report, it will have been nearly a year since the process began.

I cannot think of any stakeholder group that has not had extensive meetings with the Government. Even the organisations which you have quoted, particularly in relation to part 1 of the bill, with which I am dealing this morning, all agree that the general principles of part 1 are perfectly agreeable. Nobody has raised any objection to the fundamental principles of part 1, and any concerns relate to the detail. I am sure that Fergus Ewing will make a similar claim in relation to part 2 when he appears before the committee later this morning.

It is not correct to say that the legislation is rushed. You say that we have not consulted, but I am happy to circulate to the committee a full list of all the meetings that we have had with stakeholders, including the repossessions group. You are aware of the repossessions group's remit, members and report, which was warmly welcomed by all the major parties in the Parliament, except possibly one.

Far from rushing the legislation, we have, as I said earlier, been under enormous pressure from Opposition parties to speed up the process. We believe that we have struck the right balance between getting the legislation considered timeously and consulting on it properly. The fact that we have a consensus on the principles reflects the success of the consultation process.

The Convener: So the Insolvency Practitioners Association, the Law Society of Scotland and KPMG are wrong? The committee received written and oral evidence that questioned the consultation and questioned what was agreed at meetings would be part of the bill and what has suddenly appeared. Did those respondents attend different meetings?

Alex Neil: We are dealing primarily with the repossessions group's report in relation to part 1. If you consider the evidence, it is clear that there is unanimous agreement on the report and its principles. Such reports deal with the higher-level policy proposals. When we have to translate such proposals into a bill, there are issues to do with the detail of implementation, such as the concerns about the recall of decree or the voluntary surrender of properties. Those are issues of detail, not kernel principles of the bill.

The first two organisations that you mentioned told us and said in their written evidence that they accept the general principles of the bill. They are not complaining that they were not consulted on the repossessions group's report; they signed up to it unanimously. Their concern has been about two or three points of detail of implementation. We have a flexible approach to that and we are listening to what people are saying.

10:15

The Convener: Would you not have preferred to keep it simple by taking the advice in some of the evidence that we received that much of what could be achieved, which was agreed on, did not require this complex legislation or this radical and fundamental change? We could have achieved our objective of giving people a better chance to stay in their own home by making simple amendments or adjustments to guidance in order to make provision for the 90 per cent of people who have little equity in their home—all that could have been done by making adjustments in relation to the equity left in the home. That is the evidence that we have received. The proposals did not need to get as complicated as they have; we could have made quicker progress by keeping things simpler.

Alex Neil: That is some of the evidence that you received from some people. There was other evidence to the contrary. The evidence has been quite contradictory. Yesterday's panel disagreed with the panel who gave evidence last week. None of the members of the panel who gave evidence last week was a member of the debt action forum or the repossessions group, so they were giving evidence at second hand—they were not members of the group.

Mr Ewing will deal with your specific points about equity when he gives evidence on part 2 of the bill. On part 1 of the bill, the suggestion by the Govan Law Centre that we scrap the bill and start again shows a total misunderstanding of what has happened since the Mortgage Rights (Scotland) Act 2001 was passed, of the need to take account of new regulations from the Financial Services

Authority and others and of how long it takes to get new legislation through. The reality is that we and our stakeholders—even the ones who disagree with some of the detail of implementation agree with the fundamental principles of the bill—honestly believe that both part 1 and part 2 of the bill are essential if we are to achieve our objectives.

The Convener: So, the practitioners are wrong. The Law Society is wrong and the Govan Law Centre is wrong. We have to put all their evidence to one side and trust the minister. Is that what you are suggesting?

Alex Neil: No. I am not saying that they are wrong; I am saying that they have expressed concerns about points of detail, which we are happy to address. What they have not done is challenge the fundamental principles of the bill. Shelter, Citizens Advice Scotland and Money Advice Scotland were right yesterday. Even the Council of Mortgage Lenders supports the work that we have done on the repossessions group. Although it has concerns about detail of implementation, which we are happy to address, it is in favour of the fundamental principles of the bill.

Alasdair Allan (Western Isles) (SNP): In your opening remarks, you mentioned the figures for repossessions. Is there an emerging or continuing trend towards an increasing number of repossessions?

Alex Neil: I can give you the figures, which you will be aware are United Kingdom figures. There is an issue with the availability of Scottish figures, which Mr McLetchie explored to some extent with Kennedy Foster yesterday.

In 1991, when we were experiencing the previous recession, there were 75,500 repossessions in the UK. That number dipped right down to 8,200 in 2004. However, in the following year, the number nearly doubled to 14,600. In 2007 it went up to 26,000 and in 2008 it went up to 40,000. The current forecast from the CML for the whole of the UK, which I believe is going to be downgraded tomorrow, is 65,000 repossessions this year—the original forecast was 75,000. If you plot those figures in a graph, which we have done, it looks like a big "U". We start in 1991 with a high of 75,500, which dips right down to 8,200 in 2004. Since 2004, there has been a steady rise and, in the past two years, there has been a very steep rise indeed. That is the trend.

We have had discussions with CML members and have spoken to a significant number of lenders. When I have asked them what will happen in future, every one of them has said that the current indications are that there will be a plateau at the current level of 60,000 to 65,000 annual repossessions. When I have then asked what will happen after the plateau and when it will finish, to a person and to a body, they have all said that it will depend on two key factors. If unemployment continues to rise or if interest rates go up, or if they both go up, the number of repossessions will go up as well.

Alasdair Allan: Those statistics and factors aside, can the bill do something to turn the situation round? If it can, how does it relate to other current and forthcoming legislation?

Alex Neil: Part 1 of the bill is for dealing with the repossession stage. We should record the fact that there are big differences between this recession and the previous one. As Kennedy Foster pointed out yesterday, the number of people who have a mortgage in the UK is 7 million higher today than it was in 1991. Although the absolute number of repossessions has gone up, it has gone down as a percentage of the people who have mortgages. I pay tribute to those responsible lenders—although one or two have not done it—who have taken significant rehabilitation steps to prevent repossession. If we had the same proportion of repossessions in the current recession as we had in the previous one, the figure would be much higher than 65,000. Against a background of 7 million more mortgages, the proportion of people who end up in repossession is significantly lower than it was during the 1991 recession. In large part, that is due to the rehabilitation measures taken by lenders and, more recently, by the Scottish and UK Governments.

As members know, the bill is part of a package of legislation, which is first of all about preventing people from getting into difficulty. Many lenders intervene to provide advice the minute that someone gets two or three months into mortgage arrears. We also provide mortgage to rent, mortgage to shared equity and other services to people who have gone further down the road into difficulty. We are all in the game of trying to prevent repossession but, in a number of cases, estimated to be roughly 65,000 in the UK this year, repossession action is unavoidable.

Alasdair Allan: You said that the bill is part of a package to help people who are in that situation. In your view, where would we be if we took the Govan Law Centre's advice and abandoned the bill? How would that package of measures be affected?

Alex Neil: As Gavin Corbett said yesterday, there is no logic to the Govan Law Centre's conclusion. I know that Mike Dailly has a romantic, emotional attachment to the Mortgage Rights (Scotland) Act 2001 because he was heavily involved in drafting it but, ironically, we are, in part, dealing with the unintended consequences of that act, which is one of the reasons why we need this

bill. To go back to the drawing board as he suggests and try to amend the 2001 act would be totally unsatisfactory. It does not take account of a range of issues that need to be addressed, and are being addressed by parts 1 and 2 of the bill. I notice that he does not say much about part 2, although many of the provisions in part 2 would affect his clientele as much as those in part 1.

Some of Mike Dailly's suggestions are reasonable. For example, he talks about how he, like others, is of the view that the current practice of voluntary surrender is perfectly satisfactory and we do not need the affidavit process. That is a technicality. It is a detail of implementation. If the committee recommends that we change or even delete it, we will be open to your suggestions. Mike Dailly makes a reasonable point on the matter, which has also been made by other people. Again, however, opinion is divided. Even yesterday's panel was divided on the issue. Kennedy Foster from the CML gave an entirely opposite point of view from the other three panel members. When the committee has heard all the evidence and decided what it thinks the proper balance would be, we will be open to its suggestions about changing the proposal. It is not a fundamental principle of the bill.

David McLetchie (Edinburgh Pentlands) (Con): Good morning. I was interested to hear your fulsome tribute to the responsible way in which mortgage lenders have dealt with issues of arrears and your statement that the absolute number of repossessions in the UK is lower than it was in the previous recession. We heard in evidence yesterday that it is projected to dip still lower to below 65,000—I think that that is the figure that Mr Foster gave. We also heard that the number of repossessions as a percentage of all mortgages is far lower than it was in the previous major recession.

Given that all these lenders are behaving in such a responsible and sensible manner towards people who fall into mortgage arrears and difficulties, what evidence is there to justify your statements that the bill is necessary and urgent, that we must enact it as soon as possible, and that it is essential that we step in to protect people's interests? It would seem from your tribute that those interests are being more than adequately protected by the very responsible lenders we have in this country and their approach to dealing with arrears. Is that not a fair comment?

Alex Neil: First, I think that you made a slip of the tongue in the first part of your question. The absolute numbers are round about or slightly below where they were in the 1991 recession. However, if unemployment and interest rates increase, they could well numerically exceed the 1991 figure of 75,500. That is the advice that we have had from lenders. As a proportion—

David McLetchie: But the figure at the moment is 65,000, which is 10,000 lower than in the previous recession. I think that you will see in the *Official Report* that Mr Foster said yesterday that 65,000 is a pessimistic figure. The figures are embargoed, but it was suggested that, when they are published, we will find that the projection is lower still.

Alex Neil: Absolutely. That is a forecast, but it does not hide the fact that, in the past five years, and particularly in the past two, we have had a continuing, significant trend of a substantial rise in the number of repossessions. If we take the UK figure—unfortunately, that is the only reliable one that we have—there were 8,200 repossessions in 2004. Even if the CML, let us say, downgrades its forecast to 60,000—and it is just a forecast—the number will still be nearly eight times what it was five years ago. The clear evidence from Mr Foster's members is that, if there is a further rise in unemployment and/or interest rates, the forecast will be revised upwards later.

Secondly, we believe that it is clear from the mortgage arrears figures that the timeline from getting into trouble to going to repossession is a bit longer than it was before. I know that some of your witnesses have said that the turnaround time is about 18 months. There are no precise figures, but that is probably a reasonable estimate. We have to consider not just the forecast for the next few months but the horizon over a period of at least 18 months. As you know, unemployment is forecast to go significantly higher during that period. According to the CML's members, if that happens, the number of repossessions will increase as well and it will have to revise the forecast.

10:30

Thirdly, although you talk—quite rightly—about the responsible lenders, unfortunately, despite all the regulation, we still have some irresponsible lenders, about whom you heard evidence yesterday. Specific mention was made yesterday of the difficulties in regulating the sub-prime market. Although the figure for repossessions might not end up being as high as forecast, it has multiplied by a factor of nearly eight over the past five years.

David McLetchie: Who are those irresponsible lenders? Can you provide any evidence of their irresponsible conduct in seeking repossessions prematurely without properly considering all the options?

Alex Neil: Yes. I think that Shelter gave you some examples. As a Government minister, I am

not in a position to name names, particularly publicly. That would be highly irresponsible of me and I do not think that any member of the committee could reasonably expect me to do so. Shelter's evidence gave some examples of categories, and the sub-prime market has been singled out as being one in which there are still rogue practices—if I can call them that—that need to be dealt with.

David McLetchie: Shelter did not name names, and you have not named names. Can you advise us whether there is some confidential memorandum from Shelter and other organisations to you or your officials that details irresponsible practices?

Alex Neil: From the evidence from Shelter—

David McLetchie: That is not evidence—that is assertion. I am asking you on what substantive evidence of irresponsible practices has the Government based the measure?

Alex Neil: If you read Shelter's evidence, you will see that it has some evidence of that, although it does not name names. Furthermore, the FSA—the UK regulatory body—has said:

"It is clear that many firms have not exercised forbearance but moved quickly to repossess properties."

I think that that is what Shelter cited, and that is what we are trying to deal with.

David McLetchie: Is that the same FSA that we heard yesterday is undertaking on a UK basis a review of policies on arrears and repossessions?

Alex Neil: As far as I know, there is only one FSA.

David McLetchie: Exactly. So the FSA, which you are calling in aid of your case for necessary and urgent action, feels it necessary to undertake a review—starting in January and embracing all lenders—on the subject of arrears and repossessions. If you support the FSA's comments, would it not be sensible, given that it deals with a UK market involving UK players—albeit that the legal procedures in Scotland are different from those in England—to await the outcome of its review, which will be wide ranging and comprehensive? Should you not wait and review the evidence that the FSA obtains and publishes, then consider the principles and recommendations that emerge from it?

Alex Neil: It is not an either/or situation. We are taking urgent action now because we believe that it is required on the basis of the evidence that is available. The FSA's review may well take a year to complete—we do not know. If additional measures are required as a result of the FSA's inquiry, we will consider taking them—assuming that we are re-elected in 2011.

David McLetchie: Indeed, assuming that, but let us not get into such speculation, minister.

Let us move on to some specifics. We keep hearing how all the recommendations had the support of everyone. However, on voluntary surrender, you are already in partial retreat from your earlier remarks. Do you concede that that was never a recommendation of the repossessions group?

Alex Neil: I have made that absolutely clear. What I have said is that we must distinguish between the high-level policy proposals and their implementation. As with drafting every bill, we must consider how we can implement the policy proposals.

I have not made any kind of retreat, because right from day one I have said that we are open-minded about some of the detail of the bill. It is clear that opinion is divided, particularly on whether affidavits are needed. The view of Govan Law Centre and the CML is that no changes are required, because the current procedures are satisfactory, but at yesterday's meeting Money Advice Scotland, CAS and Shelter indicated that they see merit in the use of affidavits.

It is a matter of record that that implementation detail was not discussed by the repossessions group, but it was something that we had to consider when we drafted the bill. We have a very open mind. The panel at yesterday's meeting showed that opinion on the pros and cons of the proposal is divided. We will take our lead from the committee. If, once it has heard all the evidence and considered all the submissions on this and other matters, it believes that we need to alter the bill, the Government will take that seriously and lodge appropriate stage 2 amendments.

David McLetchie: But why did you dream up the idea in the first place?

Alex Neil: It was dreamt up because it was felt that there had to be some way of ensuring that there was an acceptable legal record for abandoned and voluntarily surrendered properties.

David McLetchie: There is such an acceptable legal record. You want to introduce a bureaucratic procedure to create another legal record. Is that not the case?

Alex Neil: That is the argument against it.

David McLetchie: Indeed.

Alex Neil: I have an open mind. It is clear that our inclusion of the provision has generated a debate about how we should implement the principles of the relevant part of the bill. We are not hung up on the issue; we are totally open-minded. If the committee feels that the provision is unnecessary or too bureaucratic, or if it has a

better alternative or feels that there is no need for change, we will be happy to lodge appropriate amendments at stage 2. It is not a kernel principle of the bill.

David McLetchie: No, but it is still in the bill. Given that section 1 contains a poorly drafted provision that has been panned by those professionals who know anything about the process and which Mr Foster of the CML said yesterday would, by and large, be treated as a dead letter by his members—they would simply ignore it and move straight to repossession proceedings—how can we have confidence that the other provisions in part 1 are well drafted? The proposal has been denounced by virtually all hands, and certainly by those who have any detailed knowledge of legal procedures and drafting.

Alex Neil: I think that the main criticism has been about not the drafting but the substance of the proposal and the fact that it will, allegedly, be too bureaucratic. You cite one side of the argument, but I am sure that the committee will want to take a balanced view and listen to both sides of the argument before it makes up its mind.

Although some people have criticised—that is the word that I would use rather than "panned"—the provision, others clearly support it. It is up to the committee to decide where the balance of the argument lies. The last thing that we would want to do would be to introduce a new bureaucratic procedure if it were not necessary to do so or if there were a better way of proceeding. I am perfectly open to suggestions from the committee, although, to be fair, it should listen to the people who are in favour of the proposal as well as those who are against it.

David McLetchie: Indeed, we do. If they were to produce any substantive evidence in support of it, that would lend weight to their cause, but they have not yet done so—they have relied on mere assertion.

Alex Neil: One could say the same of people on both sides of the argument.

David McLetchie: I do not think so. Those who know the system and how the present procedures work know that they work satisfactorily. They are entitled to take a policy decision on whether they would use your new bureaucratic procedure, and it was quite clear from yesterday's evidence that they would not and that, rather than go through that process, they would increase the number of repossession actions in the courts.

Alex Neil: It is obvious that Mr McLetchie has made up his mind on the issue.

David McLetchie: The evidence speaks for itself, minister.

Alex Neil: We will wait to hear the view of the committee as a whole. If the committee holds a similar view to Mr McLetchie, it will not be a problem—we will be happy to lodge an amendment at stage 2. We have always said that we would be happy to amend some of the detail, as happens with any bill. In the eight years for which I convened a committee, I never dealt with a bill that was not subject to substantive change at stage 2. That was particularly true of the Bankruptcy and Diligence etc (Scotland) Bill. I am sure that the bill that we are discussing will be no different.

Mary Mulligan (Linlithgow) (Lab): Good morning, minister. I say from the outset that I support the introduction of pre-action court protocols and I support there being legal action behind them. I hope that we all support them. My concerns are around the possible unintended consequences of the bill. We will need to decide whether they result from the drafting or the policy proposals.

I have a couple of questions that arise from evidence that has been submitted to the committee. Obviously, you have seen Govan Law Centre's submission, because you have referred to it on a number of occasions. The centre suggests that the term "reasonable time" in section 2 could be interpreted as a shorter period than that which is being used for debtors to make their repayments. Do you agree?

Alex Neil: Are you referring to new section 24A, in section 4 of the bill, or to section 2(5)?

Mary Mulligan: Section 2(5).

Alex Neil: The jurisprudence from the Debtors (Scotland) Act 1987 would not necessarily apply to define "reasonable time" as one to two years. The duties will be fleshed out in subordinate legislation and in guidance, to which the courts will look in interpreting "reasonable time". However, we will reflect on whether change is needed, although the issue raised by Govan Law Centre is not as black and white as it makes out.

Mary Mulligan: Did you consider that issue previously?

Alex Neil: We considered all the variations at all stages of drafting because, clearly, when drafting a bill a number of options are open. We have considered all the detail of the bill, and the point of stage 1 scrutiny is to ensure that we examine any potential unintended consequences. As I have said, ironically, one reason why we need the bill is the unintended consequences of the 2001 act. When we all passed Cathie Craigie's bill in 2001, we were of the view that it would substantially impact on the rights of the more vulnerable sections of the community, but we know after experience—particularly in the past five years, as

the number of people who have found themselves in difficulty has gone up significantly—that the 2001 act has not had its intended consequences. That is a driver for the bill. I argue—I think that Mary Mulligan agrees with me—and would do so even if we were not in the middle of a recession, that the provisions are required, so that people who find themselves in difficulty have these new entitlements.

Mary Mulligan: It is interesting that, when the suggestion was first made that we needed pre-court protocols, the Cabinet Secretary for Health and Wellbeing's argument against them was that we had the Mortgage Rights (Scotland) Act 2001. However, that now seems to have been called into question.

Let me ask you a further question about a point that Govan Law Centre raised in its submission, on the construction of the pre-action requirements. The centre suggests that the approach in the bill is overcomplicated, overelaborate or whatever other description you want to use, and therefore will not deliver what we are looking for. It suggests that it would have been easier to use the FSA's mortgage conduct of business sourcebook as the basis for the protocol. Was that option considered?

Alex Neil: Yes, it was. Again, I am not sure that Govan Law Centre is necessarily totally au fait with the work that is being done by the FSA. The issue is that we need to proceed in such a way that the protocol is flexible and can be easily adjusted when requirements are changed by the FSA or any successor body. We have taken our approach because it will allow us, through subordinate legislation, to make any necessary adjustments that arise from future requirements of the FSA or its successor body.

As you would expect, the primary legislation sets out a higher-level framework and principles. The view that the Subordinate Legislation Committee takes in its report is the opposite of that taken by Govan Law Centre. With all due respect, I am more inclined to listen to the Subordinate Legislation Committee's view on the issue.

10:45

Mary Mulligan: You refer to the Subordinate Legislation Committee, which takes the view that the powers in section 4 are too wide. Is there a middle road between the two positions?

Alex Neil: We need to look at the issue. As the member knows, three committees consider any bill—the lead committee, the Subordinate Legislation Committee and the Finance Committee, which will consider the financial memorandum next week. We will take the Subordinate Legislation Committee's comments very seriously. In its report, the Local Government and Communities Committee may want to comment on some of the Subordinate Legislation Committee's recommendations.

These are points of detail on which we have an open mind. If we think that someone has a better way of implementing the detail of the bill, we will not get on our high horse. We are happy to listen to what people have to say. If we think that they have a better way of phrasing, drafting or doing things, we will be happy to adopt that approach. I ask Colin Brown, our expert on the issue, to provide some additional information.

Colin Brown (Scottish Government Legal Directorate): I echo the minister's comments. There are differing views on the issue. What we put in the bill will affect the type of powers that we will want in order to vary what is in the bill in future. We need to look at the first stage in order to decide on the detail of the second.

Mary Mulligan: We all agree that we want to support people who are at risk of losing their home, but part 2 of the bill seems to be an add-on in some ways. Is it necessary to secure that aim? At what stage was it decided that both parts would be included in the bill?

Alex Neil: Mr Ewing will deal in detail with part 2. In my view, part 2 is complementary to part 1 and part 1 is complementary to part 2.

Mary Mulligan: Is part 2 necessary?

Alex Neil: I think so. Many of its provisions are necessary. As I mentioned, one of the objectives of the bill is not to add to the problem of meeting the homelessness target in 2012. A number of the provisions in part 2 will assist us greatly in doing that. For example, the bill gives the sheriff discretion, in certain circumstances, to delay for up to three years the sale of a family home, which could be significant for the family concerned.

When Mr Ewing appears before the committee, he will give you many examples. This morning, he told me about a constituent of his in Inverness who cannot go bankrupt because of her circumstances. He will explain the issue in detail to members, but part 2 will make available to the lady concerned the kind of facilities that are open to everyone else. Current legislation does not deal humanely with her situation.

Having studied parts 1 and 2, I believe that they are entirely complementary. It could be argued that we should have had two bills. However, given that the objectives of both parts are fundamentally the same, it makes sense to consider them together, in one bill.

Mary Mulligan: The concerns that have been voiced about consultation seem to be doubly loud in relation to part 2. I do not want to lose the

benefits of part 1, which will protect those who are at risk of losing their home, just because the consultation process for and detail of part 2 are still being questioned.

Alex Neil: I am sure that Mr Ewing will be able to clarify for the committee exactly what the consultation process was, despite the comments of last week's panel, none of whom was a member of the DAF.

Mary Mulligan: I suspect that one of the issues is that people who feel that they are stakeholders were not part of the on-going discussions. As you suggest, I will take up the issue with Mr Ewing.

Alex Neil: Mr Ewing and I would be happy to provide the committee with a full list of our meetings to show that the level of consultation with all the stakeholders on both parts of the bill has been extremely extensive.

The Convener: As was referred to earlier, there is a difference of opinion on that also.

Alex Neil: Absolutely.

Jim Tolson (Dunfermline West) (LD): Strangely, minister, I feel like being quite gentle with you this morning, probably because I agree with the principles of the bill. Quite rightly, however, you mentioned, in evidence to the committee and on behalf of many individuals throughout Scotland, that there are details in the bill that cause many people concern. I would like to consider a couple of those details with you.

First, on recall of a decree, the evidence that we have received, particularly Adrian Stalker's, indicates that it is quite restrictive that only one application for a recall can be made. That may cause problems, particularly given circumstances in which other family members are more able to put the case on behalf of the household. What consideration has the Government given to allowing a second application for recall of a decree, if it is made on a substantially different basis from that of the first application?

Alex Neil: There are two issues with recall of a decree. First, there is the timing issue that Adrian Stalker raised. We have discussed that with him, and we will lodge a technical amendment at stage 2 to deal with it. We totally agree that a technical amendment would rectify the situation.

Secondly, on the issue of more than one family member being able to recall a decree, I start from the point of principle. We must properly balance the rights of lenders and borrowers. The measures cannot end up being a borrowers' charter and cannot end up being a lenders' charter. There has to be a balance between the interests of both. Therefore, we are reluctant to have a situation in which there is no limitation on the number of family members who can recall a decree.

There may be circumstances in which a second member of the family should be allowed to recall a decree, but we would regard that as the exception rather than the rule. We must be fair to lenders as well as to borrowers. We think that we are striking the right balance. Obviously, we will listen to what the committee has to say, but, at the end of the day, if we ended up with no limitation on the number of applications or if any family member could use the procedure, that would be unfair to lenders.

Jim Tolson: I accept your point, minister. It would be problematic if a situation had gone on for God knows how long and everyone from the father down to the dog could put a representation together. However, the situation is seen as restrictive, therefore I ask the Government seriously to consider that point and to allow more flexibility.

Alex Neil: We will consider that. I have read your questions to previous witnesses, and you make a fair point. At the end of the day, however, we must always be cognisant of the fact that we are treading a fine line on the balance of interest between lenders and borrowers.

Jim Tolson: I also want to touch on lay representation, which you referred to in your preamble. Again, there is not enough detail to see where the Government wants to go and to reassure the public. I would be grateful if you outlined what you are aiming at in allowing lay representation. Again, I accept the principle. Going to court can be daunting for people at any time, not least when they feel that their property might be repossessed and their family made homeless.

Would lay representatives have to have any qualifications or experience? We heard from Citizens Advice Scotland that its staff go through an awful lot of training before being able to represent people. On the other hand, could someone off the street, like me, represent someone in court? What is the Government aiming at?

Alex Neil: Two issues have been raised in evidence on lay representation. The first is the one that Jim Tolson raised, about qualifications. Clearly, we cannot have a situation in which anyone can walk in off the street and call themselves a lay representative. There will be a register of accredited lay representatives. There is already a system of accreditation for such people. We will extend it, and ensure that training is available.

Secondly, we will ensure that enough people are qualified and accredited as lay representatives to deal with the volume of work. We are doing more to define that in statutory instruments. When you see the instruments next week, you will see tighter

definitions of who can or cannot be a lay representative. The fundamental principle is that they must be accredited.

Jim Tolson: That is my final point: who will meet the criteria? Does the Government feel that enough people will be registered to cover all the extra cases that may come forward?

Alex Neil: As you know, we have announced a number of measures already. In fact, the Scottish Legal Aid Board has reconvened a group that met previously to address that issue. We are considering not only lay representation but the advice network throughout the country—particularly in some rural areas, where there are problems—to ensure that sufficient advice of the right quality is available to make a success of the bill and, more widely, to deal with the problems that lead to people getting into the position that the bill covers.

Jim Tolson: I am grateful for that assurance and I look forward to examining the details in due course.

The Convener: Minister, have you had discussions with local authorities and the Convention of Scottish Local Authorities about their role in building the capacity to which you refer?

Alex Neil: We are just starting with COSLA a joint review of the whole range of advisory services. The review will report early next year, I think.

Stephen Sandham (Scottish Government Housing and Regeneration Directorate): I think that it will report in late 2009.

Alex Neil: It will probably report before Christmas. We are working closely with COSLA on the issue.

The Convener: Have you discussed with representatives of COSLA the consequences of the bill? What submissions have you had from COSLA?

Alex Neil: I will let Stephen Sandham answer that in detail.

Stephen Sandham: As you heard yesterday, COSLA has not given any evidence on the bill. However, it had representatives on the debt action forum and the repossessions group, so we do not believe that it has any difficulty with any of the proposals—certainly not those in part 1.

Alex Neil: COSLA is also represented on the group that the Scottish Legal Aid Board is bringing together again. It has been heavily involved in all the key groups.

The Convener: Do you find it strange, as we do, that COSLA has not presented any evidence to the committee on its views, given local authorities' important role in the provision of advice and their responsibilities under homelessness legislation? Is that discussion taking place off field directly with the Scottish Government? Did you have any detailed discussions with COSLA representatives and seek their views on the bill prior to its introduction, other than within the groups on which COSLA is represented?

Alex Neil: I have a six-weekly meeting with Councillor McGuigan from COSLA, at which we review all housing and regeneration matters. We mentioned the bill, although not in great detail, because COSLA has not submitted evidence, as you say. I do not know whether that is because of a resource issue but, in the interest of the historic concordat, it would not be right for me to say anything about why COSLA has not given evidence. You should ask it that question.

The Convener: I look for your assurance that we should not draw the conclusion that it is opposed to the bill because it has not given any evidence or made any representation to the committee. As you have pointed out, there are great differences: some of the parties that are involved are enthusiastic in their support, others question the bill and others oppose it. Do you agree that it is strange that COSLA has decided to sit on the fence, given its participation in the process and local government's involvement in future initiatives?

Alex Neil: COSLA was a member of the repossessions group and the DAF, the reports of which were unanimous.

11:00

The Convener: I ask all present, including members of the public, to be upstanding for the two minutes' silence.

11:02

The Convener: Thank you. Bob Doris has a question.

Bob Doris (Glasgow) (SNP): Minister, I think that you have a genuine desire to shape the bill in partnership with the committee and that you are prepared to have an open mind about criticisms rather than being defensive. That is what we have picked up from your replies so far. We look forward to shaping the bill with you and to making any necessary amendments.

Section 4 of the bill is entitled "Pre-action requirements". In England, pre-action protocols have no statutory basis and are based on discretion. Why have you made a policy decision to put that system on a statutory footing in Scotland?

Alex Neil: The pre-action requirements will have more force if they are in statute. I said earlier in reply to Mr McLetchie that, although the vast majority of lenders are responsible and adhere to the pre-action protocol, that is not always the case, as you heard in evidence from Shelter yesterday. Making pre-action protocols law will create a fair playing field not only between lenders and borrowers but between lenders, because those who do not adhere to that practice at the moment will be required to do so.

We also think that the pre-action protocol will be helpful not only when court action begins, but in further encouraging rehabilitation measures, because, by the time that lenders get to this stage, they should have explored all possibilities. That happens in the majority of cases, but not always. Of course, the key point is that the bill takes forward the intentions of the Mortgage Rights (Scotland) Act 2001 by creating a way in which those aims can be achieved in practice.

Bob Doris: I agree. It is certainly naive and complacent to believe that all lenders will by nature be responsible. Section 4, which puts all this on a statutory footing, is a significant and welcome step forward.

I know that a draft of the Scottish statutory instrument that would be made under section 4 will be published next Tuesday. Obviously, we have yet to see that instrument and the guidance that it gives, but is there enough flexibility? After all, it is horses for courses. In six months' time, we could be in a different place with regard to lenders' performance and in a year's time somewhere else. Have you given any thought to revising any guidance by statutory instrument, which might allow you to leave section 4 open-ended and as flexible as possible to deal with whatever might happen in future?

Alex Neil: Section 4 sets out the framework and principles that need to be operated. We should, within reason, leave discretion to the sheriff, because every case is different—only very seldom will two cases be identical. The whole point of going to court is to give the sheriff the chance to listen to both sides of the argument and decide the best way forward, which, ideally, should be fair to the lender and the borrower. If we expect sheriffs to do what is fundamentally their job, we should leave them some discretion.

Bob Doris: Turning briefly to section 7, I welcome the prospect of lay representatives at court proceedings that Jim Tolson referred to. When, as we hope, the bill successfully completes its passage through the Parliament, do you think that it will be seen as a no-brainer that organisations such as Money Advice Scotland, Citizens Advice Scotland and Shelter, all of whom we took evidence from yesterday, should have been involved from the very start to the very end of a process that is all about seeking debt solutions for vulnerable people and that such organisations are the most natural ones to provide such lay representation?

Alex Neil: It is always easy to look in hindsight at what should have happened. However, it is only fair to point out that, for what you have suggested to have happened, those organisations would have required more resources than were available to them in the past.

The bill should be viewed as part of a wider package to deal with this problem. As you know, as a result of a repossessions group recommendation, we increased the money available to CAS, Shelter and Money Advice Scotland, first, to increase their capacity and, secondly, to ensure quality of provision. The purpose of the group that has been re-established by the Scottish Legal Aid Board is to monitor the situation, because we need enough advisers of good enough quality to cater for the problem.

I see this as an investment, because we need to resolve as many of the issues that lie close to the problem as possible. Last Friday, I attended a joint meeting of Airdrie and Coatbridge citizens advice bureaux and found the capacity and quality of provision in both bureaux to be absolutely first class. In their day-to-day work, they are helping a lot of people not to get into this particular position. Those people might already have some debt but, over time, they are managing their way out of it with the debt arrangement scheme and all the rest of it. Investment in that kind of front-line service provision saves us all not only money but, more important, a lot of human heartache.

Bob Doris: If you agree that involving such organisations in lay representation is a natural next step, have you given thought to any other areas of legal representation in which Shelter, Money Advice Scotland or Citizens Advice Scotland could be involved?

Alex Neil: No, because that is not my ministerial responsibility. You would be better off asking Mr Ewing that question.

Bob Doris: Good idea.

The Convener: How many advisers will be required to reach a level of capacity that would meet the very significant demands of the people who are entering this system?

Alex Neil: That is one of the conclusions that we would like to come out of our work with Shelter. It is clear that we need to establish, area by area throughout Scotland, exactly what our baseline is, what the demand is and where the unmet demand is. That exercise is taking place at the moment. We are also talking to the organisations whose

representatives the committee had around the table yesterday, because they have raised a number of capacity issues with us. We are addressing those issues on an on-going basis. I think that I am right in saying that nobody has an absolute figure at the moment.

Stephen Sandham: That is right. We have made £3 million available to SLAB.

Alex Neil: That is the cash figure, but the absolute number of people—

The Convener: You do not know whether the £3 million will be enough or how many advisers we need.

Alex Neil: We are pretty sure from the feedback that we have received that the £3 million—

The Convener: How many advisers will the £3 million bring to the table? What is the expected outcome of the £3 million?

Stephen Sandham: The £3 million is funding 16 projects across Scotland. It will boost capacity in a wide range of projects.

The Convener: By how much—10, 15 or 20 per cent, for example?

Alex Neil: Part of the problem is that no national statistic shows how much has been spent. We must add up the local authority welfare rights advisers and those involved in Money Advice Scotland, citizens advice bureaux and the range of other organisations that provide such advice, but we do not have a specific number for the full-time equivalent people who are involved in providing such advice at the moment, because many organisations are involved. That is one area in which we are trying to get a better handle on the numbers.

The Convener: Even if we agree to the principles of the bill and rush it through, when will we start to make a difference if we do not have people on the ground? I asked that question yesterday.

Alex Neil: The money advice and the £3 million are already making a difference—

The Convener: I know. I presume that the £3 million can lie until people get their act together.

Alex Neil: We have already started to spend the £3 million on increasing capacity in different parts of the country through the projects that Stephen Sandham mentioned. When the bill becomes an act is in members' hands to a large extent. As members know, one reason why we are submitting draft SSIs early is to speed up the process, so that there is not a big gap between the bill receiving royal assent and instruments coming into force. If there is agreement on the SSIs and we are ready to move quickly once the bill receives royal assent, they should become effective between spring and summer next year, ideally.

The Convener: We discussed practical implementation yesterday. Certain things will be enabled and there will be increased expectation that things will happen on the ground. Will there be sufficient capacity on the ground as a result of the money that you have invested in projects? Will people be up to speed? Will there be more people on the ground? Will there be more trained people? Will those outcomes be achieved?

Alex Neil: There will be more people on the ground. More money is available and there is more training and more data collection, but we need to quantify things nationally so that we know that every area is properly covered. That is where, for example, the reconvened group under SLAB and the joint working with COSLA, on which there will be a report before Christmas, will help us to identify any gaps that concern us.

The Convener: So that work will be concluded by Christmas and we will therefore have a better idea by then about what will happen on the ground.

Alex Neil: The joint review of services with COSLA will be completed by Christmas. We expect the report before then.

The Convener: When will we know whether the £3 million—

Alex Neil: This is not just about the £3 million. Loads of services on the ground are not funded using the £3 million. For example, in Inverclyde, which you represent, convener, a service is provided through and funded by the council; it is not directly funded by the Scottish Legal Aid Board. We do not have an inventory of all the money spent by every organisation in that area of Scotland.

The Convener: Is the fact that discussions are on-going one reason why COSLA is holding its counsel? Yesterday, we heard from Shelter and Money Advice Scotland that there is significant capacity that needs to be released and there are sometimes restrictions. According to Money Advice Scotland, bureaucracy prevents money advisers in local authorities from helping out as they could. Have you had any discussions within your remit with local authorities to ensure that capacity is being brought together?

Alex Neil: We have been talking to COSLA, but that should be covered by the joint review.

11:15

Stephen Sandham: The joint review will cover that, and I am sure that the advice sub-group that

is being reconvened by SLAB will consider those issues. In her evidence to you yesterday, Yvonne MacDermid indicated that Money Advice Scotland is scoping its training requirements in regard to that. We will see what flows from that and whether additional resources need to be committed.

The Convener: I am sure that the committee looks forward to hearing about all the on-going work to build capacity.

Alex Neil: It is not just a one-off exercise. We are dealing with a dynamic situation that may get better or worse, and we will need to monitor it on an on-going basis once we get the baseline data.

The Convener: Including the scaling down, then. That is interesting.

John Wilson (Central Scotland) (SNP): Good morning, minister. I have two questions, the first of which relates to the figures from the Council of Mortgage Lenders. We have heard this morning—and we heard in evidence yesterday—about the difficulty in accurately assessing the number of repossessions that are likely to take place. The Council of Mortgage Lenders previously predicted a figure of around 75,000 but it has now revised that to 65,000 and, as David McLetchie said, we were told that that might be a pessimistic figure.

My difficulty is in getting to the figures for Scotland. You mentioned 1991, the last big recession that affected property values. My recollection is that, since then, the percentage of home ownership has risen higher and faster in Scotland than in the rest of the UK. How can we extrapolate accurately from the UK repossession figures the number of home owners that we now have in Scotland compared to the number that we had in 1991? Can we place a greater demand on the Council of Mortgage Lenders to start releasing regionally based figures so that we can realistically address the problems that we are likely to face, rather than speculate, without any real evidence, on what we think may be happening?

Alex Neil: I share John Wilson's concern about the lack of Scottish figures and I have repeatedly—as recently as yesterday—written to the Financial Services Authority, asking it to use its powers to ensure that we get the Scottish information. Kennedy Foster yesterday mentioned that the Northern Ireland Assembly has, rightly, requested the same information for Northern Ireland. I made my request orally to the then chair of the CML in Scotland several months ago and I was told that the CML did not want to release the Scottish figures because that would affect share prices. I find that an absurd proposition. We are not asking for information on individual lenders; we are asking for the Scottish figure as part of the UK figure. I find it very hard to believe that giving us the Scottish figure would affect anybody's share price.

Kennedy Foster also mentioned that Lord Myners's special group in the Treasury, which is considering the issue of repossessions and so on, could provide us with some figures. We have been in touch with Lord Myners's office and its response is that the figures with which it has been provided are so meaningless, unreliable, unco-ordinated and unformatted that it regards them as totally unhelpful. So, we are back where we started—I plead again for both the CML and the FSA to give us the numbers. Going back to the convener's previous question, if we knew the figures, that would help us to plan the capacity that we require in a range of services not just in Scotland as a whole, but in terms of the resources that we need to allocate to this or that sheriff court depending on where the repossessions are taking place.

There has been some improvement in that, from April this year, anyone who takes action for repossession has had to notify the relevant local authority. That has been happening, but taking action for repossession does not mean going the whole hog and repossessing a property. The only information that we have relates to the number of actions raised. That provides minimal insight into where the problem lies and is no substitute for the CML or the FSA providing the numbers on a regular basis. It would be extremely helpful to us if they would acquiesce in our repeated requests for them to do so.

John Wilson: Would that also provide us with an accurate figure for the total number of repossessions UK-wide and the percentage in Scotland? At present, we try to get a figure for Scotland by extrapolating it from certain data. If the CML provided accurate figures, we would know exactly what was happening in the Scottish market.

Alex Neil: Absolutely. It would help with forecasting, planning budgets and resources and the rest of it. It goes without saying that such figures would be a useful budgetary planning tool for us.

The point is not restricted to repossession figures. In a conference on these matters a couple of weeks ago, a lender raised with me the issue of improvement and rehabilitation, which we discussed earlier with Mr McLetchie. It is not essential to us that the lenders publish statistics showing how effective their rehabilitation measures are, but it would be helpful. If I were their public relations manager, I would encourage them to do so, because responsible lenders have a good story to tell over the piece.

John Wilson: My next set of questions relates to the mortgage to rent market. Members around

the table will have dealt with constituents who have been renting from someone who has taken out a mortgage on a house in order to let it. I know that the minister has been considering the issue. We have information that proposals are likely to be made at stage 2. Is the minister prepared to outline some of the problems and some of the solutions that he may propose at stage 2?

Alex Neil: Are you asking about unauthorised tenancies?

John Wilson: Yes.

Alex Neil: This is another area in which it is difficult to get reliable statistics, but our statisticians reckon that the problem affects between 250 and 300 tenants every year. I am referring to situations in which a landlord secures a mortgage but lets the property without telling the lender that they have done so. If the landlord is pursued for repossession and the repossession is successful, the tenant is left high and dry, through no fault of their own.

The purpose of the consultation on what are generally described as unauthorised tenancies was to look at how the rights of the tenant in such situations can be extended. We must be careful to strike the right balance between the interests of the tenant and those of the lender, so we have included three options in the consultation paper, which I am sure members have read. We will publish the analysis of the responses to the consultation by or on 14 December.

As I said earlier, the issue may need further consideration. Previously I was inclined to consider including provisions in the bill, if we had decided that we could do something and, ideally, had reached broad agreement on what that should be. However, the timescale is probably such that any provisions relating to the issue will be included in the housing bill, rather than this bill. We would welcome the committee's comments on the issue.

The Convener: I requested, and received, figures for the people who are identified to local authorities as those who might risk repossession or eviction. Has the Scottish Government brought those figures together from across local authorities in Scotland?

Stephen Sandham: Those are the figures that are provided under section 11 of the Homelessness etc (Scotland) Act 2003, which are not published yet. There are proprieties about sharing information that is not published. We will have to see at what point we can publish them.

The Convener: I was provided with the figures from my local authority. Although they are no substitute for getting the mortgage lenders to provide the information to which John Wilson and others have referred, they are as important as the court figures; they are heavily qualified, but they provide an indication. Are you saying that you do not have the figures or that you are not publishing them?

Alex Neil: We have the figures and we will publish them but, unfortunately, under the UK Statistics Authority rules, I am not allowed to give them to you until they are published. As you know, I was the subject of a minor complaint recently from Mrs Mulligan—I got my fingers rapped a wee bit—about allegedly prematurely giving a hint about figures. Unfortunately, we are bound by the UK Statistics Authority's rules, which say that we cannot disclose the figures until we publish them. However, I will discuss with the statisticians whether we can bring forward the publication date, so that the information is available to the committee before you publish your stage 1 report.

The Convener: That is a kind offer indeed. What do your statisticians draw from those figures? I understand completely that not all those cases will move to repossession, but is there agreement that a percentage—5 or 10 per cent—are likely to move to repossession?

Stephen Sandham: I do not think that we can draw any conclusions from the figures, precisely because the number of cases that go to court will vary. There would be problems—

The Convener: We are quite happy to extrapolate from and theorise about the numbers from the previous recession, the numbers that we have now, the numbers that we might have and the increase in home ownership, but we cannot draw conclusions from the current figures for people who are facing debt issues about whom the local authority is notified. Surely we must be able to draw some conclusions from those figures, although those conclusions would be qualified.

Stephen Sandham: I come back to the point that we cannot share that information or what our analysts make of it until it is all in the public domain. We will give you whatever information we can.

Alex Neil: I think that I am right in saying that I saw a CML UK estimate—again, the Scottish figures are not available—that about 60 per cent of actions raised end up being pursued. I notice that Shelter in its evidence yesterday said that that 60 per cent figure was now nearer 75 per cent.

The Convener: Okay. We look forward to seeing the figures, if that is possible.

What does the bill do for people who have been identified to local authorities by registered social landlords?

Alex Neil: In what respect?

The Convener: In relation to possible evictions and the other issues that they might face.

Alex Neil: Evictions happen where the accommodation is rented. The bill does not cover evictions.

The Convener: If eviction is the last resort, why should protection be available only to those who own their home?

Alex Neil: An eviction would happen to someone who was renting their home; it would happen for non-payment of rent or for whatever reason.

The Convener: In my local authority, there are higher numbers of people who rent. It is a genuine question. I do not know what is being done for them.

Alex Neil: We are of course setting up a group to look at evictions.

The Convener: Ah! Good.

Alex Neil: As you know, Stirling Council has recently adopted a policy of no evictions. I will be interested to see how that works.

The Convener: It was not a trick question, minister; I genuinely did not know what was being done there. I hope that there might be opportunities for those people to have the same early intervention and advice to sort out their debt problems as we are providing for those who have a mortgage.

11:30

Alex Neil: Absolutely. I would also like to see earlier interventions for people who get into trouble with their council tax. Quite a few local authorities could benefit from the rehabilitation practices in which the responsible lenders are engaged.

The Convener: As the Minister for Housing and Communities, you are in a good position not just to like to see something being done about that, but to do something about it.

Alex Neil: That is why we are setting up the group that will tell me what to do, convener.

The Convener: Good. I look forward to hearing all about the group.

Patricia Ferguson (Glasgow Maryhill) (Lab): I was interested in your exchange with Mr Tolson about unauthorised tenancies. Are you looking to give people who are in that situation similar protection to those who have authorised tenancies? I presume that an unauthorised tenancy is one where no tenancy agreement is in place. Is that your approach?

Alex Neil: A tenancy agreement can be in place between the landlord and the tenant. What makes it an unauthorised tenancy is the fact that the landlord does not have approval from the lender. The problem is that, in those circumstances, the agreement between the landlord and the tenant is pretty irrelevant, because the key player is the lender.

One of the options in our consultation paper is to do what has been done south of the border and synchronise the rights of unauthorised tenants with those of people who find themselves in parallel situations. That gives them, I think, two months to find alternative accommodation. We will wait to see the analysis of the responses to the consultation. The 25 responses will be independently analysed and the report will come to the committee. If the committee would like sight of the 25 responses in the meantime, we are happy to give you those, but the analysis will be available by 14 December.

Patricia Ferguson: It is helpful to have that clarification about the two groups of people.

I want to return to another exchange. I apologise, but members who come in at the end of a session tend to have an eclectic bag of questions. You had an exchange with the convener about the £3 million. Is that a discrete £3 million that has been put in place in recognition of the new needs that will arise because of the lay representatives, who will have to be trained and brought up to speed? Is the £3 million particularly for that?

Alex Neil: It is not exclusively for that, but it includes money for that. We are happy to send you details of the 16 projects that are to be funded, but the money is also for wider capacity building, including the recruitment and training of new people to work in advisory centres and so on. It is part of the wider picture of increasing the number and quality of money advisers in the various organisations. Some of those people will go on to be lay representatives in court, but some will never do that.

Patricia Ferguson: Given that the £3 million is money that was previously announced to do a specific job, is there not a view that the new responsibilities of lay representatives will increase the need for funding? Will Citizens Advice Scotland and others not need more funding in order to fulfil the requirements?

Alex Neil: Once we know what our budget is for next year—we will not know that until the pre-budget report—we will be in a position to see whether we need to make any additional funds available and, if so, how much and where they should best be directed. We are conscious that investing in services up front saves us money further down the line and, more important, saves

an awful lot of people an awful lot of heartache, so it is a worthwhile, humane investment.

We are conscious of the need to ensure that an appropriate level and quality of advice and support is available throughout the country to people who get themselves into financial difficulty. Many people who go to money advice centres are not home owners, but people who have got into trouble with credit card debt, council tax debt, rent arrears or whatever, although home owners use those services as well. It is important to ensure that the front-line services are properly resourced, within our overall financial constraints, because that saves us all a lot of money further down the line. I would rather invest in that than have to invest in court services because we have not provided the front-line services.

Patricia Ferguson: I do not think that anyone would dispute that approach. I merely wonder whether any assessment has been made of the cost of the lay representatives who will be put in place as a result of the bill. Obviously, when the Parliament comes to scrutinise the financial memorandum, that might be one of the elements that would be of interest.

Alex Neil: We have spelled that out on page 25 of the explanatory notes, where we say:

"Information was sought from Citizens Advice Scotland (CAS) to try to estimate the likely increase in advice sector provision that would be needed as a direct consequence of the Bill provisions regarding lay advisers representing in repossession matters. The information provided assumes 2.5 hours of preparation and court time with the client per case, and an average hourly rate per adviser of £14.55, giving an average cost per case of around £36.40."

There is more information behind that in the financial memorandum.

Patricia Ferguson: It will be interesting to see whether that works out in practice.

I share the minister's concern about the need to ensure that the facility that allows people to remain in their own homes is as robust as possible, but I wonder about the need for the pre-action requirements to be included in the bill. The FSA already has strict industry rules on the matter that might be subject to amendment, as Mr McLetchie mentioned earlier. Is it right to have the pre-action requirements in the bill, as that would make it more difficult to update them in line with any new FSA guidance?

Alex Neil: I hope that you are not out of step with your party's policy, Tricia.

Patricia Ferguson: I am just asking a question, minister.

Alex Neil: We are dealing with the core of the bill. The provisions on pre-action requirements are worded in such a way as to allow SSIs to fill out the detail of the protocols. The bill establishes the principle that the lender should, within reason, make every effort to ensure that, at every step, action has been taken to rehabilitate, rather than force through repossession. It is important that that principle is established in the bill, because it is fundamental. How it is interpreted and so on can be changed by statutory instrument on a regular basis, if that is what is needed. Obviously, the FSA might come up with new recommendations as a result of the review that, as David McLetchie reminded us, it is starting in January. The last thing that we want to do is to initiate primary legislation every time that the situation is reviewed. If we get the principles established in primary legislation and allow any detailed changes to be made through SSIs, that will strike the best balance.

Patricia Ferguson: I am grateful for that answer. Given the minister's other burdens, he need not worry about my compliance with my party's policies.

The Convener: As there are no further questions, I thank the minister and his officials for their attendance.

11:38

Meeting suspended.

11:43

On resuming—

The Convener: I welcome the second witness panel: Fergus Ewing MSP, minister for housing—no, that is wrong; he is Minister for Community Safety. Somebody is going to get it for that one. The officials supporting the minister are David Ferguson, Rosemary Winter-Scott, Sharon Bell and John St Clair. I invite the minister to make an opening statement before we move to questions.

The Minister for Community Safety (Fergus Ewing): Thank you very much, convener. You had me worried for a moment there.

I start by declaring that I am a solicitor, but I am not in practice and have no financial interest in the bill.

I am delighted to have the opportunity to speak to the committee about the provisions in part 2 of the Home Owner and Debtor Protection (Scotland) Bill. As members will no doubt be aware, the measures flow from the valuable work of the debt action forum that I convened earlier this year, which was specifically designed to enable us to introduce legislation at the earliest opportunity to respond effectively to the impact of the recession and to help Scots who are struggling with debt and reduce for them the risk of insolvency leading to

homelessness. The debt action forum members were drawn from a broad range of stakeholders, who have had ample opportunity to contribute to the formulation of the bill.

I practised as a solicitor for many years, specialising in the protection and preservation, wherever possible, of debtors' family homes. From that experience, I can speak to the extreme trauma that debt causes when homes are at risk. It causes immense strain on the families, often leading to their break-up and damage—hidden harm, we might say—to the children.

11:45

Such problems can only get worse while we are in a recession. Accordingly, it is essential that we provide effective measures to safeguard home owners so that, whenever there is no real benefit to creditors in selling the home, the debtor will have the reassurance of knowing that their home is protected. We know that the sale of homes is frequently unnecessary, that more flexible systems are accepted by creditors in England and Wales, and that certainty about what will happen to the family home saves families. That is the underlying theme of most of part 2.

I know that the committee has received in evidence some adverse criticism of our proposed measures, which I am confident that I can rebut. Before I do so, I ask members to bear in mind that the criticisms, although voluminous and repetitive, were predominantly produced by the sector of the stakeholder community that has a vested financial interest in the work that insolvency creates for it. That sector's views are not shared by all stakeholders. I understand that the committee has heard alternative views in evidence presented yesterday by the money advice sector. It is not even the case that all insolvency practitioners oppose the bill's measures. My view, as chair of the debt action forum, is that the measures before us have the general support of most of those who participated in the forum and are a reasonable and proportionate response.

A second point that I wish to make at the outset is that a great deal of the criticism to which I alluded confuses the measures in part 2 with much more far-reaching proposals that were discussed by the debt action forum but which are not contained in the bill. For example, despite what was said in evidence to the committee, the bill does not exempt family homes from insolvency proceedings or introduce state-administered trust deeds or an advice-giving role for the Accountant in Bankruptcy. It does not undermine the importance of the role of insolvency practitioners in helping debtors into appropriate debt solutions.

Such radical proposals were indeed discussed by the forum. However, our intention is, and has always been, to consult more widely before developing any such policies. I seem to detect a degree of panic among insolvency practitioners that such measures are even being considered. I understand their anxieties, but we obviously cannot conflate or confuse their concerns about what a future bill might do with what the current bill actually does. I am sure that the committee understands that.

The insolvency practitioners emphasised that they are trained and experienced professionals who operate in a regulated industry. The bill will make use of that knowledge and professionalism by allowing insolvency practitioners to guide debtors into solutions that are better targeted at their circumstances. The bill will allow more flexibility for the insolvency practitioner and the debtor in relation to trust deeds. Only when appropriate and when creditors agree will the bill allow the protection of trust deeds that exclude family homes. That simply reflects the reality of the majority of protected trust deeds and ensures that the debtor knows at the outset that their home is safe. We do not expect that measure to be used for homes with large amounts of equity, or when an insolvency practitioner believes that excluding a family home would be unacceptable to creditors.

Creditors can, in any event, object to any trust deed, so I cannot see that there is any risk of abuse. If creditors object, the debtor will be no worse off than he was before. He will be able to suggest an alternative trust deed that includes the home, and he will have the same alternatives as he has under the existing law. It is therefore simply not true that the measure will force more debtors into bankruptcy.

The principles of the bill are sound. The measures that it introduces are based on the discussions of the debt action forum, and I am satisfied that they constitute a proportionate and necessary response to the current credit crisis. We have not upset the fundamental balance of our insolvency laws, and we have separated out the more radical proposals for future consultation. The debt action forum's report gives us a duty to act on the measures that can and must be introduced now. The real difference that the bill will make for Scots who are struggling with overindebtedness should not be underestimated.

The Convener: Thank you, minister. Alasdair Allan will ask the first question.

Alasdair Allan: From what you have said, minister, there is pressure to legislate. Much of the discussion that we had about part 1 of the bill in the earlier part of the meeting focused on whether consultation with stakeholders has been adequate.

Do you feel that consultation has been adequate with regard to part 2?

Fergus Ewing: Yes, there has been adequate consultation—it has been as adequate as it would be possible to carry out within the constraints of introducing a piece of legislation that I firmly believe is essential if people are to avoid being made unnecessarily homeless, particularly those who may be facing real debt problems that are partly occasioned by the economic recession.

I will outline the consultation process for the committee, because I know that the issue has quite rightly been raised by many witnesses and several committee members.

As I said, I convened the debt action forum, which met on seven occasions. It brought together, as the policy memorandum states, a large number of interested stakeholders. Each meeting lasted for about two hours, and the forum discussed a huge range of topics. I chaired five out of the seven meetings and held two fairly lengthy meetings—each lasting between one and a half and two hours—with insolvency practitioners, on 3 June and 23 September. As my ministerial colleague Alex Neil may have mentioned to the committee, we plan to continue to engage with insolvency practitioners. We have arranged a meeting with the Institute of Chartered Accountants of Scotland on 25 November to follow up a number of matters.

We have had meetings with the banking sector, and during the summer I had several meetings with the money advice sector to discuss not only the measures that are contained in the bill but the debt arrangement scheme. Excluding the meetings with the banking sector and those on the DAS, I personally undertook 23 hours' work on the bill. The involvement of officials in those and other events took up in excess of 86 hours.

We have presented a series of measures that I believe are not an add-on, but are absolutely essential if we want—as I am sure we all do—to help people who may, in the recession, face losing their homes unnecessarily. Sections 9 to 12, on which I imagine we will concentrate, focus on how we can do that, and are intended to help people and families avoid losing their homes.

There has been a great deal of talk about unintended consequences. It is clear that that is a serious issue, and we have taken it extremely seriously. Because we—myself in particular, given the coincidence that I spent a lot of my life involved in this area of work—wanted to do what we could to eliminate the possibility that any of the measures would have unintended consequences, we brought together a group of experts who were specifically tasked with considering whether the proposals in part 2 would have any foreseeable consequences that would cause difficulties. That expert group comprised Professor George Gretton of the Scottish Law Commission; Professor Nicholas Grier of Edinburgh Napier University, who was an adviser on the Bankruptcy and Diligence etc (Scotland) Bill; and Michael Green from the University of Wales, who is a senior academic and a researcher for the UK Insolvency Service. I am not sure whether the committee will have the opportunity to take advice from those individuals. Their role was designed to ensure that, although we are acting swiftly, we are doing so prudently and correctly and that—as far as we can ascertain—we are thinking ahead to eliminate any unintended consequences.

Alasdair Allan: You mentioned insolvency practitioners in your introductory remarks and you have again mentioned them in passing. You said that the committee has received evidence from people who might be said to have a vested financial interest in maintaining the status quo. Is that vested interest trivial or substantial for individual insolvency practitioners?

Fergus Ewing: In Scotland, we have a group of insolvency practitioners who carry out their work professionally and who are regulated; in fact, they have been regulated by and subject to the supervision of the Accountant in Bankruptcy since 2008. However, anyone who makes a living from a particular area has a vested interest in continuing to receive the financial returns that they enjoy from that area.

Members will have noted that paragraph 114 of the financial memorandum to the bill—which is well worth a look—contains a reference to a paper prepared by the Accountant in Bankruptcy in which the work that is carried out by insolvency practitioners is analysed. The paper was based on a sample of 1,262 out of 3,825 protected trust deeds that were registered between 1 April 2008 and 30 September 2008.

The paper shows that the average debt included in protected trust deeds was £32,652, whereas the average dividend to creditors was only 17p in the pound. So, on average, creditors had to write off 83p in the pound. The paper also shows that the total amount of fees and outlays—I stress that this is not all fees income—payable to the private sector as a whole for carrying out the work was £37.7 million. Members will wish to take into account the fact that that is a substantial amount of money. The dividend to creditors was £42 million, and £205 million was written off.

The paper also shows that the average cost of administering a trust deed was about £5,400. One cannot compare low-income, low-asset—LILA—administration with protected trust deeds. Protected trust deeds involve more work, and many of them will be much more complicated. By

definition, the LILA scheme does not involve a house or assets of any real value—it is for people who are on or below the minimum wage. The cost of the Accountant in Bankruptcy administering an average LILA case is £125. I mention that because I think that it is right to praise the Accountant in Bankruptcy, Rosemary Winter-Scott, and her predecessor for the good job that they have done in helping people with debt in Scotland to get remedies quickly and at reasonable cost.

Alasdair Allan: The figure of £37.7 million reflects the fact that the industry is substantial. I am not suggesting that the industry should be shut down, but are you satisfied that the Government's proposed measures will make it more efficient?

12:00

Fergus Ewing: I make it absolutely clear that the bill does not, in our view, seek to tackle that issue. The issue of reforming how trust deeds are handled is for another day. Rather, the provisions in section 10 seek to help those debtors who are at risk of losing their homes, especially in the recession.

Yesterday, witnesses from the money advice sector said that, in the recession, many more people who might be adjudged middle class are chapping at their door and seeking help, because for the first time they have problems holding on to their homes. It is likely that in the next few years more people will seek the services of insolvency practitioners in Scotland, through protected trust deeds. I refer to people who have quite a lot of equity in their houses but rather more debt, through credit cards and the like, and who find themselves without a job and without the capacity to pay back their debt.

I welcome the opportunity to make it clear that the provisions do not reform how trust deeds are operated by insolvency practitioners. The issue of whether the work is being done for the right cost is for another day. The figures are available to the committee in the paper that is referenced in paragraph 114 of the financial memorandum. I have cited some of them today, but the paper provides much more information on how protected trust deeds operate. I hope that that assists you.

Alasdair Allan: You mentioned the implications of the bill for people who have larger and more expensive homes. Some of the evidence that we have received—as I recall, again from insolvency practitioners—suggested that larger homes might be used by certain individuals to circumvent the aims of most people's idea of fair legislation. Did you suggest that homes with a large amount of equity might be treated differently?

Fergus Ewing: Yes. First, section 10—indeed, part 2 as a whole—does not exempt the family home from trust deeds; it allows people to reach a negotiated exemption of the family home from trust deeds. Secondly, if a home is worth £300,000 and the secured debt is £100,000, it would be absurd under the existing law to exclude that home, because there would be £200,000 of equity that, rightly, creditors would feel entitled to seek to get at to satisfy their debt.

The proposal does not change the substantive law or exempt assets from either protected trust deeds or sequestration. It allows a trustee to enter into discussion with a debtor when the equity is zero—when there is negative equity—or very modest. I refer to situations in which a house is worth £60,000 and the secured debt is £58,000. We all know that, if the family home is sold off in those circumstances, there will be nothing left, once the costs have been added up, so what is the point of doing that?

At the moment, trustees cannot exclude a home with zero or minimal equity from the scope of a protected trust deed. That means that they are duty bound to do a huge range of work that, ultimately, is unlikely to serve any purpose. Consider the case of a debtor with a wife and two children who has acted foolishly by raising a lot of credit and spending a lot of money that he should not have spent, or who has been unfortunate in business and made mistakes. That family will suffer if we cannot bring certainty to it as soon as possible.

In my experience, there is nothing that corrodes family life more than the pressure of debt, with letters coming through the door every day demanding more money. As Citizens Advice Scotland said in its report "Drowning in Debt", nine out of 10 people in that situation experience exacerbated mental health problems. Debt also leads to exacerbated addiction problems and puts huge pressure on the children.

Section 10 would allow, at the outset, a debtor to negotiate with a trustee for their home to be excluded from a protected trust deed if the equity is low or zero. The benefit of that approach is that it removes at a stroke the huge pressure of losing the home. In my previous life, I acted almost exclusively for debtors—I do not think any of the insolvency practitioners from whom you heard evidence ever instructed me or sought to instruct me. It was usually the female who came see me, because it was usually the wife or partner who had the guts to face up to the situation. They were almost always weeping when they came to my office because of the stress, the anxiety and the prospect of losing their children's home. Section 10 would allow people to work out a solution at the outset, not after three more years of worry.

The Convener: I must allow time for questions, minister. We get the point.

We have heard evidence that some of the most harassed people—those who are under the pressure that you refer to—will not benefit from the bill because they have no equity or no property. In fact, they are directed away from any bankruptcy proceedings that could assist them, and there are many of them.

The committee would appreciate a copy of the report by the academics who advised you on unintended consequences because we may still have some time to call them to give evidence—if members wish to do so.

Mary Mulligan: I am very aware of the pressure that was on the Scottish Government to introduce measures to respond to the increasing numbers of repossessions and threats of repossession. I listened to the Minister for Housing and Communities, Mr Neil, give evidence on part 1. He discussed pre-action court protocols, giving people an opportunity to be heard in court, proper court scrutiny and allowing lay representation. At what stage was it decided that part 2 of the bill was necessary to support those measures?

Fergus Ewing: That is a fair question.

Convener, we will provide a copy of the expert group's report. The group would be ready and willing to provide any more information that the committee would like.

The Convener: I may have misled you and the committee. Given the timescale—we have had an extra committee meeting this week and our deadline is in December—I do not think that we will be able to call the experts to give evidence, so their report would certainly be beneficial.

Fergus Ewing: Indeed. I am sure that, if you needed further written evidence, they would be able to provide that. That is entirely up to committee members, obviously.

To answer Mary Mulligan's point, it is not so much that the provisions in part 2 are in the bill as an adjunct to those in part 1. Rather, it was always envisaged that there would be provisions in part 2 that were designed—to come at it from a different angle—to address the problem of people unnecessarily being made homeless. I pray in aid the debt action forum's terms of reference, which you have. They make it clear that the forum's job was, inter alia, to consider legislative measures. I explained that to the forum at its first meeting. In addition, the terms of reference show clearly that—this might help to dispel some of the confusion that has arisen—the members of the forum would consider the Accountant in Bankruptcy's proposal to

"Allow a debtor's family home (subject to creditor consent) to be excluded from a protected trust deed".

Contrary to the suggestion that part 2 emerged at the last minute, it was always the case that the debt action forum would make legislative proposals; that was part of its task. It was made clear at the outset that the various stakeholders on the forum would be asked to look at the measure in section 10 that will enable negotiation to take place about excluding the family home from a protected trust deed. That flexibility might enable insolvency practitioners to take on more work and do more, rather than—as has been suggested in evidence—fewer cases than hitherto. The documents about the debt action forum show that from the outset it was intended that there would be a separate raft of measures to tackle and eliminate, where possible, unnecessary homelessness and eviction through legislative measures related to debt law rather than legislative measures related to housing law.

Mary Mulligan: If it is correct that it was always the intention that such provisions would form part of the bill—I have no reason to doubt you—why are people who were members of the debt action forum saying that they expected those proposals to go out to consultation and to form part of the family homes bill that is due to be introduced? People were surprised that there was not further consultation before the measures in question were introduced.

Fergus Ewing: I have had the opportunity to read some of the evidence that the committee has taken as part of its emergency schedule, but as I understand it, it has not taken evidence from any members of the debt action forum, except Yvonne MacDermid and Adrian Stalker. As you know, Adrian Stalker's main job was to chair the repossessions sub-group of the DAF. We have not heard from Gillian Thompson, Ann Condick, George Way, Susan McPhee, Lindsay Montgomery, Karen Titulaer, Andy Pike from the British Bankers Association, Anne Feeney, George Gretton, Paul Brown or Frank Johnstone. That is not a criticism of the committee, I hasten to add—

The Convener: I wonder then why you and the Minister for Housing and Communities have mentioned it. We contacted the organisations that were represented on the debt action forum and they decided who to send to give evidence; we do not decide who comes along. We must be careful not to infer too much from that. We have no reason to question the evidence of the representatives on the debt action forum who were sent to give evidence to us. Indeed, we will return to that evidence later because, as you are aware, the Institute of Chartered Accountants of Scotland

has recommended some simpler measures that could achieve the Government's objective.

Mary Mulligan: I am not sure that my question was answered. There are issues about the evidence that we have received and the concerns that have been raised, and about who was on the forum and who was not and how that affected people's ability to contribute to the process. Other members might raise those issues.

Minister, a side issue that has arisen from the evidence that you have given today is around the work that the Accountant in Bankruptcy will take on, should the proposed measures be introduced. Are you content that that agency is fully resourced to take on the additional responsibilities that the bill will give it?

Fergus Ewing: I am content that the proposals that are contained in the financial memorandum, which provide for a small number of additional staff at a cost that is relatively small in the scheme of things, represent the best possible estimates of what is necessary to carry out the additional workload. It is estimated that the new certificate route for which section 9 provides will result in 500 additional cases. There is no need for me to rehash the resources that the Accountant in Bankruptcy's office will require to carry out that additional work, as they are laid out precisely and in detail in the financial memorandum.

12:15

The Accountant in Bankruptcy is probably one of the Scottish Government's unsung success stories—which is probably my fault, given that I am the minister in charge. Since its establishment in Kilwinning, it has reduced year on year the cost of bankruptcy from £7 million to £5 million. It does 9,000 LILA cases a year at a cost of £125 per case, has excellent and capable staff and operates its business in an exemplary and extremely efficient way. I am very confident that the AIB will be able to take on the additional work that is envisaged in the bill as supported by the policy memorandum, the explanatory notes and the financial memorandum.

Mary Mulligan: Are you confident that those excellent and productive people have the necessary skills to take on those responsibilities, or will new staff have to be recruited?

Fergus Ewing: Your question is perfectly fair. The financial memorandum clearly specifies the number of staff we believe will be necessary, the level that they should be at and so on. Am I confident about all that? Yes, I think that it will happen.

If it helps, I will make a brief comment that might be of some interest to insolvency practitioners, who have expressed concern at the scrapping of an existing route into bankruptcy. In many cases in which a PTD fails and the debtor goes into bankruptcy, insolvency practitioners carry out that work. However, that would cease under the bill as drafted. We are due to meet ICAS on 25 November and I am ready to discuss with its representatives whether in certain cases in which practitioners have already carried out a lot of work for a debtor with a view to concluding a PTD but, for whatever reason, have not succeeded in that task, it might make sense to allow them to go on and do the bankruptcy work. In such cases, of course, no money from the public purse will be spent on the additional work that practitioners will have to carry out on the bankruptcy.

That potential concession, which as I say I intend to discuss further with ICAS, might be of interest to insolvency practitioners and useful to the committee in its work. I certainly think that it is relevant to your question because if such a concession were to be made insolvency practitioners would continue to take on some of the workload that is envisaged.

The Convener: When you meet ICAS, will you discuss its suggestion given in evidence to us that the Government's aim of ensuring the protection of the family home

"could be achieved in a relatively simple way by agreeing the protection of some de minimis level of equity, which would take 90 per cent of people out of the process"?—[*Official Report*, *Local Government and Communities Committee*, 4 November 2009; c 2554.]

The witness went on to say:

"For most trust deeds, the level of equity is relatively low so protecting a de minimis level of equity"

would also avoid any "unintended consequences". Have you already discussed that recommendation? Do you have any view on it?

Fergus Ewing: We have not discussed the suggestion with ICAS. The proposal was first set out in a paper that was relayed to us at 5.46 pm the day before a 9 am meeting that we were due to have with the organisation, and unfortunately we did not have an opportunity to study it before the meeting.

The Convener: What date was that meeting?

Fergus Ewing: It was 3 June. As I understand it, we received the proposal at 5.46 pm on 2 June. In fact, I was not aware that it had been received until 8 am the next morning when my officials and I were preparing for our meeting in Edinburgh with insolvency practitioners.

Convener, I am sure that you will agree that if you want a minister to discuss in detail a proposal that will radically and fundamentally change the law of diligence it is sensible to give him more than

half an hour's notice of it. I am not complaining; that is just the way it happened. I am simply explaining to the committee why we have not previously discussed the matter with ICAS. I am pleased to discuss these and other matters with the institution and, having had an opportunity to consider the proposal, I can, if members would like it, give more information about our views.

The Convener: Mr McLetchie might have some questions about that, so we will leave it until then.

I am puzzled by an issue related to Mary Mulligan's point about the capacity of the courts to meet the increased expectation. Is it the case that 5 per cent of cases are currently defended but that the consultation said that the aim was to have 50 per cent of cases defended? That would be a significant increase.

I am testing the evidence that we received at a previous meeting from Fiona Hoyle. She said that the Finance and Leasing Association was carrying out an impact assessment as part of its response to the bill and that it was concerned that

"if we introduce procedures under which all cases are called to court we must ensure that the courts have the necessary resources … At present, 5 per cent of cases are defended, but the consultation said that the aim is to have 50 per cent".—[*Official Report*, *Local Government and Communities Committee*, 28 October 2009; c 2505.]

Is that what the consultation said? Is she right or wrong?

Fergus Ewing: With respect, convener, that is properly a matter that would have fallen to be answered by—and would, I am sure, still be answered by—my colleague Alex Neil, because it relates to the provisions in part 1 of the bill. I am very sorry, but I have not come equipped to respond to questions on part 1.

The Convener: We are talking about the capacity of the courts. I presume that we expect the bill to make a difference because one of its focuses is to address the issue of those who currently walk away unadvised of their rights in the way that they will be under the proposals in the bill. There will be an increased expectation, and I presume that you recognise that more people will be in the courts as a consequence.

Fergus Ewing: I am sorry, convener, but that question relates to part 1 of the bill. I have been involved in the past in discussions on these issues, but not in preparation for this meeting because I came here on the basis that I would be responding to questions on part 2.

The Convener: Is the ambition, as has been stated, to get 25 per cent of people who lose their homes into the court system?

Fergus Ewing: Our objective is to avoid people being evicted unnecessarily. I am afraid that I could not speak to percentage targets in relation to the courts.

The Convener: So Mr Neil has not shared his ambition with you, and you will just deal with whatever comes out of that part of the bill. If it means that there are more people in court, you will deal with that, but you have not discussed the matter with the minister.

Fergus Ewing: No, we have discussed many things, including the impact of part 1 of the bill on the Scottish Court Service. Indeed, I engaged in further hours of discussions with Mr Neil and the bill management team at the bill meeting, and I can assure you that I considered these matters very fully at that time. Mr Neil and I share the ambition and aim that we do not want people to be evicted unnecessarily. The burden on the courts and the issue of how many court appearances there would be is dealt with in part 1, and I am advised that the Scottish Court Service has assured the minister that it has the necessary capacity.

I do not think that I answered the question that the convener asked previously on our views about the ICAS proposal, such as it is. I am very happy to answer it, if you would like me to do that.

The Convener: Yes, that is fine. You can do that and Mr McLetchie can follow up.

Fergus Ewing: The difference between our proposal and the ICAS proposal is that the ICAS proposal would exempt part of the asset that forms a family home from the reach of creditors in the protected trust deed. Our proposal does not automatically exempt the asset; as I have said, it allows for a process of negotiation at the beginning to exempt that asset.

In our application of section 10—assuming that it becomes law—if there was equity of, say, five grand in a house, a debtor's family could offer to pay five grand to the trustee to buy that equity out and/or the debtor could say, "I'll pay you 300 quid a month from my wages, because I am on a decent wage, and I will buy out the equity in the house." That deal can be struck at the beginning so that there is certainty. The ICAS proposal is to exempt a proportion of the equity—a de minimis; a small proportion up to a certain amount.

I am bound to say that there are a number of difficulties with the ICAS proposal. Some of them are of a technical nature and one of them is to do with adjudication, which I do not think anyone has mentioned in their evidence. Adjudication is the remedy that is available to creditors, before bankruptcy, to go against heritable property. I am sure that Mr McLetchie is familiar with the process. Those who are not lawyers cannot be expected to be familiar with it, as it was rarely used until

recently, but I understand that at least one of the banks is now using it.

Adjudication is a powerful and valuable tool, because a creditor owed a substantial amount of money can go to court and, instead of making someone bankrupt or going to a trust deed, go straight to the debtor's heritable property. If we exempt from one part of the debt process assets that are not exempt under the rest of the law of diligence, we will immediately create an incentive for creditors to use adjudication. If a creditor thinks that going to a trust deed will prevent them from getting the equity of five grand, or whatever the available sum is, they may raise an action of adjudication. Although adjudication has its limitations, as it is a complicated, drawn-out process, it may be the unintended consequence of the ICAS proposal.

The same applies to sequestration. Is it proposed that exemption of the asset would be for the purposes of a trust deed only, or would it also be for sequestration? There needs to be equivalence in all areas of law.

We intend to consult on these issues. In the previous session, Parliament considered the new diligence of land attachment, which is intended to replace adjudication. Members from across the chamber—perhaps not from all parties, but from some—have expressed the view that the family home should be exempt from the reach of creditors, apart from secured creditors. That issue can be consulted on in due course.

The ICAS proposal is interesting and worthy of consideration, and we do not have a closed mind on the issue. However, it would alter fundamentally and radically the law of how creditors can recover property—the law of diligence. In our view, it takes a piecemeal rather than a wholesale approach. We intend to consult on the matter more widely; at that point we will confront it head on.

David McLetchie: Good afternoon, minister. I will start with the issue of consultation, consent and the support that has been secured for the proposals in part 2 of the bill.

In paragraph 10 on page 2 of the Government's policy memorandum, you say that, as a result of the deliberations and discussions in the debt action forum and repossessions group, involving key stakeholders, the Government took the view

"that the main stakeholders had been directly consulted through these groups and support for early action secured, even without the usual wider formal consultation."

You have reiterated the essence of those comments today.

In section 4.3 of its report, which deals with increasing the protections for family homes, the debt action forum states:

"It must be noted that there was insufficient time to consider the paper"—

the reference is to a paper tabled by Professor Gretton and Mr St Clair, who is with us today—

"in detail and some Forum members would have wished more time to reflect on the issues raised and an opportunity to fully consult with their membership on the potential impact of these issues."

We have also heard that the members of the debt action forum were sworn to confidentiality, which meant that they were unable to consult their members on the proposals that were being canvassed. Why were the forum's operating procedures constructed in such a way that the participants—those whom you describe as the main stakeholders—could not consult their members on the proposals that were under discussion?

12:30

Fergus Ewing: I understand that Mr McLetchie is referring to a proposal in a paper on the exemption of the family home from the reach of creditors that was prepared by George Gretton and John St Clair and presented to the debt action forum. From my recollection, the paper was presented at one of the two meetings that I did not attend—nonetheless, that proposal was put forward.

My first point to Mr McLetchie is that, as I said in response to the question on the ICAS proposal, it was accepted that the family home proposal is not part of the bill. It was one of the issues on which we recognised that we needed to carry out a full public consultation. That position is set out in paragraph 12(3) of the policy memorandum, in which the Government commits to

"carry out a public consultation on the following matters",

one of which is stated in bullet point 4 as

"what changes, if any, might be appropriate to the way in which the family home is treated in bankruptcy."

The example that Mr McLetchie uses does not prove any point other than that we recognise that, because the proposal would constitute a radical change to the law in Scotland, it would need to be the subject of a full consultation, and it is likely that it will.

My second point concerns the reference to a vow of confidentiality, which cropped up in Mr McLetchie's question. We did not ask people to swear any oath of confidentiality; no such undertaking was sought or granted. There was a recognition, which I made clear and explicit at the outset of the DAF meetings, that

"The formulation of ideas may require members of the DAF to take issues outside of the"

discussions

"to enable further wider interaction with outside parties and stakeholders."

That is from the DAF terms of reference document, which is available to members of the committee.

We recognised at the outset that the members of the DAF would need to consult their people. All that we asked was that they do so with tact and discretion, so that, to put it bluntly, a rehash of what was said in each of the seven meetings did not appear in the columns of the press. We did not—and nor would it have been appropriate or helpful to—seek a vow of confidentiality, to which Mr McLetchie referred. Our approach was quite the contrary. Indeed, the proceedings—given that there were seven meetings that lasted approximately two hours apiece—were frequently informed by members of the forum after they had been consulted.

I hope that that answers the two main points of your question, but if there are other points I will do my best to answer them.

David McLetchie: There is remarkable variance between what you have told us today and the evidence that we heard from the organisations that were represented in the debt action forum. They have said clearly in their evidence to the committee that they were specifically constrained in their ability to consult their members fully on the proposals in the bill because of the terms of operation, which were effectively determined by the Scottish Government.

You may dispute that, minister. Nonetheless, it raises the question why all the people who represent all those organisations should be under such a misapprehension on such an important matter. You are telling us that they were free to consult their members and they are telling us that they were not.

Fergus Ewing: I am responsible for what I say and do. I cannot cast too much judgment on the accuracy and reliability of what others say and do; I can only give you the facts.

The minutes of the seven meetings were prepared as soon as possible after the meetings, and published on the website. It was not a series of meetings that were held in camera, for which the results and the minutes were withheld. The minutes were published as we went along, and they were therefore available for all members of the DAF, and those whom they represented, to study. That shows that those who say that they were barred from speaking to their members do not seem to accept the fact that the minutes of the DAF meetings were made available at that time.

Many people who were on the DAF have not given evidence to the committee—there have been constraints of time and so on—but many of the people who have made those charges were not on the DAF.

David McLetchie: But their organisations were represented on the DAF, so there is no reason to doubt the accuracy of the oral evidence that they have given us or the written evidence that they have submitted.

Fergus Ewing: ICAS did go to its membership to clarify two issues: protected trust deeds and heritage and car values, which I have not mentioned—we want to take action to help families if they go bankrupt to hold on to a motor car, which would help them find another job, particularly if they lived in rural Scotland. ICAS came back to the forum after it had gone to its membership and it made useful contributions, of which we took full due account.

The facts show that, although there might have been some discontent, our minutes were published and members of the forum went back to their organisations to get responses, which informed our work.

John St Clair has other information that might be useful to Mr McLetchie.

John St Clair (Scottish Government Legal Directorate): I can speak to this issue having been an official who attended the DAF and having been partly responsible for the paper to which Mr McLetchie alluded. There seems to be some misunderstanding about confidentiality and the consulting of member organisations.

What Mr McLetchie describes as a proposal that was put to the DAF was not a proposal as such. The DAF was meant to be about blue-skies thinking on serious matters, and both the main forum and the sub-group were given options papers. That is the approach that is normally taken—such groups are normally given a range of measures to consider.

The paper was prepared by Professor Gretton and me. We recognised from the beginning that it contained far-reaching and radical measures. It was going to be used to inform the discussions, but almost as soon as it was lodged it was clear that the options that were proposed, on which views were canvassed, could not be subject to recommendations of the DAF, because they were too radical or controversial. At that stage, the Accountant in Bankruptcy informed the DAF that those proposals were likely not to form the subject of any legislation that flowed directly from the DAF but to be subject to a full-scale formal consultation.

That is the position as outlined in the minister's opening speech.

As regards confidentiality, it was recognised from the beginning that, if views on controversial measures were being canvassed, it was necessary to have a bit of discretion and not to canvass the full membership of the organisations represented on the forum. It was only in relation to the proposals in question, which are not anywhere near this bill, that there was any constraint in canvassing the full membership. There were never any constraints on ICAS or any of the other members of the DAF speaking to their immediate circle within their organisations, or going wider, in relation to what we thought at the time were the less controversial measures—not the ones in the options paper.

David McLetchie: Are you telling us that none of the proposals in the bill and in sections 10 and 11 in particular—given that the options paper was talking about protection for family homes—was the subject of the options paper? None of those proposals was in your options paper.

John St Clair: A large part of the section 10 stuff was in the options paper, but that was not, as we understood it, subject to any controversy in the DAF.

David McLetchie: So proposals in section 10 were included in your options paper.

Paragraph 4.3 of the DAF report says of your options paper:

"There was no consensus reached in relation to the options tabled in the paper. Members"—

that is, all members of the DAF, not just some of them—

"accepted that the whole subject of action against property was complicated and affected a lot of areas. They"—

in other words, all members of the DAF—

"agreed that this paper raised a number of issues which should only be considered after a full public consultation."

We have just heard from Mr St Clair that what is proposed in section 10 was included in the options paper, and we know from the DAF report that there was no agreement on the options among the members of the group. They specifically said that the issues should not be considered without a full and proper public consultation, which we have not had. Therefore, why is section 10 in the bill as opposed to being the subject of a consultation and a part of a later and more comprehensive measure?

Fergus Ewing: Mr McLetchie is not looking at the other parts of the report from which he has just read. He refers to the paper by George Gretton and John St Clair that proposed to exempt the family home entirely from the reach of creditors other than secured creditors. Everybody agreed that that proposal should not be included in the bill and that there would be consultation.

An entirely different part of the report, which Mr McLetchie has not read out, clearly shows that measures that are in the bill were treated separately. For example, paragraph 3.1a of the report states that the forum discussed

"the extension of the protection currently available for debtors' family homes in bankruptcy to Protected Trust Deeds."

The views of members of the DAF are shown in the minutes—I am reading from the same document that Mr McLetchie read from partially, if I may say so—which say:

"This was agreed in principle by the Forum members in general".

Paragraph 3.1b of the report says that the forum discussed

"the extension of the protection for debtors' family homes in bankruptcy procedures to debtors who live alone".

The British Bankers Association wanted further consideration of that, and changes were to be consulted on. That proposal was therefore not included in the bill.

The document charts the separate strands of the work that was done and shows that the measures in the bill were supported. That support was not always unanimous; the insolvency practitioners did not agree with them through ICAS, which represents them. Ann Condick played a full and active part in the report. In our view, however, the measures in the bill commanded reasonable if not unanimous support, and they are necessary to avoid unnecessary homelessness.

The papers that the debt action forum considered are listed in its report. I can provide the committee with that document if it does not already have it, although it should be in the public domain. It shows, for example, that the COSLA paper on cheque cashing was presented with additions. Anne Feeney of COSLA took advice from her members and made an amended proposal. COSLA therefore consulted its members, and we discussed the amended proposal.

Incidentally, we took account of COSLA's view that the recommendation that in the bill the AIB be given the power to give advice was inappropriate. It expressed strong views because its members have to deal with homelessness. We wanted to take account of its views and we did so after it had consulted its members, contrary to the strand of cross-examination that Mr McLetchie has chosen to pursue—although the approach that he takes is entirely up to him.

I have demonstrated that the debt action forum separately considered the measures in sections 9 and 10 of the bill and those that specifically relate to the family home in sections 10 and 11. I was not present when Sharon Bell and another person made the presentation on what has become section 10, but it was within the terms of reference right from the word go.

12:45

David McLetchie: Let us go through those sections and see what was recommended and agreed to and what was not. Section 9 is on the proposed certificate for sequestration. I am advised that nothing in the report supports the proposition that the Accountant in Bankruptcy should become the trustee in all certificated cases. I am also advised that there is no mention in the report of the removal of two existing grounds for a sequestration petition to be presented, yet both of those measures are integral features of your proposals in section 9. It appears not only that the measures were not recommended by the debt action forum, but that they were not even considered by it. There is certainly no recommendation in the report in support of the proposals in section 9. Is that correct?

Fergus Ewing: Let me answer that clearly. Section 9 proposes that there should be a certificate for sequestration. The reason is that that was the view of the expert group, reference to which I have already made, about how we should implement objectives and points that were discussed by the forum.

The debt action forum existed not to draft a piece of legislation but to discuss high-level principles. At the start, in the very first words that I uttered in the debt action forum, I said that the recession will lead to people losing their jobs unnecessarily, that those people are likely to be home owners, that they might not have much equity and might not be able to afford a trust deed, and that they would therefore be stuck. They would be in limbo. Section 9 is intended to deal with those people.

We estimate that most people will have access to sequestration through LILA, but many middle-class debtors who lose their jobs and have a home find it difficult to get debt relief measures because their creditors will not serve a charge on them, so they do not become apparently insolvent and they do not qualify to become sequestrated. They are stuck because the law prevents them from going bankrupt. As I am sure Mr McLetchie knows, a creditor will be advised by a solicitor not to throw good money after bad. If a creditor cannot see any sign of getting any money back from a debtor, all that they will do by sending out sheriff officers to serve a charge is run up more bills. In fact, they might not even go to court to get a court decree—

David McLetchie: That is all very interesting, minister, but it does not answer the question that I asked. I am not asking you to justify the creation of an alternative or new route into bankruptcy—that is, the certificate for sequestration. You have outlined well why that might be a desirable feature. The question is nothing to do with that. The question is about the proposition that the Accountant in Bankruptcy should have a monopoly in administering sequestrations in such situations and the fact that there is nothing about that in the debt action forum's report. I also asked about the provision in your bill that removes two existing grounds for sequestration; again, that is not mentioned in the debt action forum report.

I did not ask you to justify the creation of the alternative route. I simply asked you to confirm that two aspects of section 9—the role of the Accountant in Bankruptcy and the abolition of two existing grounds for sequestration—were not recommended in the debt action forum report. Is that correct?

Fergus Ewing: It is correct, but the—

David McLetchie: Thank you. That is all I wanted to know.

Fergus Ewing: May I finish the answer, convener? I will not be long.

The Convener: Yes, of course.

Fergus Ewing: It is correct to say that the procedural mechanism was not devised by or proposed to the debt action forum. The forum identified the problem and legal experts came up with the solution. After the debt action forum had met seven times, once every few weeks, we went to the experts and said, "How can we implement the policy objectives of the debt action forum?"

Mr McLetchie is therefore entirely correct in saying that the specific mechanism of a certificate for sequestration was not one that we put to the debt action forum, because it came from our legal experts. That is why we have legal experts. Moreover, the certificate for sequestration provides a universal route into sequestration. We would certainly all have loved to have a much longer time to do all that we had to do. We will continue to consult everybody involved, and we are willing and pleased to do so. However, the fact is that, if we do not enact section 9, we estimate that 500 families in debt will have no solution; they will be stuck in limbo with the pressure and anxiety that every case of debt is heir to.

I accept that Mr McLetchie has a point.

David McLetchie: Thank you.

Fergus Ewing: But it is a procedural point. Even if other members agree with you that the point is correct, I hope that they also agree that it is procedural and should not detract—

The Convener: Excuse me, minister, but you assured us that you would be brief.

Fergus Ewing: I am being brief, for me.

David McLetchie: You say that that is why we have legal experts to consider all such matters. However, it is also why we have wider public consultations of the sort that was recommended in paragraph 4.3—"Increasing the protections for Family Homes"—of the debt action report. However, you refused to undertake wider public consultation before bringing the bill to Parliament and, if I may say so, that is the essence of the criticisms. The issue is not your good faith or good intentions or your desire, which many of us share, to reform laws that may have inadequacies, but that the case has simply not been properly consulted on and presented to those with a relevant interest in it. That is true of sections 9, 10, 11 and 12, which are the key measures in part 2, for which you are responsible. That, in essence, is the substance of all the evidence that was presented to us by the overwhelming majority of the interested parties who came to the committee.

Those interested parties say that the bill, in so far as it affects the general law of bankruptcy and personal insolvency, should be taken away and properly consulted on, then brought back to Parliament at a later stage as part of a wider-ranging series of measures. That is what all the professionals and lenders want, and I suggest that it should be done. Given the lack of support in the debt action forum's report for the specifics of your proposals, I put it to you that my suggestion would be the sensible course of action for the Government to take.

Fergus Ewing: I reject that entirely. First, you heard yesterday from witnesses who have made the same arguments as I have regarding the need for the bill, so it is wrong to say that all professionals are as one in saying that more consultation is the key. Secondly, I have already indicated that we continue to engage with, and have agreed to meet, ICAS. Thirdly, we are happy to consider amending the bill at stage 2 of the Parliament's legislative proceedings, as is always the case, and we are in a continuous process of engagement and consultation. Finally, it is clear from paragraph 12 of the policy memorandum that a series of measures is to be legislated on now because those measures contribute to alleviating unnecessary homelessness, but a series of other measures—the ones that Mr McLetchie has focused on—will be the subject of major consultation. For example, the last bullet point in paragraph 12.3 refers to consultation on "what changes, if any," will be made regarding "the family home". The major change to the substantive law will therefore be the subject of consultation, if appropriate, in due course.

I entirely reject Mr McLetchie's suggestion. I urge members to consider the substance of the issue, accepting that, in any emergency process, one does not have as much time as one wishes. The former ministers whom I see round the table are probably not unfamiliar with that scenario. We are acting, with expert advice, on a proposal that I firmly believe is necessary and essential if we want to achieve the policy objectives that I believe many of us round the table share.

The Convener: I am sure that we all share that sentiment. We certainly all want to see something being done quickly that actually makes a difference for people. That is why it is important that the committee process tries to establish who will benefit, given that we have not been given any cost benefit analysis. I remind the minister that those who are under threat and suffering from what has been described as income shock due to unemployment include, perversely, not just middle-class families. The right-to-buy discount has created a situation in which many working-class families have equity in their homes. I want to be assured that, whatever process we use, such people will be protected by the Government's proposals.

Bob Doris: I must say, minister, that I have never seen such a defensive and reactionary response as the one that we saw from certain insolvency practitioners.

I want to focus on section 9. In yesterday's evidence-taking session, Citizens Advice Scotland, Money Advice Scotland and Shelter all supported the provisions on a certificate for sequestration. Keith Dryburgh pointed out that many people are caught in a debt trap in which they cannot exercise any debt solutions. The experts in the field are not just those who profit from debt, but those who look pragmatically for debt solutions, and I suggest that we should give equal weighting to organisations such as Shelter, Money Advice Scotland and Citizens Advice Scotland and not just consider those who make a profit from the situation.

Do we have any evidence on the number of people who are caught in a debt trap and who cannot access a debt solution under the current legislation?

Fergus Ewing: I echo Bob Doris's support for the good work that is done by citizens advice and money advice organisations throughout the land. Their volunteers do an excellent job in providing a sympathetic response to many people, all of

whom, as the convener said, we wish to try to assist.

The memoranda to the bill provide the best information that we have about the likely numbers of such people. We estimate that 500 additional cases are likely to use the new route. Those people are stuck—as Keith Dryburgh said, they are caught in a debt trap—because they currently have no mechanism by which they can go bankrupt and they do not have money to pay for a trust deed. As I said earlier, the average fees and outlays for a trust deed are £5,400. Those who do not have such money available—or who cannot reach an agreement with an insolvency practitioner, as many people do, for a figure less than that—cannot get into a trust deed, cannot go bankrupt and cannot pay off their debts if the debt arrangement scheme is out of the window. Such people are stuck, are in limbo and are trapped.

Bob Doris asked how many people are in that situation. It is difficult to tell, but the figure of 500 that is given as the number who would fall within the new certificate for sequestration is the best estimate from the Accountant in Bankruptcy. The figure stems from an analysis of those applicants who approached the AIB but who were ineligible for the low-income, low-asset route. Typically, people were ineligible for that because they owned a house, albeit with negative equity, or because their income was above the minimum wage—previously £5.73 an hour and now £5.80 an hour—which is equivalent to £230 a week for a 40-hour week. Those people were stuck because they did not qualify for LILA and they did not qualify for anything else. After analysing the data that it had, the AIB came up with the figure of 500. An analysis was also done of the data from citizens advice bureaux that appears in documents such as "Drowning in Debt", with which committee members might be familiar. That is where our estimate comes from.

As with all estimates, the figure of 500 is an attempt to work out how many people in the future might be in the situation where they need to avail themselves of the proposed certificate. That figure may be accurate or it may be a slight underestimate. We are confident in it, but we can say with certainty that there is a group of people in Scotland—it is not a majority, but it is a significant group—who are in limbo and cannot get access to any effective debt relief measure. That is why section 9 is necessary.

13:00

Bob Doris: That is incredibly powerful evidence. It is worth restating that, if the bill is delayed, 500 or more families will face the anxiety and threat of someone coming to their door looking for money and their house being at risk. To delay further would be unacceptable for the unknown number of families—500 plus—who cannot access a debt solution.

Fergus Ewing: It is 500 a year, every year.

Bob Doris: That point is well made. You also said that the average fee for the Accountant in Bankruptcy was £125. Is that correct?

Fergus Ewing: That, I understand, is the estimated cost of administering the average LILA case within the Accountant in Bankruptcy's office.

Bob Doris: Insolvency practitioners often recover fees if people become bankrupt in other ways without a certificate for sequestration. Do we know how much they tend to recover?

Fergus Ewing: I do not want to make unfair comparisons. As I think I made clear, it is apples and pears because LILA applies to people who have no house and no major assets and whose income is not above the minimum wage. The work involved in a LILA case might include checking out where the debtor lives; their name and address, personal particulars and family circumstances; and the amount of debt they have. It might also involve going to the creditors to find out whether that information is correct. It is fairly routine in nature; it is not a complicated proceeding.

Protected trust deeds can be more complicated. If a house is involved, one has to get a surveyor's valuation. On occasion, one might have to look into the background. If a business is involved, one might have to examine some of the business aspects. There may be more property or more debts. There is more work in PTDs but, nonetheless, to say that they are different in degree would be to exaggerate. The difference in headline fees and outlays is stark: I think that it is an average of £5,471 for a PTD and £125 for the AIB proceedings.

Having said that, we do not believe that the bill should result in work being taken from insolvency practitioners. In fact, we believe that section 10 is likely to lead to more work for them and, as we are removing the failed trust deed route to sequestration, we are willing to discuss with them how they might continue to play a part in carrying out that work. We will consider that further at a meeting on 25 November, but we will be able to develop it further only if part 2 proceeds past stage 1. Otherwise, it would not be possible.

Bob Doris: My reason for asking about the fees is that, when I look at evidence, I have to be assured that those who are giving evidence are giving it professionally and basing it on public interest as well as self-interest. Last week, when we took evidence on section 10, it was not made clear to me that the exclusion of the family home from a protected trust deed was by negotiation.

We were left with the impression that it was a compulsion upon those who sought a debt solution through a protected trust deed. I felt that last week's evidence was unbalanced, which is why I asked about fees. I thought that that was important.

Patricia Ferguson: We have received evidence from Her Majesty's Stationery Office that the withdrawal of advertisements concerning such issues would be detrimental to the continuance of the *Edinburgh Gazette* and would at least lead to job losses at the newspaper of record, if not question its future viability. We have also heard from insolvency practitioners and others that the register of insolvencies—which I understand is proposed as an alternative mechanism for publishing such information—is not geared up to provide that information in the way that is currently required to allow people to go about their business. What actions do you propose to take to remedy those situations?

Fergus Ewing: I am aware of those issues. The bill proposes a saving of nearly £400,000 through ceasing to have sequestration and trust deed information registered in the *Edinburgh Gazette*. As far as the sequestrations are concerned, that would be a saving to the public purse. I note in passing that, if part 2 is scrapped and does not proceed to stage 2, that would skew the financial memorandum because that saving of £400,000 is being used, in part, to finance the measures in part 1. I am sure that members have already thought of that issue.

Patricia Ferguson raises a serious matter. We are meeting a number of companies that use the *Edinburgh Gazette*—credit reference agencies such as Experian that purchase services from the *Edinburgh Gazette*—to discuss their concerns. I think that that meeting will take place on 18 November. David Ferguson is involved in that work. We have given an undertaking that the services that are provided in the register of insolvencies will be at least as good as the services that are provided in the *Edinburgh Gazette*. In any event, the register of insolvencies is the primary source and the most up-to-date record at present. There is unnecessary duplication and we must look after the public purse.

We have offered to provide all the data that HMSO publishes at the moment so that it will have the data and can sell them on to its clients. In other words, it should still be in a position to do business with its clients—I have mentioned the name of one of the credit reference firms but there are, no doubt, many others. We will provide that information, which I hope will be of assistance. I think that Experian, in its evidence, supported the principles of the bill, for which we are grateful. We accept that, in its current format, the register of insolvencies does not fully meet the needs of all clients. Nevertheless, our commitment is that the service will be at least equivalent to that which is received through the *Edinburgh Gazette*. We will discuss the matter with those who are involved on 18 November and we will report back to Patricia Ferguson and the committee after that meeting if the bill proceeds to stage 2.

Patricia Ferguson: Will the database that the Accountant in Bankruptcy will have, which will replace or become an improved version of the register of insolvencies, be in place by the time that the bill's provisions come into force?

Fergus Ewing: The register of insolvencies is in place at the moment. I think that it has been in place since 1993, under the Bankruptcy (Scotland) Act 1993. It is recognised in statute, but you are right to say that it needs to be improved slightly. We are confident that that work can be accomplished without any huge difficulty. It is a routine clerical exercise to have that work conveyed to the register of insolvencies. It needs to be done on time, as it is important to conveyancing practitioners and others to have access to an up-to-date and accurate register. That is the issue, but we are confident that that can be achieved and we are engaged in the necessary discussions to bring that about.

Patricia Ferguson: I understand the minister's point about the saving of some £400,000 but I wonder whether that figure is not skewed by the fact that there could be anything up to 14 job losses as a result of that part of the bill. Will you discuss that with the *Edinburgh Gazette* and HMSO?

Fergus Ewing: The member mentions a figure. I was not aware that there had been specification of how many jobs might be at stake. However, plainly, we are concerned about anyone losing their job in Scotland. We have offered to provide the data to the *Edinburgh Gazette* so that it can continue to provide a service for its clients and to receive a revenue from selling the information to them. I hope that that will provide the *Edinburgh Gazette* with continued income streams. It might have felt that its income streams were under threat, although our intention all along has been to provide the data and that has been communicated to HMSO.

Patricia Ferguson: Just to be clear, because I might have misunderstood you, are you suggesting that, once the improved—if you like—register of insolvencies is in place, the information will still be printed in the *Edinburgh Gazette*?

Fergus Ewing: The bill will remove the statutory duty to print the information in the *Edinburgh Gazette*, but we will continue to provide it with the

information that is conveyed to it at present before it is printed. I assume that it will be up to the *Edinburgh Gazette* whether to continue to print the information about insolvencies in the current format. The point is that we will provide it with the information that is necessary for it to retain its income streams. If it can retain its income streams and clients, I hope that that will enable it to deal with its financial situation effectively and without huge job losses.

The Convener: I seek clarification on the exclusion of the family home from trust deeds. A concern has been raised about possible abuse of that. You have said, I believe, that only homes with negligible equity in them will be excluded. However, nothing in the bill limits the protection to homes in which there is little equity. How does the Scottish Government intend to ensure that the provision is not abused?

Fergus Ewing: That is a fair question. The answer is that, first, we will use the expertise of insolvency practitioners and, secondly, we will not exempt assets from the reach of creditors, but will allow potential exemption by way of negotiation. Thirdly, I refer you to the policy memorandum, which states clearly that it is not envisaged that the provision should or could be used in connection with a house in which there is substantial equity, which would be entirely inappropriate. The measure allows more flexibility than, for example, the ICAS proposal. Those who are above the threshold of ICAS exemption will not be exempt, but if there is, say, equity of £10,000 and a family member is willing to pay that amount or to negotiate a solution for slightly less, then—

The Convener: How does it wipe away the tears of the woman who comes to your office in tears? How does it take away the pressure and the worry? I am told by practitioners that some people cannot get rid of their house quickly enough—that is one of the problems—because they are under so much pressure and have so much worry and anxiety. If the proposal is simply for an extension of negotiations or a compulsion to negotiate, what bargaining chip will the person with all the worry, debt, stress and mental anxiety have in that negotiation? How will they be better off?

Fergus Ewing: They will be better off because they will be capable of negotiating a solution at the start. At present, a trustee under a trust deed has no discretion. He must include a home in the range of assets in the proposal to the creditors—he cannot exclude it even if there is no equity or no hope of equity. Therefore, throughout the course of the trust deed, the debtor might be left in limbo and uncertain as to whether the house will be protected.

The Convener: I do not have your experience in such matters, minister, but surely the creditors will get round a table and negotiate. If a person has £10,000, £15,000 or £20,000 in their home, what creditor will agree to put that to one side and in what circumstances would that happen? Does the provision not diminish the impact of the bill?

13:15

Fergus Ewing: We propose a creditor-controlled provision. I agree that a creditor is unlikely to agree to a deal when £25,000 of equity is involved, unless a member of the debtor's family offers to pay off the equity under that deal, for example. That is the customary route.

The Convener: Does the option not exist now for a family member to look after that and service that interest?

Fergus Ewing: The difference is that the procedure that we have set out will allow matters to be dealt with at the outset and flexibly, rather than requiring the trust deed to include the family home in every circumstance, which extends the period of worry and concern, as you said.

Comparable flexibility is available under individual voluntary arrangements in England and Wales, where the power exists to negotiate the exclusion of the family home. I presume that MPs in England and Wales decided that such flexibility was worth having, so people there have it. We want people in Scotland not to be discriminated against and to have such facilities, too.

The Convener: We have received written evidence that the arrangement already exists in Scotland, because the equity in the homes that are involved is low. At what point does the measure become a benefit? I am genuinely puzzled by that.

Fergus Ewing: If I understand you, you are asking what difference it will make. The difference is that debtors will be able at an early stage to sort out whether they can hold on to the family home.

The Convener: Can debtors not do that now?

Fergus Ewing: I do not believe that they can sort that out easily, readily or quickly enough.

The Convener: Nevertheless, debtors can do it.

Fergus Ewing: It is possible, but it takes much longer than it would under the bill, because protected trust deeds typically take years to administer and require debtors to pay monthly contributions to the trustee. Throughout that period, uncertainty remains about what will happen to the home.

The Convener: The bill will speed up the process.

Fergus Ewing: The bill will speed up the process. I understand that Max Recovery Ltd said in its submission that it supports

"the proposal in section 10 to allow certain creditors to agree to their exclusion from the trust deed."

That is a creditor that agrees with the proposal. Alan McIntosh of Money Advice Scotland gave helpful evidence about uncertainty and the desirability of removing it as early as possible.

Patricia Ferguson: I understand that the intention was to protect homes with limited equity. How is "limited equity" defined and where is that done in the bill?

Fergus Ewing: It is probably better not to define limited equity with specific amounts, because as soon as that is done, some people could be excluded. We want to allow trustees the flexibility to negotiate with debtors solutions that can be tailor-made to each case. A myriad of circumstances might arise. Some debtors might be able to obtain finance from a third party. Remortgaging is difficult, but possible if one is not bankrupt. If one is bankrupt, one cannot grant a heritable security.

I have negotiated deals that involved money from third parties—from family members such as dad, mum and children. The key aspect is that the professionals who are involved have the flexibility to consider each case and to find a solution that it merits.

The explanatory notes to the bill make it clear that when a huge tranche of equity—of £200,000 or £300,000, for example—is involved, it is pretty unlikely that retaining the family home will be appropriate and it is pretty likely that creditors would object to excluding the family home. That situation is not what we envisage.

We are not altering the rules about how trust deeds become protected. The rules require a majority in number and two thirds in value of creditors to agree before a trust deed becomes protected. It is plain that any creditor who disagrees with a proposal has the power to disagree and to prevent the deed from becoming a trust deed. Creditors control the process.

Finally, even the British Banking Association's evidence stated clearly that the procedure must be dealt with case by case using the expertise of the insolvency practitioner to work out whether a solution is practicable, or is pie in the sky and cannot be done, which is sadly the case in some instances. I hope that I have answered the question.

The Convener: It may be worth noting that ICAS says that 90 per cent of people would benefit. That might be wrong and it could be tested. The test for the Government's proposals is to suggest that even more than 90 per cent could be protected and would be relieved. Are you confident that the bill will give protection to more than 90 per cent of people who find themselves in such a situation?

Fergus Ewing: I am confident that the bill will give people who have no or modest equity a new route that will enable them, where possible, to protect the family home—I am choosing my words carefully, convener.

The Convener: Yes. Absolutely.

Fergus Ewing: I cannot generalise for every single case.

The Convener: You are a minister and a lawyer.

Fergus Ewing: The bill will enable any person who is able to, to hold on to their home and make ends meet, which is a huge achievement in any single case.

David McLetchie: I seek clarification, minister. In your earlier exchanges with Patricia Ferguson about the evidence that was submitted by Experian, you said that Experian supports the principles of the bill. The submission from Experian certainly does say that. It says

"Experian fully support the underlying intent of the Bill to increase the protection for a family home."

However, just so that people are not misled by your wide-ranging statement, would you care to acknowledge for the record that, on section 12 of the bill on the *Edinburgh Gazette*, which is the matter with which Experian is primarily concerned, Experian's evidence says that it

"is therefore unable to support the changes within section 12 of the proposed Bill as it believes this to be detrimental to the interests of consumers as well as the credit market as it will inevitably lead to poorer credit decision making."

Experian certainly does not support that principle in the bill.

Fergus Ewing: I hope that I have not given the impression that Experian supports 100 per cent what we seek to do. That it was not my intention, and I welcome the opportunity to make that clear.

Experian has indicated that it can see the desirability of what we seek to do and, as I said, we will meet Experian shortly to discuss practical matters about the effectiveness and efficacy of the system. We are confident that we can and will provide a system that meets the needs of credit reference agencies, and in doing so, we will create the savings from the *Edinburgh Gazette* and the duplication of effort, which I imagine many political parties would like to eliminate from Government in all its forms in order to benefit the taxpayer so that we can pay for part 1 of the bill. I hope that committee members feel that that is a worthy aim.

I gave the undertaking to Patricia Ferguson that we will come back to the committee with further information after our discussions with Experian; no doubt Experian is also free so to do.

John Wilson: My first question is in reference to a comment that you made earlier about vehicles and their value. I do not remember you expanding on that. We have figures from the report that ICAS produced in June. Do you now have a figure for the value of vehicles?

My other question ties into my first question and is about LILA applications. The current figure that is used is assets of £1,000. ICAS suggests raising that to £3,000. Has the minister considered a figure that he might seek to adopt for the level of assets for LILA applications?

Fergus Ewing: I asked for the point about cars to be discussed by the debt action forum. I represent a seat that has a huge rural hinterland, and constituents have told me that they often need two cars so that the husband and wife can do their work, perhaps because they travel in different directions every morning. With debt problems, such people might lose their cars. It is ludicrous that a person in rural Scotland who is trying to get a job, who needs a car to find and do that job, as well as everything else in life, could have that car taken away from them even if it is an old banger that is barely worth anything. The forum considered the issue and decided that the limit should be raised.

At the moment, cars up to a value of £1,000 are exempt; we propose raising the threshold to £3,000. If someone has an Aston Martin or Lamborghini, tough luck, but if they have an average, common-or-garden car, which has been around the clock a bit, it is okay—they can hold on to their car and use it to help build their life again. I cannot remember whether everyone on the debt action forum agreed to it, but the forum did agree that that was a good idea. We heard useful comments from ICAS and received useful responses from IPs. As I should make clear in their defence, IPs said that they do not routinely seek to take cars off people, and that is welcome.

We are planning to make secondary legislation to implement the change and to protect motor cars of reasonable value for people who want to recover the strands of their lives—who want, in particular, to get a job.

John Wilson mentioned people on low incomes. We currently have no intention of reviewing the LILA thresholds, but we are keeping that in mind. If the committee feels that we should look into that in more detail, we can no doubt do so and get back to you in a more considered way.

There was a useful discussion at the debt action forum about people on low incomes who do not have bank accounts. When such people get their weekly or monthly salary or wage cheque, they have to go to a bucket shop and sell that cheque before getting their wages and lose 5 or 10 per cent of their wages, or whatever it is. Members will be aware of that. Like the debt action forum, I feel strongly that that is morally wrong: it is something that we would all like to be sorted. It is scandalous, but unfortunately the powers on that are reserved. I am not aware that the BBA has any immediate intention of addressing that problem in any effective manner but, sadly, we cannot tackle it with the powers that are open to the Parliament at this moment.

The Convener: I thank the minister and his officials for their time today, and for their evidence. We will now move on to the next item—I give the minister this chance to escape.

Subordinate Legislation

Town and Country Planning (Miscellaneous Amendments) (Scotland) (No 2) Regulations 2009 (SSI 2009/343)

Planning etc (Scotland) Act 2006 (Development Planning) (Saving, Transitional and Consequential Provisions) Amendments (No 2) Order 2009 (SSI 2009/344)

13:28

The Convener: Agenda item 3 is consideration of two Scottish statutory instruments that are subject to negative procedure. Members have received copies of the instruments. No concerns have been raised, and no motions to annul have been lodged. Do I have members' agreement that we do not wish to make any recommendations to Parliament in relation to either of the instruments?

Members *indicated agreement.*

The Convener: We move now to agenda item 4. As previously agreed, we will continue the meeting in private to consider the main themes arising from the evidence that we have heard on the Home Owner and Debtor Protection (Scotland) Bill. This is the last meeting at which oral evidence will be heard.

13:30

Meeting continued in private until 13:52.

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