SOCIAL JUSTICE COMMITTEE

Wednesday 21 March 2001
(*Morning*)

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SOCIAL JUSTICE COMMITTEE
11th Meeting 2001, Session 1

CONVENER

*Johann Lamont (Glasgow Pollok) (Lab)

DEPUTY CONVENER

*Ms Sandra White (Glasgow) (SNP)

COMMITTEE MEMBERS

*Brian Adam (North-East Scotland) (SNP)
*Bill Aitken (Glasgow) (Con)
*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Karen Whitefield (Airdrie and Shotts) (Lab)

*attended

THE FOLLOWING ALSO ATTENDED:

Ms Margaret Curran (Deputy Minister for Social Justice)
Rhoda Grant (Highlands and Islands) (Lab)

CLERK TO THE COMMITTEE

Lee Bridges

SENIOR ASSISTANT CLERK

Mary Dinsdale

ASSISTANT CLERK

Rodger Evans

LOCATION

Committee Room 3

Scottish Parliament

Social Justice Committee

Wednesday 21 March 2001

(*Morning*)

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

10:08

Meeting continued in public.

Mortgage Rights (Scotland) Bill

The Convener (Johann Lamont): I welcome everybody to what is a full house today for the Social Justice Committee.

We open the public part of the meeting with agenda item 2. I move motion S1M-1753,

That the Social Justice Committee considers the Mortgage Rights (Scotland) Bill at Stage 2 in the order of the Bill, save that each schedule is considered immediately after the section that introduces it.

Motion agreed to.

Housing (Scotland) Bill

The Convener: We move to agenda item 3. I move motion S1M-1765,

That the Social Justice Committee considers the Housing (Scotland) Bill at Stage 2 in the order of the bill, save that each schedule is considered immediately after the section that introduces it.

Motion agreed to.

The Convener: I also confirm that consideration of stage 2 starts on 4 April 2001 and that the time scale for completion of stage 2 is the week beginning 14 May 2001. I ask members to confirm that they are happy with that timetable. Before we get into a debate on whether members are happy with it, I say to Brian Adam that I have in mind a fairly broad definition of happy.

Brian Adam (North-East Scotland) (SNP): The answer is, "No", especially as the recess takes place during that time. I anticipate that there will be quite a lot of amendments.

The Convener: I expect that there will be, but I give members an assurance that each amendment will be given consideration. We might have to look at how we manage our time, but we are obliged to get through all competent amendments that are lodged. The committee has to agree to the timetable.

Brian Adam: Before we do so, I would like the convener's assurance that, if we find that we have a number of amendments and we are struggling to keep to the timetable, we can seek to review it at that point.

The Convener: The Parliamentary Bureau has lodged a motion outlining the timetable for the Parliament to decide on that motion on Thursday. If the timetable had to be changed, that would be a matter for the bureau. However, if the committee wanted to say something, we would have a powerful voice.

Bill Aitken (Glasgow) (Con): Brian Adam raised the matter at the bureau yesterday. The view was that we should adhere to the timetable but, if difficulties arose, the opportunity to revisit the situation would be made available.

The Convener: If that is agreed, can we move on?

Robert Brown (Glasgow) (LD): On that point, is there likely to be a statement to that effect before tomorrow's motion is put to the Parliament. A number of members have concerns about the time scale on what is a large bill, and it would be helpful if such a statement was made.

The Convener: My understanding is that there is a procedure for such motions. As all members

are aware of it, it would not be re-stated. If we are anxious about the timetable, we have channels through which we can raise those concerns. I do not think that, as a matter of course, such changes would be raised, because things change fairly speedily in the Parliament.

Brian Adam: Is the convener saying that that reassurance will definitely not be in the motion?

The Convener: I suggest that we move on.

Mortgage Rights (Scotland) Bill: Stage 2

The Convener: Item 4 is stage 2 consideration of the Mortgage Rights (Scotland) Bill. I welcome Margaret Curran, the Deputy Minister for Social Justice, along with her officials Richard Grant, Linda Sinclair, Catriona Graham, Ailsa Richardson and Colin Wilson.

I want to outline how we intend to go through the procedure, which is possibly not the same thing as how we should go through it, and I will try to explain the procedure as clearly as I can. As stage 2 is new to most members, I will explain how we will deal with it. It will be helpful if members check that they each have a copy of the bill, the marshalled list of amendments—published this morning—and the groupings of amendments.

The amendments have been grouped to facilitate debate, and the order in which they are called and moved is dictated by the marshalled list. Members will have to get used to working between the two papers. All amendments will be called in turn from the marshalled list and will be taken in the order that they appear on that list. We cannot move backwards on the marshalled list. Once we have moved on, that is it. There will be one debate on each group of amendments. Members can speak to their own amendment, if it is in the group, but there will be only one debate on each group.

In some groups there might be several amendments and many of those might be technical, but some may be more substantive. I will call the lodger of the first amendment in the group, who should speak to and move the amendment. I will then call other speakers, including the lodgers of all amendments in the group. Members should please note that they should not move their amendments at that stage, unless they are speaking to the first amendment in the group. Members should also note that calling them to speak is at the convener's discretion. I will call members to move their amendments at the appropriate time. Other members should indicate that they wish to speak by pressing their request-to-speak buttons in the usual way.

Following debate, I will clarify whether the member who moved the amendment wishes to press it to a decision. If not, he or she may seek the agreement of the committee to withdraw the amendment. If it is not withdrawn, I will put the question on the first amendment in the group. If any member disagrees, we will proceed to a division, which will be conducted by a show of hands. It is important that members keep their hands raised until the clerks have fully recorded

the vote. Only members of the Social Justice Committee may vote. Other members of Parliament may be here to speak or to move amendments, but they are not able to vote. If any member does not want to move their amendment, they should say simply, "Not moved", when the amendment is called. After we have debated each amendment in the group, the committee must agree to each section or schedule of the bill.

I am happy to allow a short general debate before I put the question on any section or schedule because that might be useful in allowing discussion of matters that were not raised in amendments. On the other hand, of course, members might feel that they have said enough. That would be a novelty—the point is that we do not have to have debates.

10:15

Members should be aware that the only way in which it is permitted to oppose agreement to a section is by lodging an amendment to leave out a section. If members want to delete an entire section, they must have lodged an amendment that would do so. A section cannot be opposed if such an amendment has not been lodged. If a member wants to oppose the question that a section or schedule be agreed to, he or she has the option to propose a manuscript amendment. If that happens, it is my decision whether to allow that amendment.

To comfort members, I inform the committee that if we get ourselves into a pickle and everybody is a bit confused, I will call a break during which we can get ourselves sorted.

Section 1—Application to suspend enforcement of standard security

The Convener: We proceed to consideration of amendment 37, in the name of Cathie Craigie, which is grouped with amendments 19, 20 and 21, which are also in her name. I call Cathie Craigie to move amendment 37 and to speak to it and the others.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Thank you for the guidance that you have given the committee. I will do everything in my power to follow that guidance. I do not want to make mistakes.

This group of amendments would make it clear at the start of the bill that the provisions apply only to standard securities over properties that are used wholly or in part for residential purposes. It would also amend the bill to ensure that lenders were not required to issue to debtors notices of standard securities over purely commercial properties. My proposals would mean that the new notice explaining the rights under the bill would have to be sent in every case in which the creditor is calling up the security or the debtor is in default.

As members know, the purpose of my bill is to give people in mortgage default the opportunity to get back on track with their mortgage if possible, or to give such people more time in which to find alternative accommodation. The Keeper of the Registers of Scotland pointed out that it is unnecessary for new notices to be sent if the property is not a home, for example, if the security is over a shop unit in a local main street, or a factory unit. I accepted that criticism of the bill and I propose that the notice should be sent only if the security is over the debtor's home.

I also propose a change to section 1 to clarify that the provisions in the bill would apply only to property that is used to any extent for residential purposes, so that lenders need not concern themselves about commercial properties. I understand that, in many banks and building societies, corporate lending is handled quite separately from residential lending, so it should be fairly straightforward for them to draw the distinction. However, I acknowledge that, in some cases, there will be an overlap—if the security is over a shop with a flat above, or a bed-and-breakfast business that also serves as the debtor's home. Under the bill, complying with the provision would be up to the debtor and the courts would decide whether the provisions applied.

The change that I propose would ensure that the overall effect would be less bureaucratic and more economic than serving largely meaningless notices on factories and shops.

I move amendment 37.

The Convener: Minister, do you wish to add anything?

The Deputy Minister for Social Justice (Ms Margaret Curran): I will add only that I think that Cathie Craigie explained the position clearly.

The Convener: Cathie, do you want to say anything to wind up?

Cathie Craigie: It is agreed that the amendments in the group are not problematic. For that reason, I ask the committee to support them.

Amendment 37 agreed to.

The Convener: Members should note that the other amendments in the group will be disposed of later as we go through the marshalled list of amendments.

I call amendment 1, in the name of Robert Brown, which is grouped with amendments 2, 3, 17 and 18, which are also in his name and relate to persons who are entitled to apply to the court. I call Robert Brown to move amendment 1 and to speak to all the amendments in the group.

Robert Brown: The group of amendments deals with two separate issues. The committee will be aware that the people who could apply to the court for an order under section 1(2) are the debtor, under the standard security, and the non-entitled spouse. Members will be aware that the definition of the non-entitled spouse is included in the Matrimonial Homes (Family Protection) (Scotland) Act 1981, which is designed to give protection to wives and husbands who are resident in property that is subject to a standard security.

The 1981 act also deals with the position of cohabitees—of the opposite sex, I should say—in the context of the time. It is anomalous that, as the number of people who reside together is now so high compared to the number of those who are married, there should be no provision that gives a similar protection to cohabitees, which is effectively what the phrase "non-entitled partner" means.

That is a distinct issue to which amendment 1 relates, as do amendment 2 and the definition in amendment 18. However, other people who might reside in the property create a separate issue. The most obvious example is that of same-sex partners. As the committee endeavours to have regard to equality issues in the way in which it deals with the bill, it is appropriate to deal with single-sex partnerships too. They are dealt with by my proposal in amendment 3 to include

"any other person who … lawfully occupies the security subjects as that person's sole or main residence."

They are defined in amendment 18 to cover not just anybody who might be in that position, but a person of the opposite sex, in a relationship that is equivalent to that between husband and wife, or a person

"of the same sex, in a relationship which has the characteristics … of the relationship between husband and wife"

other than the same-sex aspect.

That definition comes, on the advice of the clerks, from the Adults with Incapacity (Scotland) Act 2000, where it has been used to cover the same situation. It would be a bad signal if the Social Justice Committee were not prepared to support the widening amendments to give the full protection that the bill is intended to give. I cannot see any down side to the amendment.

I move amendment 1.

Cathie Craigie: I will speak against amendments 1, 2, 17 and 18 together and then come back to amendment 3, because it presents different issues to the others. Amendments 1, 2, 17 and 18 propose to extend the rights of non-entitled spouses to non-entitled partners whether of the same or opposite sex. Although I accept the general principle of extending the right to non-married partners, there are some issues that the committee needs to consider in more detail.

I say up front that I am happy to consider in more detail and consult the Executive and other interested parties on the possibility of lodging an appropriate amendment at stage 3. I will set out why I think that that is the best course of action. My bill allows a non-entitled spouse, within the definition of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, to apply to the court if the property is

"the sole or main residence of the non-entitled spouse but not of the debtor or, as the case may be, the proprietor."

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives non-entitled spouses automatic occupancy rights to the matrimonial home. My bill protects the non-entitled spouse—for example, where the couple have separated—by allowing them the opportunity to apply to the court in the same way that a debtor can. That complements the provision in the Matrimonial Homes (Family Protection) (Scotland) Act 1981, which gives the court the power to decide that the non-entitled spouse can take on the mortgage payments instead of the entitled spouse, who is the debtor.

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 also defines non-entitled partners as cohabiting couples of the opposite sex and gives them certain occupancy rights, where cohabitation is proved in court. A non-entitled partner under that definition may have children or similar circumstances to those of a non-entitled spouse. That would warrant protection under the bill. It would therefore be attractive to give non-entitled partners the same rights, but we must bear it in mind that, under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, the rights of cohabitees are much more limited than those of spouses and there is no power for the court to transfer responsibility for mortgage payments.

Robert Brown also proposes that we extend the definition of non-entitled partners in the bill to same-sex couples and give them the same rights as non-entitled spouses have. I have no difficulty with that in principle. I will explain the practical effect of doing so. As I have explained, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 gives the non-entitled spouse and the non-entitled partner differing degrees of occupancy rights, but does not provide any similar protection for same-sex partners. That means that the court cannot recognise that a non-entitled partner of a same-sex couple has any rights to occupy the property.

Therefore, although we could amend the bill to

allow non-entitled partners of same-sex couples to apply to the courts under the bill, the amendment would be limited, rather than having much force, because of the Matrimonial Homes (Family Protection) (Scotland) Act 1981's provisions. It would be likely to be outwith the scope of my bill—which is about mortgage repossession actions—to make any amendments to the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and give non-entitled partners of same-sex couples similar occupancy rights to those of opposite-sex couples. I am sympathetic to the principles of Robert Brown's amendments, but I cannot agree to them.

Amendments 1, 2, 17 and 18 raise two technical issues. They would appear to create a dual definition of non-entitled partner in a relationship with somebody of the opposite sex. Amendment 17 would link the definition to the Matrimonial Homes (Family Protection) (Scotland) Act 1981. With amendment 18, Robert would redefine non-entitled partner. I suggest that it makes sense to link the definition to the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

Although Robert Brown defines who the non-entitled partners are, he provides no criteria for defining someone as a non-entitled partner in a same-sex couple. As it stands, somebody could be the non-entitled partner on day one of the relationship. I suggest that any amendment should keep in line with other legislation for which, for example, the couple would have to prove that they had lived together for at least six months. Such criteria would also prevent others from using that as a potential loophole to apply to the courts under the provisions of my bill when they had no right.

For those reasons, I encourage Robert Brown to withdraw amendment 1 and not to press the other amendments. I undertake to consider the issue further with the Executive and other interested parties, including the lenders. I will find out whether it is possible to lodge an appropriate amendment at stage 3.

I am sorry for taking up so much time in replying to the group of amendments, but it is a big and important group. Amendment 3 has a different emphasis from the others in the group. The amendment would extend the definition of applicant to include anybody who lawfully occupies the property as a sole or main residence. I do not think that that is a good idea.

My proposals would allow the debtor, debtors or spouse of the debtor to apply to the court for the suspension of the creditor's rights under the standard security. That is sensible, as the security is a contract between the debtor and the creditor. A non-entitled spouse has recognised occupancy rights under existing legislation.

On tenants or other persons who occupy a property, we must first deal with how the court defines the phrase "lawfully occupies". I understand that some lenders exercise their power of variation of the standard condition so that no one other than the lender is allowed to reside in the property without the lender's prior consent. The lenders will argue that the only persons lawfully occupying the property are the debtor, their spouse and anyone whose occupation has been disclosed to the lender in accordance with any conditions of the loan. Therefore, if your cousin from Australia stayed with you for an extended period, you might be in breach of the conditions of your loan if you did not ask the lender's permission first.

Under Robert Brown's proposals, if you had mortgage difficulties, that cousin could apply to the courts to stay in your property for longer, until they found alternative accommodation, even if you, as the debtor, did not want to apply, perhaps because you wanted to minimise your mortgage arrears. That risk might make some people less inclined to rent out their property, or a room in their property, if they could be forced to shoulder mortgage arrears while the tenant remained in the property.

Amendment 3 would give third parties rights against the creditor, without imposing any responsibilities. If the amendment were agreed to, lenders could decide to be much more restrictive in their lending. In areas where there are few one-bedroom flats or houses, many people manage to afford their mortgages by taking in a friend as a tenant. Lenders might not lend in such circumstances, whether or not there was any likelihood of default, simply to avoid being penalised by a third party.

By agreeing to amendment 3, we would risk imposing a burden on creditors and debtors to give other occupiers—who have taken on no responsibilities—some benefit. That could have a detrimental effect on the provision of accommodation in the private rented sector, as debtors and creditors seek to avoid the risk.

What a tenant needs is more information about their rights and notification when there is a possession action by the landlord's creditor, so that they are not finding that out when the sheriff officer turns up at their door asking them to leave.

The bill would provide that spouses were advised that the creditor had initiated action and would point them towards obtaining advice on their existing rights. That is the best way forward, because it balances the rights of all the parties in the situation.

10:30

Bill Aitken: The definition in amendment 3 would cause all sorts of difficulties in the event of

the subject being tested. The amendment has the effect of making the provision far too wide. Were we to adopt the amendment, lenders could find themselves open to a degree of exploitation by people who might seek to justify an entitlement, although they have no moral entitlement or only a questionable legal entitlement.

I understand where Robert Brown is coming from and I would usually be sympathetic to some extent. However, I feel that incorporating the amendment could leave people vulnerable to the litigious section of society, which is happy to exploit any loopholes. I cannot support the amendment.

Brian Adam: I have concerns about the definitions that Robert Brown has used in amendment 18. I do not know whether the relationship between a debtor and a lender ought to be based on any sexual relationship—whether a same-sex or mixed-sex relationship. People who choose to live together may not choose to do so on the basis of their sexuality. People can enter into arrangements whereby they simply live together—I believe it is the rights of those people that Robert Brown's amendments seek to protect. Unfortunately, the definitions that Robert has come up with all relate to the nature of the relationship and do not allow for circumstances in which the relationship is of an altogether non-sexual nature.

I have considerable sympathy for Cathie Craigie's view that we should reconsider granting rights to folk who live together without going out of our way to find out about the nature of their relationship. There should be protection for people who have chosen to live together, and the time for which they have lived together should be taken into account, but trying to define their relationship in terms of sexuality—the relationship between a husband and wife, for example—is a minefield and is irrelevant to the relationship between a debtor and a lender. I therefore hope that Robert Brown will not press his amendments.

If amendment 3 was tightened up a bit, it might arrive at the desired objective, as it talks about people living in the property at the time. I understand the difficulties that Cathie Craigie talked about, of cousins coming from Australia. However, including a provision that recognises that occupants of the house besides the debtor and the lender have certain rights might be a better way to deal with the situation than stretching the idea of relationships to include relationships other than the legally recognised one of marriage and trying to relate that to indebtedness or anything else.

Ms Sandra White (Glasgow) (SNP): I congratulate Cathie Craigie on the amount of work that she has done and on the advice that she has taken. I did not take any advice or consult anyone—just myself.

When I first read amendments 1, 2, 17 and 18, I thought—like Cathie Craigie—that they seemed to impinge slightly on the Matrimonial Homes (Family Protection) (Scotland) Act 1981. Although Robert Brown's intentions are good, he seems to have made a meal of achieving the one goal that his amendments aim to achieve. I hope that he can come to some arrangement with Cathie Craigie or the committee and that he will return with different amendments at stage 3. His amendments are too complicated and could be simplified. After looking closely at the Matrimonial Homes (Family Protection) (Scotland) Act 1981, I cannot support them.

I did not have an awful problem with amendment 3 and would be happy to support it. However, we need clarification of the word "lawfully". I have taken on board what Cathie Craigie said, but when people enter into a contract to rent out their house, a written contract is usually involved, although I know that some people take in lodgers—possibly family members—and that they may not want them to sign a written contract.

The Convener: I point out that we will not be able to lodge committee amendments as such at stage 3. However, a committee member could lodge an amendment that other committee members would feel able to support.

Ms Curran: I will talk about this grouping in two parts, as amendments 1, 2 and 3 relate to section 1 and amendments 17 and 18 relate to section 2.

I genuinely have sympathy with what Robert Brown is trying to do, in an ethos of anti-discrimination, with his amendments to section 1. However, Cathie Craigie in particular has pointed to a number of difficulties. We must bear in mind the effect on the 20-year-old Matrimonial Homes (Family Protection) (Scotland) Act 1981, which gives much stronger rights to spouses. We must be clear about the exact effect of the amendments, given that it is not open to us to amend the 1981 act. I welcome Cathie Craigie's suggestion: the Executive would be happy to work with the committee in an attempt to come to an agreement about the difficulties. We are sympathetic to the underlying principle, but see some difficulties in the technical detail.

I see Cathie Craigie's point on amendment 3, and we are ultimately not persuaded by the amendment. That is largely because in its present form it presents a number of loopholes, which mean that it could prove unworkable. Its effects could be uncontrolled and we believe that lenders would strongly dislike its provisions. As Cathie Craigie pointed out, they could undermine the letting of properties in the private rented market

and so on. There is sympathy with people who have found themselves in difficult circumstances. The court, in making its decisions, would be able to take people's situations into account. Amendment 3, however, would not deliver the proper balance of rights between lenders and debtors that the bill intends to achieve. In keeping with the aim of balance, we oppose the amendment.

Robert Brown: A number of useful and interesting points have been made about this group of amendments. I want to return to our objective. The objective of the bill—and my objective in lodging my amendments—is to stop unnecessary homelessness; it is to stop people being thrown out of their houses when that is not necessary, because other things could be done about the situation.

The committee will recall the evidence given by the Edinburgh in-court advice project on the slightly different issue of rentals. The group indicated that 75 per cent of people who are caught with rent arrears at the final stage could have been saved, as it were, and put back on track through proper intervention and advice. That is the object of the exercise.

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 is now 20 years old. The social context of the act has changed: nowadays, a much larger number of people live together in relationships that are not one of marriage, whether in opposite-sex or same-sex relationships. I detect a desire on the part of the committee to deal with that change if that can be done validly.

I do not think that an amendment to the Matrimonial Homes (Family Protection) (Scotland) Act 1981 is required. We are trying to use the definitions in that act as a basis for dealing with a specific problem, because they provide a useful framework.

In any non-registered relationship—if I can put it that way—there are problems in identifying the facts of the situation. The Department of Social Security sinks itself into difficult issues such as cohabitation. Although I am not unsympathetic to the idea of a six-month cohabitation requirement, it is not a registered fact, but something that is provable by evidence one way or the other; it does not advance the argument about the nature of the relationship. Therefore, although I do not altogether disagree with Brian Adam, I would prefer that the courts and public authorities did not get involved in examining people's relationships. However, I readily accept that there is a potential problem with that and I am open to other ways of considering the issue.

On the other hand, the general public and the committee probably understand that there has to be an element of connection between the person to whom we are trying to give rights and the person who borrowed the money to buy the house in the first place. We must deal with that aspect in some way.

Amendment 3 is all-encompassing, but it is different in one respect. Other members have homed in on the phrase

"any other person who … lawfully occupies the … subjects".

In many ways, the occupation of the subjects is a key issue. As I understand it, if someone is living in a room, that does not mean that they have occupation of the subjects, just that they have a licence to be there. Occupation of the subjects means that the owner is probably not there any longer and that someone is occupying the subjects in their place. An example might be where parents split up or one parent dies, and the other begins a new relationship and goes off to stay elsewhere, leaving their adult children in the house. In such a case, there is a reasonably significant connection with the house; the occupiers might have lived there for many years.

We would not want people in that position to be thrown out; they are not just lodgers. I am sure that members can think of other examples of similar households. The issue is one of occupation, so it is not as wide as it looks at first glance. People can apply for protection under the bill, but that does not mean that they will necessarily get it. The court must consider the relationship and the advantages and disadvantages of doing anything about the case, and must make orders or not make orders appropriately. Everything must be considered in context.

Having said that, I am more than happy to welcome Cathie Craigie's helpful suggestion that we should look at the matter in more detail. We must get things right. I accept that there are risks of unintended effects that may cause other results further down the line. I do not go along with everything that has been suggested but, on the basis of the assurances that we have received from the minister, I am prepared to withdraw my amendments. I look forward to more suitable amendments being lodged at stage 3. I hope that the committee and the Parliament will try to effect a practical way of dealing with this important aspect of the bill.

The Convener: You can withdraw only the amendment that has been moved, amendment 1. When we come to the other amendments, you will be given the opportunity either to move them or not to move them.

Amendment 1, by agreement, withdrawn.

Amendments 2 and 3 not moved.

The Convener: I call Cathie Craigie to speak to and move amendment 4, which is grouped with amendments 5, 6, 8, 9, 24 and 27.

10:45

Cathie Craigie: Amendments 4, 6 and 8 are fairly technical. They are designed to make clear the time limits within which those who are entitled to apply under the provisions of my bill can do so. The current proposal gives those who are entitled to apply in a situation in which the lender has issued a calling-up notice or a notice of default two months to do so. However, the Conveyancing and Feudal Reform (Scotland) Act 1970 permits the period of notice for a notice of default and a calling-up notice to be dispensed with or shortened with the consent of the debtor or proprietor and the debtor or proprietor's non-entitled spouse. It was suggested that I examine how the provision in my bill on the time period for applying—which is linked to the period of notice—could fit with the provisions to vary the period of notice in the 1970 act.

After considering the issue, I came to the view that the period of notice should not be reduced below one month but that the debtor should have the ability to vary the other month that is normally available for application. I realise that some people might argue that the period of notice should not be reduced. In the stage 1 debate, Euan Robson wondered whether the period might not be too short. However, the minimum period of one month is still longer than the period that a person has in which to respond to any civil action, for example, if they want to lodge an application for a time-to-pay direction under the Debtors (Scotland) Act 1987. The basic application period of two months will still apply and can be reduced only if everyone concerned gives their consent.

I recognise that there are cases in which the debtor has had enough and wants to be shot of everything to do with the mortgage and the house that he or she is no longer happy in. In such cases, it makes sense to minimise the amount of arrears building up. At the same time, there should still be an opportunity for the debtor to have second thoughts, take advice and determine whether the situation can be redeemed.

Equally, we must protect debtors from unscrupulous creditors who might try in effect to force the debtor to sign away their rights to apply by shortening the period of notice to nil, perhaps by offering to reduce the arrears or by some other tactic. My amendments suggest a compromise to vary the time period for application and to protect debtors from more unsavoury practices.

A further related concern is that, if a debtor chooses to shorten the period of notice in relation to the calling-up notice, other parties who might have a right to make an application under the bill might be prejudiced. I have therefore proposed an amendment that will ensure that, when a proprietor chooses to shorten the time available, they must do so only with the consent of the debtor and, in certain cases, the non-entitled spouse.

I move amendment 4.

The Convener: I call Robert Brown to speak to amendments 5 and 9 and the other amendments in the group.

Robert Brown: Amendment 5 is a substantial point in a short compass. Section 1(3) of the bill allows applications by the court

"before the expiry of the period of notice specified in the calling-up notice"

or

"not later than one month after the expiry of the period of notice specified in the notice of default"

or

"before the conclusion of the proceedings."

Bearing in mind the ostrich syndrome that we often come across in this kind of case, amendment 5 seeks to extend the possibility of applying to the court—and I stress that it is up to the court what to do with the application once it is received—at a later stage than the bill provides for, to prevent the repossession from being effected and the person from being put out of the house. The issue is important. If we are serious about trying to prevent homelessness, we should recognise human frailty and the fact that people are often unprepared for the eventuality that we are discussing.

Amendment 9 tries to put in place a technical procedure to bring about the proposal outlined in amendment 5. We are dealing not with an application but with a court action raised by the creditor to move to a repossession order. People get into the action that my amendment proposes by a process called a minute. Once the minute is lodged with the court and the creditor is notified, it would stop further procedures until the court had dealt with the matter. That would not take months, but would create the minimum period necessary to get the matter before the court to have a decision made about whether any further action should be taken.

I hope that the committee will be sympathetic to the idea of creating the possibility for people to apply to the court when they realise at the last minute that something nasty is about to happen to them, which they might not have picked up on before in the morass of legal terminology.

The Convener: Thank you.

I ask Karen Whitefield to speak to amendments 24 and 27 and to the other amendment in the group.

Karen Whitefield (Airdrie and Shotts) (Lab): Amendments 24 and 27 seek to make clear in the notices how long people who are entitled to apply for an order under the bill have to make that application. The bill currently provides for new notices that explain the rights under the bill, which are to be sent by creditors whenever they call up the security or whenever the debtor is in default. However, the notices do not make clear the length of time that the person has to make an application under the bill. Such information would be crucial to anyone receiving such a notice to give them an idea of how much time they had to seek legal or other advice on their circumstances and on the protection afforded by legislation before deciding whether to make an application under the bill. That issue was raised in the stage 1 debate.

The amendments state clearly that the person receiving the notice has

"two months … to make an application"

and that that period can be shortened only with consent. The notices already advise the person to get advice, so they would not be consenting to the shortening of the period of notice without having had the implications explained to them.

I ask the committee to support the amendments.

Cathie Craigie: Amendments 5 and 9 appear to extend the length of time that a debtor has to make an application under a section 24 or a section 5 order beyond even the final decision of the court.

One clear message that I picked up during the consultation on the bill, from lenders and others, is that people like certainty. With the time limits that I have proposed, the lender and the debtor would know that if an application had not been made within a certain time scale, the lender could go ahead in the certain knowledge that possession could be granted. It would mean that arrears would not keep building up against the debtor and it would lessen the likelihood of administrative mistakes being made. Allowing the debtor to apply right up to the moment when the sheriff officer turns up on the doorstep removes that certainty. It may give the debtor false hope and prolong a possibly untenable situation for the debtor. There must be a clear cut-off point. Hanging on in case something turns up or things get better is not in the debtor's interests. In practice, the debtor will have sufficient time to make an application before the end of the proceedings. It seems overly bureaucratic and expensive to provide in legislation for the potential of two court hearings on the same issue. I urge the committee to reject the amendment.

Brian Adam: I have some sympathy for Robert Brown's proposals, in that there may be circumstances—although I imagine they will be rare—in which people will make a last-minute challenge. I accept Cathie Craigie's point that while the clock is ticking, the debt is rising. People who are about to become homeless may decide to tackle the problem in extremis. If a solution can be applied that will prevent homelessness, we should provide it. I support Robert Brown's suggestion—it is a situation that would happen rarely, but nevertheless what he suggests could help to prevent a small amount of homelessness.

The Convener: Does the minister want to add anything?

Ms Curran: I will speak first to amendments 4, 6 and 8. Cathie Craigie has flagged up some important issues. I will talk quite a bit about balance, because it is clear that there is a balance to be struck.

Forcing all debtors to wait for two months until the period for applications has elapsed could act against their interests in some cases. Cathie Craigie has given the example of people simply wanting to hand in their keys and not wanting to run up further arrears. On the other hand, some debtors may simply agree to give up any chance of applying to the court, without realising that they have other options, especially if they are put under pressure by unscrupulous lenders. I think that Cathie Craigie gets the balance right, and we support that.

I appreciate that Robert Brown is doing his best with amendments 5 and 9 to assist debtors in great plight. However, we would argue strongly that it is in everyone's interest to get the balance right. If we do not do so, we will not help the debtor. We have to listen to what the lenders are saying. Amendments 5 and 9 would require the court to reconsider the issue after having granted a section 24 order, incurring additional court costs. We therefore support Cathie Craigie's position and reject the amendments. The amendments could also be fairly impractical. Lenders will simply use a different mechanism to possess a property—using calling-up notices or notices of default—to avoid potential difficulties.

On amendments 24 and 27, we think that it is quite right that notices should set out clearly how long debtors have to apply to the court. I am sure that the committee will acknowledge that.

The Convener: I ask Cathie Craigie to wind up and to indicate whether she intends to press her amendments.

Cathie Craigie: I will be brief. I believe that amendments 4, 6 and 8, in my name, clarify the way that the bill will interact with existing legislation. They take account of the debtor's right to vary the time period to reduce arrears. I therefore urge members to support amendments 4, 6 and 8.

I have already set out my arguments on amendments 5 and 9. What they propose is impractical. Lenders will simply use a different mechanism to possess the property—perhaps using a calling-up notice or a notice of default. As I said, that could be overbureaucratic and expensive. I urge the committee to reject amendments 5 and 9.

Amendments 24 and 27 concern giving information to people. They will mean that any notice will make clear how long people have to apply. I urge members to support those amendments.

Amendment 4 agreed to.

The Convener: Amendment 5, in the name of Robert Brown, has already been debated with amendment 4.

Robert Brown: I intend to move amendment 5. In response to the points that have been made, let me say that I feel that the minister and Cathie Craigie are not taking account of the evidence that we heard from representatives of the Edinburgh in-court advice project. The inconvenience that the amendments may cause would be fairly minimal. The impression has been given that there are two court hearings. There are—but the first one is an undefended hearing that is over in two minutes flat, so the point that was made about the courts requiring to give extra consideration is not really relevant.

There are people who will seek advantage from any arrangements but, from our own experience, we are all aware that perfectly genuine people get themselves into a muddle, leave things to the last minute and do not understand legal notices. We must acknowledge that reality. The committee has heard evidence about the number of people who do not even turn up at court to defend eviction actions.

Anything that we can do to stop evictions is helpful. It has been suggested that people will get round the issue in some other way but, as I understand it, the calling-up notice or notice of default still has to be followed by a court action to get people out of the property. A fail-safe mechanism therefore exists.

We must keep the objective in mind. The committee is well aware of the social and personal costs of people losing their homes. The objective of the bill is to stop that happening whenever possible. Amendments 5 and 9 are useful additions to the panoply of powers that are available. I do not accept the Council of Mortgage Lenders' argument on this issue; I do not think that it was compatible with reality. We are talking about a few weeks' delay. The addition to the debt is fairly minimal. Perhaps creditors should look more closely at giving 100 per cent loans.

I ask the committee to consider amendments 5 and 9 favourably.

I move amendment 5.

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (North-East Scotland) (SNP)
Brown, Robert (Glasgow) (LD)
White, Ms Sandra (Glasgow) (SNP)

AGAINST

Aitken, Bill (Glasgow) (Con)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Lamont, Johann (Glasgow Pollock) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 3, Against 4, Abstentions, 0.

Amendment 5 disagreed to.

The Convener: It is worth while to say at this stage that, when someone is moving an amendment that has already been discussed, there is provision for them to make a short statement, after which no one else is allowed to make further comments. However, the statement should be short.

Amendment 6, in the name of Cathie Craigie, has already been debated with amendment 4.

Amendment 6 moved—[Cathie Craigie]—and agreed to.

11:00

The Convener: Amendment 7, which was lodged by Cathie Craigie, is in a group of its own.

Cathie Craigie: Amendment 7 seeks to ensure that a creditor cannot exercise their rights under the standard security until the period within which any application can be made under section 2 is over and until any application has been determined by the courts. That would ensure that no debtor would be disadvantaged by an unscrupulous creditor selling the property while an application to the courts was pending. The amendment is fairly technical. It simply makes the effect of my bill absolutely clear.

I move amendment 7.

Ms Curran: We were surprised to discover that it was technically possible for creditors to sell property even though a court had granted an order. In practice, I am sure that the professions involved in house buying and selling would try to ensure that that did not happen. Amendment 7 puts the illegality of such sales beyond doubt, so we commend it to the committee.

Cathie Craigie: Amendment 7 seeks to clarify the situation. I urge members to support it.

Amendment 7 agreed to.

The Convener: Amendment 8 has already been debated with amendment 4.

Amendment 8 moved—[Cathie Craigie]—and agreed to.

The Convener: Amendment 9 has also been debated with amendment 4.

Robert Brown: In the light of the decision on amendment 5, I will not move amendment 9.

Amendment 9 not moved.

Section 1, as amended, agreed to.

Section 2—Disposal of application

The Convener: Amendment 10 is in the name of Robert Brown and is in a group on its own.

Robert Brown: Amendment 10 is fairly straightforward. It would not only give wider powers of continuation to the courts, but impose on them a duty whereby, if they continue with cases, they will have to make provision for what happens in the meantime to the payment of the debts under the standard security, subject to certain limitations.

The amendment relates to the balance that Margaret Curran spoke about. I am all in favour of giving rights to people, but we must consider the reality and the legality of the debt that is owed to the creditor. The amendment is intended to give some flexibility on the debt while the court has the opportunity to consider the matter.

I move amendment 10.

Cathie Craigie: Amendment 10 proposes that the court should take account of whether the debtor has had the opportunity to obtain legal or financial advice before the court hearing. It would allow the court to consider whether the court process should continue before the debtor has obtained legal advice.

I agree that debtors must be encouraged to secure legal and debt advice. That would enable them to find out what their rights are, to find a way through their mortgage difficulties and, ultimately, to get back on their feet. However, I believe that Robert Brown's proposals go about that in the wrong way. Securing legal and debt advice at an early stage is crucial and debtors require information to point them to that advice. My bill encourages those receiving the notices to seek advice on their rights from Citizens Advice Scotland or other advice agencies. As we will hear as we go through the bill, amendments 26, 29, 32 and 35, in the name of Karen Whitefield, will ensure that the notices provided for in the bill point those who are eligible towards advice on debt management. That may encourage debtors to act earlier to secure advice on their debts, when that advice can make a difference.

It is important to signpost debtors to take the right advice early. Amendment 10 could create a situation in which some debtors tell the court that they have been unable to obtain advice simply so that they can retain their home for longer. To avoid that situation, lenders might be encouraged to exclude or limit facilities offered to marginal homebuyers. I am quite sure that the committee does not want that to happen as a result of the bill. I have made it clear all along that I do not want the bill to be a debtors charter and it strikes me that some debtors could use amendment 10 to that end. Moreover, it is not in a debtor's interests to keep putting off the time when a line is drawn in the sand and the arrears stop piling up. It is far better for the debtor to get advice as soon as possible. That might mean that they do not even have to go to court. They could be advised to contact the lender and see whether they can work something out, cutting down on the arrears and saving the time and worry of a court case.

The bill does nothing to prevent the court from postponing the case to let the debtor get legal and financial advice. For example, someone may be working offshore and, while they are away, their bank might make a mistake with a mortgage payment to the mortgage lender. That happens, as the lenders acknowledge. When the lender has written to the debtor and got no response, it might raise a court action. By the time the debtor is back home, it may be too late to come to an agreement with the lender. The debtor could make an application to explain the reason for the default—that his bank made a mistake, that he was working offshore at the time and that the first he heard about it was two days ago. The courts can make an order suspending the creditor's right under the security, subject to such conditions as it thinks fit. The debtor and the creditor could then talk to each other and sort the whole thing out without the debtor losing the house or the lender losing money. Under other circumstances, the debtor could obtain legal or financial advice on how to secure and reschedule their arrears.

I do not think that it is necessary for the bill to include the express condition that has been suggested, especially as that condition could

provide a loophole for some debtors and could have wider, undesired effects. As for the courts imposing an order that would cause exceptional hardship to the debtor, or which would otherwise be unreasonable, section 2(2) clearly provides that the terms of the order must consider

"the applicant's ability to fulfil within a reasonable period the obligations … and … the ability of the applicant and any other person residing at the security subjects to secure reasonable alternative accommodation."

The concept of reasonableness is already expressly stated in the bill.

I believe that the bill offers sufficient flexibility to the courts to ensure that the debtor obtains financial and legal advice. The crux of the matter is to ensure that the debtor secures that advice at an early stage. The bill balances the rights of the debtor with those of the creditor and I ask the committee to reject amendment 10.

Bill Aitken: There is always difficulty in striking a balance, but I think that amendment 10 sets the balance rather more in favour of the debtor than is useful. If someone is in a hole, the obvious advice that should be given early on is to stop digging. If people are in debt, it is in their interests as well as everyone else's that the matter should be resolved at the earliest possible juncture. My experience in the courts bears out the suggestion that, from time to time, people seek to extend proceedings by simply delaying the evil day. If amendment 10 were agreed to, albeit with the caveat that is included in proposed section 2(1B), there would be a danger of proceedings being protracted to the extent that it does no one any good.

Brian Adam: I support amendment 10, which provides another opportunity for debtors to seek advice. The process is not open-ended; it is at the discretion of the court. If the court thinks that the claim that no advice has been received is merely a device to put off the evil day, it will not grant a continuation of proceedings to allow for advice. The amendment also allows the court to impose an interim arrangement to establish good will on the part of the debtor in circumstances where payments have been suspended for some time. I think that amendment 10 is reasonable; it will allow the last-minute rescue that Robert Brown described and which we heard about in evidence at stage 1.

Ms White: Amendment 10 is a follow-on to amendments 5 and 9, which have fallen. I have great sympathy with amendment 10. Most of us have dealt with or heard about the sort of cases in which the amendment could help. They do not involve only the chap who is working on the oil rigs. There are also people whose partners or spouses do not let them know that they are in trouble and who therefore find out only when it is too late. Amendment 10 is a commendable amendment and I support it 100 per cent. There are people who need protection and the amendment would help to protect them if they found themselves in the sort of situation that has been described.

Karen Whitefield: In the committee's stage 1 report, we stressed the importance of advice being made available to borrowers at an early stage, as we believed that that would help to reduce the emotional cost to borrowers and their families as well as the financial cost to the justice system and other public services. In the light of that, it is important that we get the balance right. Although amendment 10 attempts to be helpful, it might just tip the balance in the other direction.

Ms Curran: I support Cathie Craigie's position, as there would be a gap between the intention behind amendment 10 and what could reasonably be expected to happen on the ground. Cathie Craigie has explained the position and I agree that the normal expectation must be that debtors should obtain any legal or financial advice in the two-month period available for applications. The committee's stage 1 report flagged up the importance of advice at an early stage.

We foresee real difficulties if people can just sit on their hands and expect the courts automatically to grant a stay of execution simply to allow them to get further advice. I understand the points that have been made and I know that members have great sympathy for people in a real plight. Of course, if there are genuine reasons why it has not been possible for people to seek advice in the time given, the courts have the power, as Cathie Craigie explained, to cease proceedings while advice is obtained. I strongly believe that there is no need for the additional provision in amendment 10. We should encourage debtors to obtain advice at the earliest opportunity, and amendment 10 would create an unfortunate loophole in the bill that would cause great unease to lenders and would ultimately not benefit the neediest people who most need the bill.

The Convener: I call Robert Brown to wind up and to indicate whether he intends to press the amendment.

Robert Brown: I want to make only one point. Section 2(1)(b) already provides for continuation of proceedings, but only for certain sorts of court actions and not for all applications. That seems a little odd. Amendment 10 is designed to give a wider power of continuation. As Brian Adam pointed out, it is a discretionary measure that adds to the panoply of powers and it is set in the context of the importance of preventing people from becoming homeless. Although the issue is not a major one, it is not unimportant and the amendment will allow flexibility. As a result, I will press amendment 10 to a division.

11:15

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (North-East Scotland) (SNP)
Brown, Robert (Glasgow) (LD)
White, Ms Sandra (Glasgow) (SNP)

AGAINST

Aitken, Bill (Glasgow) (Con)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Lamont, Johann (Glasgow Pollock) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 10 disagreed to.

The Convener: Although we are doing well, I am still aware of the time and members should think about how long they are taking to make comments, particularly on non-contentious amendments. However, I have no intention of closing down any debate.

When a member indicates that they want to move or not move an amendment other than the lead amendment, there is provision for a short statement. However, that statement should be made on the basis of a member's decision whether or not to move the amendment; it should not reopen the debate and rehearse all the earlier arguments.

Robert Brown: Convener, you have made that point several times and I think that it is directed against me. I understood that I move an amendment and then sum up the debate. Is that not correct?

The Convener: No. The person who moves the first amendment in the group sums up the debate.

Robert Brown: That is peculiar, because the first amendment raises different issues, even though it is in the same group as the later ones.

The Convener: I appreciate your point, but that is what the guidance says. My comments were not directed at you. However, if members who have spoken to grouped amendments and who then move or do not move those amendments later in the meeting begin to respond to the debate at that time, they are reopening an earlier debate. I am trying to clarify the fact that any short statement at that time should focus on why a member has decided to move or not to move an amendment. However, there is sufficient flexibility to explore all the issues raised by the amendments in a group. I am aware that some issues are more contentious than others and I do not intend to close down discussion unnecessarily.

We come to amendment 11, which has been grouped with amendments 12 to 16, 25, 28, 31 and 34. I call Robert Brown to speak to and move amendment 11, and to speak to the other amendments that he lodged in the group. He will also wind up the debate on the group.

Robert Brown: I have touched several times on what I regard as the bill's proper objective. Amendment 11 reverses requirements on the applicant; in other words, the court will have to make an order to suspend the creditor's rights unless it is satisfied that it is not reasonable in all circumstances to do so. Such a requirement is designed to tilt the balance a little more in favour of the debtor. We are dealing with the debtor's home, so it is appropriate that orders that might result in the loss of that home should not be made unless they are the only way forward.

Amendment 12 goes back to a discussion on the Family Homes and Homelessness (Scotland) Bill and on this bill. It relates to the issue of generality that was raised in connection with section 2(2). I have never been altogether clear on the Executive's viewpoint on the matter. Cathie Craigie's bill says that, although the court has a general discretion to make an order in all circumstances, it must pay particular regard to three listed factors. That seems reasonable.

Amendment 12 addresses a problem raised by the second of those three factors, particularly in relation to separated spouses. People can manage to pay the interest on a mortgage to keep it ticking over, but they might not be able to afford to pay the contribution towards the capital because they are on income support, for example. If there is enough equity, there is no loss to the creditor and so no reason why there should be a requirement to fulfil within a particular period the full obligations under standard security, which obviously include the repayment of the capital as well as the interest. Amendment 12 adds a generalised measure that allows the court to consider

"the personal and financial circumstances of the applicant"

and members of their household.

Amendment 14 inserts a prescriptive measure for the court to have regard to

"whether or not the applicant or any member of the applicant's household may become homeless if an order is made."

It is important that the court should be specifically directed towards that key aspect. However, that aspect is not decisive—there may be no way on earth that the debtor will be able to make the payments, and we have to balance up such factors.

Amendment 15 is consequential on the other amendments to section 2 that I have lodged.

I move amendment 11.

The Convener: I call Cathie Craigie to speak to amendments 13, 16, 25, 28, 31, 34 and the other amendments in the group.

Cathie Craigie: I will address Robert Brown's amendments first. Amendment 11 seeks to amend section 2(2) of the bill so that the presumption should be that the court will, in all cases, suspend the creditor's rights in favour of the debtor, unless the court is satisfied that it is not reasonable to do so. That is neither fair nor just and it certainly does not balance the rights and responsibilities of the debtor and creditor. The debtor and creditor enter into a contract on the assumption that over time, the creditor will get the money back. If it is assumed that the creditor will not be granted possession when the debtor defaults, creditors will make their lending criteria even more stringent, which will disadvantage many people who have legitimate aspirations to own their homes.

I am also worried that Robert Brown's amendments would not encourage debtors to take some responsibility. I have made it clear all along that I do not want the bill to be a debtors charter, and some debtors could use his suggested provisions to go into arrears and then be protected by the legislation. That is not what the Scottish Parliament was created for.

I have similar concerns about amendment 12, which would remove my criterion that the courts consider the applicant's ability to fulfil the obligations and replace it with the consideration of

"the personal and financial circumstances of the applicant and any member of the applicant's household".

That criterion is much less focused, particularly in light of the committee's earlier concerns that sheriffs should have sufficient guidance to ensure that they understand the nuances of the legislation.

The bill gives clear guidance to the sheriff about what should be considered—for example, whether the situation can be redeemed and the debtor can get back on his or her feet. Amendment 12 would not give any guidance. Some personal circumstances will have no bearing on the ability to fulfil obligations under standard security, and the circumstances of other members of the applicant's household might well not be relevant. The court has no power to rewrite the standard security and to make a lodger pay the mortgage for the debtor.

For similar reasons, I do not agree with amendment 14, which would make the threat of homelessness a criterion for the court's consideration. In practice, that would make it very hard for the creditor to gain possession where circumstances would warrant possession, because a debtor will always be able to argue the likelihood of becoming homeless. That would be unfair to the creditor, as it would allow the debtor to sign a contract to borrow money when they had no intention of repaying it. That would leave the creditor unable to do anything about the situation.

Amendment 14 would also shift the burden for housing the homeless and the potentially homeless from the local authority, which has a statutory duty in that respect, to the creditor. Apart from any other consideration, that is not the purpose of my bill, and it is certainly not the role of the creditor, as I am sure the committee will agree. My bill already provides for the courts to consider the ability of the applicant and any other person residing in the property to secure alternative accommodation. The courts should consider that issue in coming to their decisions.

I am grateful to Robert Brown for explaining what the effect would be of amendment 15. However, the point of section 2(4) of the bill is to allow for the fact that calling-up notices and notices of default can be used in different circumstances. For instance, the debtor does not need to be in arrears when the creditor serves a calling-up notice. It could be the creditor who is in financial difficulties and wants to recall the loan to get out of those difficulties.

Section 2(4) makes parallel provisions to section 2(2) to allow for those differences. Taking out section 2(4)(c) therefore does not make sense and would leave a gap in the bill. I urge the committee to reject the amendments.

I am sorry for taking so long, convener, but this is a detailed matter.

Amendments 13, 16, 25, 28, 31 and 34 would add to the criteria that the court would be asked to take account of when considering whether to grant an order under my bill.

My proposals provide that the court must consider the nature and reasons for the default, the applicant's ability to fulfil the obligations within a reasonable period and the ability of the applicant and other persons residing in the property to obtain reasonable alternative accommodation.

The Council of Mortgage Lenders pointed out that, at present, when a mortgage debtor gets into difficulties, in the majority of cases the lender will make significant efforts to resolve the situation with the debtor, in line with the mortgage code. I accepted that point, and the committee accepted it, and I propose that the court should look at the action of the lender at the same way as it looks at the circumstances of the debtor. It might be that that would have come to light during examination of the nature of the default and the ability of the

applicant to fulfil the obligations, but it is sensible to put it in the bill.

Equally, the history of the lender's forbearance may assist the court in assessing the likelihood of the debtor fulfilling the obligations under the standard security. Either way, the intention behind the bill is to prevent avoidable homelessness and to help debtors deal with their responsibility. In addition, I propose that the notices should make clear that the creditor's actions would be taken into consideration by the court.

Amendment 13 would apply to situations when the creditor has served a notice of default. Amendment 16 would apply to calling-up notices and amendments 25, 28, 31 and 34 would add the criterion to the notes to go out with the notices.

I hope that the committee will support the amendments, which seek to ensure that the courts consider both the circumstances of the debtor and the action of the lenders to resolve the situation.

The Convener: Do any members want to comment on those amendments?

Members: No.

Ms Curran: I expected some members to comment.

Not surprisingly, I have some difficulty with Robert Brown's amendments. They could put the balance of the bill out of kilter, and would take a wee bit away from what the bill is trying to do. I had the privilege of sitting through a good part of the stage 1 evidence in the committee, and I heard a lot of the arguments. One of the big arguments is about the balance between debtors' responsibilities and creditors' lending responsibilities. We must ensure that we maintain that harmony; Robert Brown's amendments could put that balance out of kilter.

I make a plea to the committee to be careful when considering bills. With the best intentions in the world, we must ensure that amendments do not lead to unintended consequences. Some of the provisions in Robert Brown's amendments could lead to some difficulty.

For example, on homelessness, Cathie Craigie has made the point that it could be hard for the creditor to gain possession. The amendments could lead to a restriction in the home ownership market and could have a major impact on lending criteria. I do not think that that is Robert Brown's intention. I understand where he is coming from, because I have heard a lot of the evidence that the committee has taken, but I make a plea to the committee to think through the issues, because the amendments would have major unintended consequences.

I will make a quick comment on Cathie Craigie's amendments. Those amendments are all consequential on her decision to take on board the suggestion by the CML that account should be taken by the court of action by the lender to help the debtor. I believe that the court could have taken account of that within the broad criteria that are currently within the bill, but Cathie Craigie has rightly listened and made the appropriate amendments. We are happy to go along with that.

11:30

The Convener: I ask Robert Brown to wind up and to indicate whether he intends to press or withdraw amendment 11.

Robert Brown: I am disappointed that there was not some recognition of the criticism that I made of section 2(2)(b), which is too tightly phrased. Whether or not members go along with my amendments, I ask Cathie Craigie and the Deputy Minister for Social Justice to consider them again in the context of what comes up at stage 3. I said before why I thought that is important.

In the discussions, a difference in ethos is emerging between the position that I am taking and that which is being taken by Cathie Craigie. It relates to this in a broad context, there is a degree to which lenders have sometimes gone too far in making available to people who are buying at the limits of affordability too high percentages of loan, too easy access to other concessions and so on. Their objective is to encourage home ownership and to increase their business. There is an argument that the balance has gone a bit too far the wrong way and that too many people get into trouble that can be predicted from the beginning. That is not our business with the bill, but we must take account of that background.

I am concerned that we should not be put in a position where people who could be stopped from becoming homeless—with all the implications that go with that, such as the kids having to move school, perhaps being out on the street, having to move to temporary accommodation, marital break-up and so on—are allowed to become homeless. We must not allow that to happen if it can conceivably be avoided.

If I may say so, with respect, there is too much acceptance by Cathie Craigie and Margaret Curran of the arguments that have been put the other way by the mortgage lenders. A balance must be struck. If the point about avoiding homelessness were added to the criteria, it would be only one of a number of criteria, along with the reasons for the default. I am more than happy with the background to the debt information being added to the list of criteria by Cathie Craigie's other amendments and that the bill should enable everything possible to be done to sort out the debt.

It is important that the appropriate criteria are drawn to sheriffs' attention.

That is the background against which I am pressing my amendments. I ask the committee to support them and, regardless of the outcome of the vote—which I might be able to predict, given earlier votes—I ask members to consider further section 2(2)(b). I have no difficulty with any of the other amendments that Cathie Craigie has lodged on this section. They improve the bill and reflect the evidence that we heard at stage 1.

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Brown, Robert (Glasgow) (LD)

AGAINST

Adam, Brian (North-East Scotland) (SNP)
Aitken, Bill (Glasgow) (Con)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Lamont, Johann (Glasgow Pollock) (Lab)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 11 disagreed to.

Amendment 12 moved—[Robert Brown].

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Adam, Brian (North-East Scotland) (SNP)
Brown, Robert (Glasgow) (LD)

AGAINST

Aitken, Bill (Glasgow) (Con)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Lamont, Johann (Glasgow Pollock) (Lab)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 0.

Amendment 12 disagreed to.

Amendment 13 moved—[Cathie Craigie]—and agreed to.

Amendment 14 moved—[Robert Brown].

The Convener: The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Brown, Robert (Glasgow) (LD)

AGAINST

Adam, Brian (North-East Scotland) (SNP)
Aitken, Bill (Glasgow) (Con)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Lamont, Johann (Glasgow Pollock) (Lab)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 14 disagreed to.

Amendment 15 not moved.

Amendment 16 moved—[Cathie Craigie]—and agreed to.

Amendments 17 and 18 not moved.

Section 2, as amended, agreed to.

Section 3—Notices to debtors, proprietors and occupiers

Amendments 19 to 21 moved—[Cathie Craigie]—and agreed to.

The Convener: Amendment 22, in the name of Cathie Craigie, is in a group of its own. I call Cathie Craigie to speak to and move the amendment.

Cathie Craigie: Amendment 22 is a small, technical amendment and members will therefore be pleased that it does not require that I do much speaking. The amendment would correct a mistake in the original drafting of the bill. As members will know, all bills of the Scottish Parliament are supposed to be gender neutral, but mistakes are occasionally made. Section 3(4) describes the creditor as "he". Obviously, not all creditors are men. It is a small point, and I am sure that members will not have any difficulties in supporting the amendment.

I move amendment 22.

The Convener: This is the one amendment that I am fairly sure that I understand. Do any other members wish to speak to the amendment?

Ms Curran: I want to put on record my strong support for such proposals.

The Convener: I call on Cathie Craigie to wind up, although she is not obliged to.

Cathie Craigie: Nothing else needs to be said.

Amendment 22 agreed to.

The Convener: Amendment 23, in the name of Cathie Craigie, is in a group of its own. I call Cathie Craigie to speak to and move the amendment.

Cathie Craigie: Amendment 23 would give the Scottish ministers the power to amend, by secondary legislation, the notices that are contained in the bill. The notices simply provide information to debtors, proprietors and occupiers. The amendment would build in the flexibility to amend the notices to take account of changing circumstances. I believe that that makes sense.

I will not go over old ground, but the aim is to ensure that debtors have access to sufficient advice on debt management. Many members will be aware that the Executive is piloting a national debt line in Fife, which it hopes to extend throughout Scotland at a later date. Providing the national debt line's telephone number in the notices would make sense and would allow debtors to phone immediately. Unfortunately, the number is not available at present. Rather than use primary legislation to make small changes—or miss the opportunity that the debt line presents to encourage debtors to seek advice—I have proposed an amendment that would allow Scottish ministers to change the notices by secondary legislation.

The power would apply only to the notices that relate to my bill; it is not a power to change other notices in the Conveyancing and Feudal Reform (Scotland) Act 1970.

As experience grows when the bill is enacted, other changes will be identified that the Scottish ministers may wish to take account of. The amendment would give the flexibility to achieve that. I encourage the committee to support this small, but nonetheless important, amendment.

I move amendment 23.

Brian Adam: I hope that the minister will give us an assurance that the committee would be allowed to monitor the situation. I presume that we would be kept aware of the situation through changes in statutory instruments and so on.

Ms Curran: I am sure that the committee will scrutinise everything that Scottish ministers do—I doubt that we have any choice in the matter. I am led to believe that the committee will, as standard procedure, be notified of orders. I assure the committee that we would not try to go beyond our powers. However, it makes sense to be able to make amendments by order rather than to wait until there is an opportunity for primary legislation.

The Convener: Cathie, do you want to wind up?

Cathie Craigie: I simply ask the committee to support the amendment.

Amendment 23 agreed to.

Section 3, as amended, agreed to.

Schedule

NOTICES TO DEBTORS, PROPRIETORS AND OCCUPIERS

Amendment 24 moved—[Karen Whitefield]—and agreed to.

Amendment 25 moved—[Cathie Craigie]—and agreed to.

The Convener: I call amendment 26, in the name of Karen Whitefield. It is grouped with amendments 29, 32 and 35, which are also in her name.

Karen Whitefield: This group of amendments would put a reference to advice on debt management in the notices to debtor, spouse and occupier that the creditor is required to serve if a mortgage is being called up or is in default. The amendment complements amendment 23, which we have just discussed.

The proposals at present provide for new notices that explain the rights under the bill to be sent by the creditor, where the creditor is calling up the security or the debtor is in default. Those notices tell the person who is receiving the notice that they should consult a solicitor or that they may be able to get advice from any citizens advice bureau or from another advice agency.

I am concerned that that does not do enough for the debtor. Although I agree with Cathie Craigie that we should not go down the route that Robert Brown's amendment 10 would have taken us down, I believe that there is more that we can do to ensure that those who have mortgage difficulties can secure advice on debt management and other issues early in the process. Not only would that help the debtor share the burden of worry in the short term, but proper advice on debt management would help to get the debtor and their family back on track in the long term.

I propose that we use the notices to highlight more effectively to debtors the fact that they can get access to advice on debt management. That might well be what the debtor needs and might be sufficient to stop the situation ending up in court. If debtors can work out how to sort out their finances, they may be able to go to the creditor and come to an arrangement.

I move amendment 26.

Cathie Craigie: I support amendment 26 and agree that signposting advice on debt management in the notices would bring the availability of support and advice to debtors' attention and would encourage them to act early. That is important because, from the evidence that we have taken, we are aware that the earlier that action is taken, the better. I urge the committee to support the group of amendments.

Brian Adam: Karen Whitefield's suggestion that the notice should spell out the ways in which the debtor can get access to advice is valid, but I would be surprised if somebody who was in danger of losing their house did not go to get advice on how to manage their debt. I do not know how necessary in practical terms the amendments are. I have no objection to what the amendments propose, but I am not convinced that they are essential or that they would add much to the bill.

Ms Curran: I think that the amendments are quite useful because they emphasise the need for early intervention. I echo something that Robert Brown said earlier, but draw a different conclusion: sometimes, people who are in danger of losing their property ignore some of the information and advice that is available. That is why there is merit in an amendment that would highlight the fact that advice is available on debt and the details of repossession. We welcome the amendments.

11:45

Karen Whitefield: I appreciate what Brian Adam says, but the committee has repeatedly taken evidence that indicates that people who encounter financial problems are not always aware that advice is available. Our stage 1 report recognised the importance of highlighting at an early stage the fact that advice is available. The amendment will bring the availability of advice on debt management to debtors' attention when they receive the notice and might be in a confused and concerned state. Simply providing the information might prompt debtors to seek advice that might make a difference to their future and prevent them from becoming homeless. For those reasons, I urge the committee to support the amendments in my name.

Amendment 26 agreed to.

Amendment 27 moved—[Karen Whitefield]—and agreed to.

Amendment 28 moved—[Cathie Craigie]—and agreed to.

Amendment 29 moved—[Karen Whitefield]—and agreed to.

The Convener: I welcome Rhoda Grant to the committee and ask her to move amendment 38, in her name. It is grouped with amendments 33 and 36, which are also in her name.

Rhoda Grant (Highlands and Islands) (Lab): The amendments seek to insert an additional paragraph in the notices to occupiers to ensure that the non-entitled spouse is specifically notified of his or her rights. The bill currently provides notices to occupiers. That is a welcome innovation as such notices will ensure that the occupier, who can sometimes be unsuspecting in cases of mortgage repossession, is aware of what is going on in time to make suitable alternative arrangements.

However, the notice to the occupier assumes that all occupiers are tenants. Although the bill allows non-entitled spouses to apply under the provisions of the bill, the notices do not currently inform them of their rights. It is important that the spouse is made aware of his or her existing rights and of the new rights under the bill, particularly in a case where the debtor has moved out, leaving an estranged spouse in the property. Amendment 38 seeks to change the appropriate notices to bring those rights to their attention.

I move amendment 38.

Cathie Craigie: I fully support amendment 38. I agree that it is crucial to ensure that a non-entitled spouse is made aware of his or her existing rights and the new rights under the bill. I should also say that, following our discussions on other amendments and my undertaking to consider the issue of the non-entitled partner with a view to lodging amendments at stage 3, I will consider any consequential amendments to ensure that the notice to a non-entitled spouse also applies to a non-entitled partner at that stage.

Ms White: It is important that the amendment be included in the bill. I fully support amendment 38.

Ms Curran: They are helpful amendments and I thank Rhoda Grant for lodging them.

Amendment 38 agreed to.

Amendment 31 moved—[Cathie Craigie]—and agreed to.

Amendment 32 moved—[Karen Whitefield]—and agreed to.

Amendment 33 moved—[Rhoda Grant]—and agreed to.

Amendment 34 moved—[Cathie Craigie]—and agreed to.

Amendment 35 moved—[Karen Whitefield]—and agreed to.

Amendment 36 moved—[Rhoda Grant]—and agreed to.

Schedule, as amended, agreed to.

Sections 4, 5 and 6 agreed to.

Long title agreed to.

The Convener: That ends our stage 2 consideration of the bill.

The committee will not meet next week. The following week, we will begin consideration of stage 2 of the Housing (Scotland) Bill.

Meeting closed at 11:51.

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