LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE

Wednesday 27 January 2010

Session 3

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LOCAL GOVERNMENT AND COMMUNITIES COMMITTEE
3rd Meeting 2010, 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 ALSO ATTENDED:

Fergus Ewing (Minister for Community Safety)
Pauline McNeill (Glasgow Kelvin) (Lab)
Alex Neil (Minister for Housing and Communities)

CLERK TO THE COMMITTEE

Susan Duffy

SENIOR ASSISTANT CLERK

David McLaren

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 2

Scottish Parliament

Local Government and Communities Committee

Wednesday 27 January 2010

[THE CONVENER *opened the meeting at 10:00*]

Home Owner and Debtor Protection (Scotland) Bill: Stage 2

The Convener (Duncan McNeil): Good morning and welcome to the third meeting in 2010 of the Local Government and Communities Committee. I remind members and the public to turn off all mobile phones and BlackBerrys.

Agenda item 1 is stage 2 of the Home Owner and Debtor Protection (Scotland) Bill. I welcome Alex Neil, the Minister for Housing and Communities, and his officials. The minister will leave the committee once we have disposed of all the amendments to part 1 of the bill. Fergus Ewing, the Minister for Community Safety, will deal with the remainder of the amendments. Pauline McNeill MSP will join the committee to speak to the amendment that she has lodged.

Section 1—Residential standard securities: restriction of creditor's remedies

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 2 and 3. I ask the minister to move amendment 1 and to speak to the amendments in the group.

The Minister for Housing and Communities (Alex Neil): Thank you, convener. Clearly, we have listened to the concerns of lenders and the committee on the likely added cost and bureaucracy of our proposed affidavit procedure. We recognise the need for a simple and effective system to allow home owners to surrender voluntarily their property should they conclude that that is their best option. At the same time, there must be some method of evidencing that the surrender of the property has, indeed, been voluntary, and of providing the lender with evidence of its entitlement to the property without going to court.

The amendments to section 1 will achieve a better balance between the debtor and the creditor when a property is surrendered voluntarily. They will remove the requirement for a formal affidavit to be signed, and will replace that procedure with a simpler requirement to obtain a written signature from the borrower and, where appropriate, from others, such as a spouse or partner, as evidence that the surrender was, indeed, voluntary.

Shelter, Citizens Advice Scotland and Money Advice Scotland welcomed the affidavit proposal, so we have moved as far as we can to accommodate the concerns of lenders—the Council of Mortgage Lenders and the Finance and Leasing Association. There being no requirement for written evidence of the voluntary nature of the surrender would leave no protection at all for the borrower and would fail to provide any clear entitlement to the property for the lender. It would fail both tests.

Our amendments provide a good balance. They address the interests of borrowers and lenders while also responding to concerns about the formal affidavit procedure and those that the committee expressed in its stage 1 report.

I move amendment 1.

Bob Doris (Glasgow) (SNP): Minister, I welcome your intention to compromise by striking a balance between the concerns of interested groups. An affidavit gives witnessed legal certainty to the process. The replacement of "by affidavit" by "in writing" could render the process unclear. What do you mean by "in writing"? The suggestion has been made to me that it could include something written on a scrap piece of paper, such as "I surrender this house." We need some kind of standard to ensure that a person does not feel under pressure to scribble down a few lines on a piece of paper. The signing of an affidavit is a big thing; it gives focus to the process. Perhaps you could at stage 3 provide clarification by way of guidelines or recommendations on what you feel is appropriate in moving from "by affidavit" to "in writing". That would ensure that the gravity of the situation dictates the "in writing" process.

The Convener: As no other member wishes to contribute, I invite the minister to wind up.

Alex Neil: Bob Doris has raised a reasonable point. In effect, it will be for the lender to decide what signature is acceptable: if the lender accepts a signature, that will carry the day. In many aspects of everyday life we sign documents that are legally perfectly acceptable. If there is a dispute, there is plenty of case and statute law to cover such matters. However, we do not anticipate such situations arising. We are striking a good balance between the interests of the lender and those of the borrower. At the end of the day, if the lender accepts the signature as bona fide, that is it.

Amendment 1 agreed to

Amendments 2 and 3 moved—[Alex Neil]—and agreed to.

Section 1, as amended, agreed to.

Section 2—Court applications by creditor for remedies on default

The Convener: Amendment 4, in the name of the minister, is grouped with amendments 55, 7 and 57.

Alex Neil: I will speak first to amendments 4 and 7. Several stakeholders raised concerns that the bill would restrict the sheriff to considering only whether lenders had complied with the pre-action requirements, rather than their having scope to consider all the circumstances of a case, as the court does under the existing Mortgage Rights (Scotland) Act 2001. We have listened to those concerns and, accordingly, I have lodged amendments 4 and 7 to make it clear that the court has discretion to make any order it thinks fit. Our amendments clarify, for example, that the court can take action to delay the date of repossession when the defender does not dispute the extent to which the lender has complied with the pre-action requirements and only seeks more time to find alternative accommodation. That additional clarity is important and I ask the committee to support amendments 4 and 7.

Amendments 55 and 57, which have been lodged by Mary Mulligan, relate to the same issue. On the face of it, the amendments look to be well intentioned, which I accept is the case. I am sympathetic to the policy intention behind the amendments—as, I imagine, most committee members are—but we have considered the issue carefully and believe that the inclusion of a reasonableness test is not only unnecessary but might have adverse consequences for the smooth running of other court business, which I know is of concern to the committee. In fact, on page 123 of the committee's stage 1 report, the committee highlights that we should not clog up the courts as a result of the bill.

My officials met representatives of the Scottish Association of Law Centres on 18 January and I met Angus McIntosh of the association on 20 January. The association raised that point with us, so we are familiar with the reasons behind amendment 55. No one disputes the fact that where a borrower makes representations to court that the lender has not done what they should have done, the court will weigh up the evidence. A reasonableness test in those circumstances is unnecessary so the only issue is whether such a test would be useful in cases where the borrower does not appear in court.

Our amendments 4 and 7 clarify that the court can make any order it thinks fit, but can grant a creditor's application only when it is satisfied that the lender has complied with all the pre-action requirements. To add more steps for the court to consider when it has no reason to believe that the borrower disputes matters, particularly when we are making it easier for them to make representations to court, seems to be unnecessary and unhelpful. A court does not need to be told only to grant a "reasonable" application. Adding a reasonableness test could open up grounds for legal challenge about what a court determines and how it should go about its assessment. The outcome for individuals would be unlikely to change, but there would be a risk that proceedings would be much more drawn out.

We have clarified in amendment 7 that the court could make any order that it "thinks fit"; the difference between "thinks fit" and "reasonable" seems like dancing on the head of a pin—I thought so when I first saw amendment 55. As a layman and not a lawyer, I asked the obvious question: what is the difference in law between asking the sheriff to act with reasonableness and asking the sheriff to act—as we propose—as he or she "thinks fit"? The answer is that a reasonableness test would require the court to assess the creditor's application, which would be very difficult to do if no one challenged any of it. Letting sheriffs do as they think fit will allow courts to look at the absolute standards that we have set, and to go further if they wish. We think that that is preferable.

If Mary Mulligan's amendments 55 and 57 are agreed to, court actions could go on for a prolonged time, which could clog up the courts. The amendments could risk sheriffs feeling obliged, for example, in every situation in which the borrower did not appear, to continue proceedings to try to get further information on which to base their judgments, which could significantly increase the amount of court time for such cases. That would adversely affect the smooth running of other court business. As I have already said, I know that that is of major concern to the committee.

I accept that the committee is likely to feel some sympathy for amendments 55 and 57 and that their acceptance is ultimately a matter for the committee. However, before reaching a conclusion on the amendments, I urge members to take note of their potentially adverse impact on the programming of other court business. We have significant concerns about that aspect, and none of us here would wish to pass legislation that will clog up the courts system or cause difficulty with other court business. If repossession cases were delayed because the sheriff continued them while he or she sought further information, that would obviously impact adversely on lenders and could add to costs. It would be preferable to have longer than is allowed by this stage 2 process to consult those who could be affected by the amendments before considering whether to accept them. Accordingly, I invite Mary Mulligan not to move amendments 55 and 57.

I move amendment 4.

Mary Mulligan (Linlithgow) (Lab): It is very important that the court can consider what is reasonable in all the circumstances of a case. A large range of circumstances can lead to a mortgage arrears action being raised. The court should be free to decide for itself what circumstances are relevant to a case and whether they should be taken into account in making a decision. At present, the bill focuses on very narrow considerations, but amendments 55 and 57 would allow the court to make a wider assessment of relevant circumstances. That approach reflects the terms of similar legislation, such as the Housing (Scotland) Act 1988 and the Housing (Scotland) Act 2001, with regard to eviction for rent arrears, and the current position under the Mortgage Rights (Scotland) Act 2001.

I accept that the minister has tried to come up with an alternative in acknowledgement of the flaw in the bill as drafted. However, what he proposes appears to be a compromise. I propose as an alternative a test of reasonableness, which is more clearly understood and more frequently used. The minister suggested that the drawback to amendment 55 is that it would mean that cases would drag on for longer than they should and clog up the courts. I assure him that that is not my intention. Unfortunately, the minister saying that that would be the case will not necessarily make it so—we have no evidence to that effect.

10:15

My amendments 55 and 57 are based on proposals from the Scottish Association of Law Centres—people who, day in and day out, deal with similar situations in our courts, and who would, I think, readily understand what might be the consequences of my amendments being accepted. I am therefore more inclined to accept that what I am proposing will not have the unintended consequences that the minister suggests, so on this occasion I cannot agree with him.

I accept the minister's comment that the difference between reasonableness and "thinks fit" could be seen as dancing on the head of a pin, and it is perhaps an argument for lawyers, but I think that we should err on the side of what has been practised in the past. Reasonableness clearly has been used on other occasions and is therefore more likely to be clearly understood and more frequently used. I therefore suggest, that on this occasion my option is probably preferable, so I will press amendments 55 and 57.

The Convener: I ask the minister to wind up.

Alex Neil: I remind the committee that, in a sense, we are here today because of the unintended consequences of the 2001 act, which every party voted for. In the 2001 act, reasonableness applies to debtor application: the Scottish Court Service is clear that agreement to amendments 55 and 57 will have unintended consequences. There has obviously been no wide-ranging consultation on amendment 55. If there had been, the Scottish Court Service would certainly have given the committee evidence that the amendment would have two potential unintended consequences. The first will be to clog up the courts and the second will be potentially to increase significantly the costs to the lender.

In the 2001 act and other acts in which such wording is used, the context is different—in legal terms it is a contra dicta, which is entirely different from the context of this bill. Therefore, to use wording from previous legislation is comparing apples not with apples, but with oranges. The danger is that if we pass amendments 55 and 57, which are well intentioned—I fully understand the arguments behind them—we risk achieving what the committee itself said we should go out of our way to ensure does not happen, which is the clogging up of the courts system. That will potentially have detrimental effects on other court business.

I appreciate that it is a very difficult balance to strike and I accept the well-intentioned motives behind the amendments, but I suggest to the committee that, in practice, there would be potentially significant unintended consequences, which could be detrimental to some of the very vulnerable people who we are trying to assist with this legislation.

The Convener: The question is, that amendment 4 be agreed to. Are we agreed?

Members *indicated agreement*.

The Convener: Amendment 4 is agreed to.

I call Mary Mulligan to move amendment 55.

Mary Mulligan: I am sorry, convener. I had assumed that my amendment 55 would be taken first. If amendment 4 is the first amendment, I say "No" to the question on it.

The Convener: We have to go to a division.

The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

FOR

Allan, Alasdair (Western Isles) (SNP)
Doris, Bob (Glasgow) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Wilson, John (Central Scotland) (SNP)

AGAINST

Ferguson, Patricia (Glasgow Maryhill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)

McLetchie, David (Edinburgh Pentlands) (Con)
Mulligan, Mary (Linlithgow) (Lab)

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

I have the casting vote. I will use it according to the precedent of casting it for the bill and against the amendment.

Amendment 4 disagreed to.

The Convener: I call amendment 3—[*Interruption.*]

I call amendment 55, in the name of Mary Mulligan, which has been debated with amendment 4.

Amendment 55 moved—[Mary Mulligan].

The Convener: The question is, that amendment 55 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Ferguson, Patricia (Glasgow Maryhill) (Lab)
McLetchie, David (Edinburgh Pentlands) (Con)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Mulligan, Mary (Linlithgow) (Lab)

AGAINST

Allan, Alasdair (Western Isles) (SNP)
Doris, Bob (Glasgow) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Wilson, John (Central Scotland) (SNP)

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

As I did previously, I use my casting vote against the amendment.

Amendment 55 disagreed to.

The Convener: Amendment 56, in the name of Bob Doris, is grouped with amendment 58.

Bob Doris: In the committee's stage 1 report, we agreed with the concerns of Shelter that, if a creditor pursues a home owner to court but does not fulfil their obligation under the statutory pre-action requirements, there will still be an opportunity for the creditor to apply back-door charges under a standard security, should the sheriff award costs against the debtor. The charges would be imposed under standard condition 12 of schedule 3 to the Conveyancing and Feudal Reform (Scotland) Act 1970, or a variation of that condition.

Shelter raised the issue and the committee agreed that it is a concern. My amendments 56 and 58 seek to amend the 1970 act to make it illegal for the borrower to be pursued in that way. I asked the advice sector for examples of the power's being used. In one case, a struggling home owner was pursued under the 1970 act and an additional £1,400 was added to their debt. It would be perverse if the Scottish Parliament were to set in place a robust system to ensure that creditors meet their statutory obligations on pre-action requirements—as we will do if the bill is passed—and then back-door charges under a 1970 act were imposed on struggling home owners. Prevention of that is the policy intent of amendments 56 and 58.

I understand that it is possible that my amendments are ultra vires under the Scotland Act 1998. Therefore, based on what the minister has to say, I might be minded to withdraw amendment 56 and not to move amendment 58. However, I will pursue the matter elsewhere and I hope for support from the committee and the Government to end the potential for back-door charges.

I move amendment 56.

Alex Neil: I have great sympathy with the intention behind amendments 56 and 58, but I regret to say that the Government believes that they should not be agreed to, primarily because they are on a reserved issue and are outwith the competence of Parliament under the Scotland Act 1998. The amendments would interfere with the standard conditions of a security between a lender and borrower, which is a reserved matter. There is therefore a risk that agreeing to the amendments could lead to the whole bill being challenged on the ground of its legislative competence by way of referral to the Supreme Court after the bill has been passed. That would put at risk—or, at the very least, could significantly delay—the introduction of vital additional protections that we seek to bring about through the bill, the majority of which are supported by all parties. I am sure that none of us would wish to take that risk.

It disappoints me to have to seek the withdrawal of amendment 56 and to ask that amendment 58 not be moved, because I am sure that the committee will be generally sympathetic to what they seek to achieve. It seems to be fair and just that, if the court concludes, following appropriate scrutiny, that a creditor has not complied with the pre-action requirements that are set out in the 1970 act and the Heritable Securities (Scotland) Act 1894, as they will be amended by the bill, the debtor should not be liable for any expenses that the creditor incurs in seeking a court order to repossess the property.

Amendments 56 and 58 were supported and inspired by Shelter, Money Advice Scotland and Citizens Advice Scotland—organisations for which I have the highest respect. I recognise that their efforts to press for such amendments took account of research that Shelter and others conducted in England and published in December 2009. That research showed that, although lenders in a third

of the cases that were studied were found not to be compliant with the pre-action protocol that operates in England, legal expenses were imposed against the lender in only six out of 106 such cases. That is clearly a cause for concern, although our legislation will be stronger than the English protocol and makes non-compliance much less likely.

I realise that all parties that were involved in lodging the amendments acted with the best of intentions, but we consider that the amendments do not fall within devolved competence. I am rather sorry to say that, and I look forward to the day when such amendments would be within devolved competence. We have considered whether there is scope to come back at stage 3 with revised versions of the amendments that would be within our competence. However, even if we get more time to consult more widely and fully—I know from earlier comments that the committee would be keen for us to do that before we introduce any new concept into the bill—we could not frame an alternative proposal in a way that would be within devolved competence.

For those reasons, particularly the concerns about legislative competence, I regret—I really do regret—having to ask Bob Doris to withdraw amendment 56 and not to move amendment 58. I am happy to give a commitment to press the United Kingdom Government to make necessary amending legislation at UK level.

Bob Doris: I am glad to hear the minister's commitment, but I understand that he does not want to give the committee or the Parliament false hope that there is any competent way to bring the matter back at stage 3, and that it is not expected that it will be brought back. I thank him for his commitment to work with the committee and others to press for the required changes at United Kingdom level.

Amendment 56, by agreement, withdrawn.

Section 2 agreed to.

Section 3—Court powers in action for possession of residential property

The Convener: Amendment 5, in the name of the minister, is grouped with amendments 6, 8, 11 to 17 and 20.

Alex Neil: These 11 minor technical amendments alter sections 3 to 5 to ensure that their provisions are not restricted to standard securities but include all securities. It is possible that some older types of security that are not legally referred to as standard securities may still be in existence, although we believe that they will be very few in number. Given the highly technical and, I hope, completely non-controversial nature of the amendments, I do not propose to say any more about them unless members see the need to explore the issues in more detail.

I move amendment 5.

Amendment 5 agreed to.

Amendment 6 moved—[Alex Neil]—and agreed to.

Amendment 7 moved—[Alex Neil].

10:30

The Convener: The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Allan, Alasdair (Western Isles) (SNP)
Doris, Bob (Glasgow) (SNP)
Tolson, Jim (Dunfermline West) (LD)
Wilson, John (Central Scotland) (SNP)

AGAINST

Ferguson, Patricia (Glasgow Maryhill) (Lab)
McLetchie, David (Edinburgh Pentlands) (Con)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Mulligan, Mary (Linlithgow) (Lab)

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

I use my casting vote in support of amendment 7.

Amendment 7 agreed to.

Amendment 57 moved—[Mary Mulligan].

The Convener: The question is, that amendment 57 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Ferguson, Patricia (Glasgow Maryhill) (Lab)
McLetchie, David (Edinburgh Pentlands) (Con)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Mulligan, Mary (Linlithgow) (Lab)

AGAINST

Allan, Alasdair (Western Isles) (SNP)
Doris, Bob (Glasgow) (SNP)
Wilson, John (Central Scotland) (SNP)

ABSTENTIONS

Tolson, Jim (Dunfermline West) (LD)

The Convener: The result of the division is: For 4, Against 3, Abstentions 1.

Amendment 57 agreed to.

Amendment 8 moved—[Alex Neil]—and agreed to.

Amendment 58 not moved.

Section 3, as amended, agreed to.

Section 4—Pre-action requirements

The Convener: Amendment 9, in the name of the minister, is grouped with amendments 10, 18 and 19.

Alex Neil: We have considered the Subordinate Legislation Committee's recommendation that significant restrictions should be placed on the scope of the powers that section 4 seeks to introduce or that orders that are made under those powers be subject to super-affirmative procedure. We believe that it is vital to retain some flexibility to amend the pre-action requirements through the use of subordinate legislation. It is not our intention that the powers should be used to make sweeping changes, but some flexibility to make adjustments in line with changes in the wider regulatory landscape is necessary.

For example, the Financial Services Authority is consulting on the development of the requirements that the bill will impose on lenders. Yesterday, it issued a further consultation on new steps to ensure that borrowers who are in arrears are treated fairly and to reduce levels of mortgage fraud. In Scotland, some of the measures in that consultation paper will probably be the subject of subordinate legislation under the bill, once it has become an act. That is why we believe that we need the flexibility to react positively to changing circumstances.

We recognise the Subordinate Legislation Committee's concerns, so we propose to amend the bill to remove the power to add further categories of pre-action requirements or to modify enactments. We are therefore tightening the powers in section 4 considerably while retaining the ability to modify the existing prescribed categories of pre-action requirements through a Scottish statutory instrument.

In line with the Subordinate Legislation Committee's recommendations, I move amendment 9.

The Convener: No member has any comments, so I do not think that it is necessary for the minister to wind up.

Alex Neil: I give up my right to speak.

Amendment 9 agreed to.

Amendments 10 to 19 moved—[Alex Neil]—and agreed to.

Section 4, as amended, agreed to.

Section 5—Application to court by entitled residents

Amendment 20 moved—[Alex Neil]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Recall of decree

The Convener: Amendment 21, in the name of the minister, is grouped with amendments 23 to 25, 27 and 29 to 31.

Alex Neil: These amendments relate to recall of decree, which the committee may remember was raised in evidence and discussed at stage 1. An application for recall of decree is generally intended to allow a party to an action who has good reason for not taking earlier opportunities to intervene in the court process a final opportunity to seek court reconsideration. Because of the significance of repossession, we are allowing that opportunity to debtors and entitled residents who could have become involved sooner but have simply buried their heads in the sand.

Amendments that allow a creditor to seek recall of a decree may therefore, at first sight, appear unnecessary—indeed, we thought that ourselves when drafting the bill. However, it has been brought to our attention—not least by Jim Tolson, and by the committee more generally—that in practice a creditor may very occasionally want to apply to recall a decree. That might occur in cases in which the creditor discovers that they have made a mistake in the decree—for example, the wrong address has been used—or in which the borrower has already taken steps to address the default and so the creditor no longer needs to pursue repossession.

It is important to allow the creditor to seek a recall in such circumstances to ensure that the owner is not blacklisted for credit purposes, as the decree can be formally withdrawn and the slate wiped clean in terms of credit ratings. Amendments 21 and 27 will enable application for recall to be made by the creditor as well as by the debtor and entitled persons.

Amendments 25 and 31 are consequential. They remove the normal obligation to inform the creditor when seeking recall of a decree, as that would clearly not be appropriate when the creditor is making the application for recall.

Amendments 23, 24, 29 and 30 address the issue of allowing more than one recall. At stage 1, the committee asked us to further consider whether more than one recall should be allowed. The committee recommended that the bill should allow a second or subsequent application for recall when it is for a different reason. After consultation with others—including the Sheriff Court Rules

Council working group, which considered the implications of the bill for court rules—we considered that a different reason test would be unworkable, not least due to the fact that the reason for the original application for recall may be uncertain if several arguments have been deployed. It would be relatively easy to argue that reasons were different.

However, we recognise the committee's concerns, particularly with regard to the need to ensure that a spouse or partner who is living in the property, perhaps with children, has an opportunity to seek court protection, especially in cases in which the relationship with the other spouse or partner may have broken down due to the strain of the situation. We accept that, in certain situations, a spouse or partner who formally owns the property may seek to hide the seriousness of the situation from the other partner or spouse, and simply throw in the towel without considering the immediate consequences for others in the home.

We have lodged amendments to section 6 to enable one automatic right to recall by each entitled resident, even if the debtor has already sought recall. The definition of "entitled resident" is set out in section 5. It is basically a married or unmarried partner who is currently living in the home. We believe that the amendment fully addresses the committee's concerns without widening the right to seek recall too far. We would be concerned that widening the right any further, for example to include any person who is living in the property, would leave the process open to abuse and manipulation through a succession of unmeritorious delaying applications. That could unfairly delay the creditor's legitimate right, granted by the court, to repossess. It could also result in extra costs to the debtor from the delay. Recall is intended to be a restricted remedy and we consider that amendment 23 strikes an appropriate balance.

I move amendment 21.

Mary Mulligan: I appreciate the changes that you have proposed. I understand that you do not want endless applications for recall, as that would not be in anyone's interests. However, you have stipulated that it is partners who will have the right to recall; do the amendments rule out the possibility of recall being sought if the household consists of a parent and child?

Alex Neil: Do you mean the possibility of the child seeking recall?

Mary Mulligan: Yes.

Alex Neil: Yes, the amendments would rule that out. In law, the parent would act on behalf of the child until it is 16, unless, of course, the child is the subject of a court order, in which case other legislation would kick in.

Amendment 21 agreed to.

The Convener: Amendment 22, in the name of the minister, is grouped with amendments 26, 28 and 32.

Alex Neil: The amendments in this group relate to the timescale and manner of applications for recall of decree. A minor technical defect in the bill has been drawn to our attention. The bill inadvertently imposes tighter time limits on when borrowers can seek such protection than are sometimes provided for under existing legislation. That will be corrected by amendments 22 and 28, which will remove the current 14-day limit by which an application for recall has to be lodged, and will allow recall until the day of eviction when the decree is fully implemented.

I have lodged amendments 26 and 32 to remove from section 6 reference to how a notice of recall application is to be served. Stakeholders expressed their concerns that the existing reference to postal service would prevent service by sheriff officers, which is sometimes needed for speed. Following a meeting with the implementation group that was set up by the Sheriff Court Rules Council, we have concluded that it would be better to leave the bill silent on how notice of recall application is to be given. Instead, the detail of service procedures should be left to the summary application court rules, which will ensure that applications can be served by sheriff officers as well as by recorded delivery post. Leaving the matter to court rules will also allow for the likely future development of electronic ways of serving documents.

As these amendments are minor and technical, I do not propose to say any more about them, but I am happy to provide further details if members require.

I move amendment 22.

Mary Mulligan: I welcome the minister's recognition of the uncertainty that can occur on these occasions. Lengthening the time limit in response to points that were made by the committee is also welcome.

I will abuse my position and clarify that, when I was talking about amendment 21, I was referring to adult children. I still have concerns about that point, but that is a debate to be had on another day.

10:45

Alex Neil: Adult children do not have any rights either, but we will provide the committee with full clarification about the position under existing legislation. If members feel that further amendments are required at stage 3, I am prepared to listen to their representations.

Amendment 22 agreed to.

Amendments 23 to 32 moved—[Alex Neil]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Representation in repossession proceedings

The Convener: Amendment 33, in the name of the minister, is grouped with amendments 34 to 40.

Alex Neil: Amendments 33, 34, 37 and 38 seek to give Scottish ministers the power to prescribe in subordinate legislation descriptions or categories of bodies and persons as well as named bodies for the purpose of approving lay representatives to avoid our having to name every approved organisation and keep submitting revised Scottish statutory instruments every time a name is added to or deleted from the list. We think it better to set out in the SSI the categories of organisation that would be appropriate. We envisage, for example, that the SSI would indicate that any organisation accredited at type 3 level against the national information and advice standards in the areas of homelessness and mortgage arrears would be appropriate as that level is geared to representational work, including court work. Clearly, we would not wish to take up parliamentary time with a revised SSI every time another organisation secured accreditation at that level.

Amendments 35 and 39, which are also fairly minor and technical, seek to allow for Scottish ministers to prescribe procedures for removal of approval as a lay representative. That is not in the bill at the moment.

It was indicated in the committee that it might be useful to maintain a list of approved individuals and, following detailed and careful consideration of the practicalities and having taken advice from Citizens Advice Scotland and Money Advice Scotland, we have decided that it would be prudent to proceed on a slightly different tack but along similar lines.

Amendments 36 and 40 seek to require organisations to provide information to Scottish ministers about approvals or withdrawals of approval of lay representatives to allow us to gather any information we judge necessary in monitoring how well the lay representation provisions are working and whether there is access to adequate lay representation in all courts. In practice, to avoid imposing unnecessary bureaucracy on the advice sector, we will restrict required information to the minimum necessary to satisfy ourselves and Parliament about how the legislation is working. Initially, that information might consist of numbers of lay representatives rather than a list of every lay representative. We hope that the committee welcomes what we consider to be a more appropriate and useful compromise.

As all these amendments are reasonably minor and technical, I do not intend to say anything more about them. However, I am happy to provide any further details if required.

I move amendment 33.

Amendment 33 agreed to.

Amendments 34 to 40 moved—[Alex Neil]—and agreed to.

Section 7, as amended, agreed to.

Section 8—Minor and consequential amendments

The Convener: Amendment 41, in the name of the minister, is grouped with amendment 42.

Alex Neil: Amendments 41 and 42 are for minor drafting purposes and are designed to tidy up a number of provisions in the bill. Principally, they address matters of consistency of language and structure. Given their technical nature, I do not propose to say much more about them, but I would be happy to provide further details, if members so wish.

I move amendment 41.

Amendment 41 agreed to.

Amendment 42 moved—[Alex Neil]—and agreed to.

Section 8, as amended, agreed to.

The Convener: I thank the minister and his officials for their help this morning. We will take a five-minute break at this point, so that the minister and his officials can be replaced by Fergus Ewing and his officials.

10:51

Meeting suspended.

10:58

On resuming—

Section 9—Certificate for sequestration

The Convener: I welcome the minister and his officials.

Amendment 43, in the name of the minister, is grouped with amendment 44.

The Minister for Community Safety (Fergus Ewing): Good morning. Amendments 43 and 44 provide a redrafted section 9 in response to

concerns that were raised by stakeholders, mainly from the insolvency sector.

Before I speak directly to the amendments, it might be helpful to recall the original intention behind section 9, which was to extend the debt relief offered by bankruptcy through the creation of a new certificate for sequestration. It was envisaged that that would be a last resort for a small group of debtors who were not able to access bankruptcy through existing routes, such as home owners with limited equity who would not qualify through the low-income, low-assets route and were unable to establish apparent insolvency.

11:00

At the time, we considered that a debtor who was unable to demonstrate apparent insolvency was also likely to have limited means to contribute to the cost of administering their estate. Accordingly, the bill originally provided that, in bankruptcy cases that were awarded on the basis of a certificate, the Accountant in Bankruptcy would be deemed to be appointed as the trustee. However, I have been persuaded by the argument that a debtor should be able to choose the trustee in certificated bankruptcy cases. That means that, where an insolvency practitioner has started to work with the debtor in providing advice, it will be possible for them to continue that role into sequestration.

The Scottish Government acknowledges and wants to support the valuable role that insolvency practitioners play in advising and supporting debtors. At stage 1, therefore, I committed to members, in particular David McLetchie, that I would lodge an amendment that would allow insolvency practitioners to act as trustees in bankruptcy cases that are based on the new certificate.

Amendment 43 will remove the deemed appointment of the Accountant in Bankruptcy as trustee in such cases and will allow debtors to choose an insolvency practitioner to act as their trustee in bankruptcy. In evidence to the committee, creditors said that they were content for insolvency practitioners to be appointed as trustees. Amendment 43 is therefore widely supported.

Amendment 44 is a minor consequential amendment. It clarifies that references to "the 1985 act" in section 9 are to the Bankruptcy (Scotland) Act 1985.

I move amendment 43.

David McLetchie (Edinburgh Pentlands) (Con): I welcome amendments 43 and 44, which have been lodged in response to criticisms of section 9 that were made in the committee's report and by many insolvency practitioners. The seeking of consensus among all interested parties on key provisions of the bill is welcome, and I trust that such an approach will be applied to other sections that we will consider.

Fergus Ewing: I am happy to have Mr McLetchie's support. We seek consensus wherever we can find it. As I think that he has argued robustly in the past, consensus is not and should not be a sine qua non of proceeding. Be that as it may, I took considerable steps to follow the committee's advice and to take into account the views that it expressed at stage 1 and in its report, and I have done substantial work with insolvency practitioners' representatives to achieve a result that I think has their approval. I am grateful for that response.

Amendment 43 agreed to.

Amendment 44 moved—[Fergus Ewing]—and agreed to.

The Convener: Amendment 45, in the name of the minister, is in a group on its own.

Fergus Ewing: Amendment 45 aims to preserve the current law, so that a debtor can still choose to apply for an award of sequestration on the basis of their trust deed being prevented from becoming protected because creditors have objected or not agreed to the trust deed terms. The bill as drafted would have repealed the so-called failed trust deed route to bankruptcy, which would have been superseded when the new certificate for sequestration came into effect. However, at stage 1, the Institute of Chartered Accountants of Scotland and other insolvency practitioners expressed concern that debtors should continue to be able to apply for an award of sequestration using that route. During the stage 1 debate, I confirmed to members, in particular David McLetchie, that the Government would lodge an amendment that would address such concerns.

The Scottish Government recognises the valuable role of insolvency practitioners in advising and supporting debtors, and agrees that continuity in the provision of that advice may be an important issue for debtors. In lodging amendment 45, I have ensured the preservation of such continuity in cases in which insolvency practitioners have not been able to complete a protected trust deed, but the debtor wishes them to carry that work through to sequestration. I have given assurances that we would make it clear that our aim is not to remove work from insolvency practitioners. The amendment follows through those assurances and addresses the concerns that stakeholders have expressed.

I move amendment 45.

David McLetchie: Again, I thank the minister for lodging amendment 45, which addresses concerns that were expressed by the committee in its report and during the stage 1 debate. The minister is to be commended for taking those concerns on board.

Fergus Ewing: I am grateful for Mr McLetchie's comments, and thank everyone in the insolvency profession—in ICAS and the west of Scotland insolvency practitioners forum, as well as individual IPs—who engaged with us at great length. Following the committee's advice and recommendations at stage 1, I engaged in a debate and discussion in a public forum that was of considerable use in allaying some of the fears that no doubt existed early on, as we heard at stage 1. I promised to lodge an amendment, and the profession saw that as a significant assurance of our intent and an opportunity to remove the worry that we would take certain steps to take work away from insolvency practitioners. It was never our intention to do that.

I thank the convener for giving me the opportunity to say that for the record.

Amendment 45 agreed to.

The Convener: Amendment 46, in the name of Fergus Ewing, is grouped with amendments 47 to 49.

Fergus Ewing: Amendments 46 to 49 relate to the procedures in which a certificate for sequestration is used. Amendment 46 alters the definition of "the prescribed period" as it appears in section 9, which limits the time within which an application for bankruptcy under the new certificated route can be made. As currently drafted, the prescribed period effectively prevents the debtor from applying for bankruptcy on the same day on which the certificate is granted. Following further discussions with Citizens Advice Scotland and Money Advice Scotland, we acknowledge that, in practice, the authorised person may wish to sign a certificate and assist a debtor in completing their application for bankruptcy at the same time. Amendment 46 is a practical amendment that allows the debtor to be assisted with the entire certificated bankruptcy process on the same day, if required. That will allow the certificated process to be more streamlined, and it is welcomed by the money advice sector.

Amendments 47 and 48 clarify that a certificate for sequestration is to be granted based on evidence that is submitted by the debtor—for example, demands for payment by creditors, documents of debt such as hire purchase contracts, IOUs, court decrees, bills, invoices, bank statements and pay slips—which proves that they are unable to pay their debts as they become due. As currently drafted, the procedures for granting a certificate provide that the authorised person is to decide whether to grant it if, in their opinion, the debtor cannot pay their debts as they fall due, and they are satisfied to that effect. Citizens Advice Scotland and some insolvency practitioners expressed concerns that the granting of a certificate based on the authorised person's opinion may be open to abuse. The amendments clarify that it is not the responsibility of the authorised person to demonstrate that the debtor is unable to pay their debts as they become due, but, rather, to make a decision whether to grant a certificate based on whether the requisite evidence has been presented to them.

Amendment 49 removes the Scottish ministers' ability to add further conditions that must be met before a debtor can apply for a certificate. In light of the Subordinate Legislation Committee's report, we consider that there are sufficient provisions in section 9 to cover our requirements adequately and that, as a result, no further powers to specify additional conditions are necessary.

I move amendment 46.

David McLetchie: I have some concerns about amendment 48, which is designed to remove the requirement for the authorised person to be

"satisfied that the debtor is unable to pay debts".

It substitutes for that a requirement for the debtor to "demonstrate" that they are unable to pay debts.

The amendment raises an important point of principle. Sequestration grants the debtor debt relief—a very important relief in law and not something to be acquired on the basis of mere assertion. The use of the word "demonstrate" in this context represents a significant weakening of the onus or burden of proof by comparison with the provision in the bill as introduced, where it is the authorised person who is supervising the whole process who has to be "satisfied".

Interestingly, the minister managed to slip from the word "demonstrate" to the word "proves" in his remarks. However, "prove" is not in the proposed legislation. The debtor does not have to prove that he or she is unable to pay their debts; under amendment 48, they merely have to demonstrate that. That is a far lower test. Many people can demonstrate many things, but that falls far short of legal proof, and it is little more than assertion.

If the balance of the law requires the authorised person to be satisfied, it is the responsibility of the person who is supervising the process to examine all the evidence, including the assertions and demonstrations given by the debtor who is seeking the relief that comes from sequestration, and on that basis to make a professional judgment—which such authorised persons should be able to

make—that, based on consideration of their financial circumstances, the debtor indeed merits the protection of sequestration.

For that reason I think that the onus in the bill as introduced was absolutely correct, and that the weakening and softening of the position by amendment 48 seriously undermine the whole balance of the law. The committee should therefore reject that amendment.

Fergus Ewing: I have listened with care to what Mr McLetchie has said, although I respectfully disagree with his analysis of the law.

As I understand it, Citizens Advice Scotland was concerned that the original wording in the bill would mean that debt advisers in citizens advice bureaux who were dealing with clients with debt problems so serious that they faced sequestration would be put in a position of having to express a personal opinion or view about whether or not sequestration was a remedy open to the debtor.

Whether or not a debtor is entitled to be sequestrated is a matter of fact in relation to the debtor's assets and debts. Basically, if a debtor is unable to pay his debts as they fall due, he can prove apparent insolvency. Citizens Advice Scotland was concerned that its advisers, who act free of charge, might be put in a position of taking on personal legal responsibility and that therefore they could face legal action if it was argued that the opinion that they had formed, as individuals, was wrong. Citizens Advice Scotland was right to express concern about that.

Whether or not someone is entitled to sequestration should be determined not according to a subjective test but according to an objective test. We therefore agreed with CAS's representations to us that the wording that required it to form an opinion placed on it an inappropriate task that could lead to individuals at a CAB who were simply trying to help people in debt facing possible action in future. As members will appreciate, those who approach a CAB and others for advice about debt in relation to sequestration tend to be in a parlous financial position; they do not go to the CAB because they are sitting pretty financially but because they are in a serious financial situation. Whether or not a debtor is unable to pay debts as they become due is a matter of fact.

11:15

I point out to Mr McLetchie that, under insolvency law in general, the onus is on the debtor, who is alone responsible for providing information about his financial affairs. Who else could provide it? The debtor is aware of his financial affairs, and it is his responsibility to provide information about them and to provide a complete and comprehensive list of assets and debts to his trustee. I know that because I spent many years trying to represent debtors who had failed to provide a trustee in sequestration with all details of their assets and who faced criminal charges for not providing a truthful, honest, complete and comprehensive account of their affairs. The debtor must be honest, as only he can provide information about what he owns and owes.

It would be completely wrong for us to seek in any way to transfer the onus of responsibility, or to allow it to be transferred, from the debtor, on whom it rightly rests, to those who are working in citizens advice bureaux throughout the land, free of charge and on a voluntary basis, to help people who are in debt. That is why we have lodged amendment 48 and why we hope that members may be persuaded to support it. I understand that Mr McLetchie has the right to probe these points, but it appears to us, as a matter of law, that his arguments are not solidly based.

Amendment 46 agreed to.

Amendment 47 moved—[Fergus Ewing]—and agreed to.

Amendment 48 moved—[Fergus Ewing].

The Convener: That question is, that amendment 48 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Allan, Alasdair (Western Isles) (SNP)
Doris, Bob (Glasgow) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Tolson, Jim (Dunfermline West) (LD)
Wilson, John (Central Scotland) (SNP)

AGAINST

McLetchie, David (Edinburgh Pentlands) (Con)

The Convener: The result of the division is: For 7, Against 1, Abstentions 0.

Amendment 48 agreed to.

Amendment 49 moved—[Fergus Ewing]—and agreed to.

Section 9, as amended, agreed to.

Section 10—Trust deeds

The Convener: Amendment 50, in the name of the minister, is grouped with amendments 59 and 52.

Fergus Ewing: I will begin with amendment 52, as it is a minor consequential amendment arising from amendment 50. Amendment 52 removes the

affirmative procedure that is proposed for the power of the Scottish ministers to prescribe further classes of property that may be excluded from the definition of a trust deed. That is a consequential change, as amendment 50 removes the power.

Section 10 as drafted provides a new definition of "trust deed" that allows for the exclusion of assets and creditors from a trust deed. Such a trust deed may become a protected trust deed. We have taken to heart the committee's recommendation in its stage 1 report, especially in paragraphs 208 and 209, that we engage further in discussion with stakeholders, especially insolvency practitioners, and consider amending the bill at stage 2 in the light of those discussions and deliberations. We have had extensive dialogue with the Institute of Chartered Accountants of Scotland, individual insolvency practitioners, west of Scotland insolvency practitioners, the Law Society of Scotland, Citizens Advice Scotland and Money Advice Scotland. Our amendments now deliver clarity and address effectively the concerns that were raised by stakeholders.

I will explain briefly why we believe that section 10 is so important. The Scottish Government remains committed to change that will help to protect home owners and debtors in the current recession. Section 10 will allow the Scottish system of protected trust deeds a flexibility that our law currently lacks. The English equivalent of the trust deed, the individual voluntary arrangement, allows the home to be excluded and, like section 10, allows the creditors to veto the exclusion. Section 10 will give our law in Scotland a similar flexibility to that which is enjoyed south of the border. It will extend debtors' rights by allowing them to propose an arrangement that protects their home and which the law does not permit currently.

We consider the introduction of section 10 to be a proactive measure that will offer considerable protection to debtors who have little or no equity or value in their home. It will allow debtors to exclude their homes, with the consent of creditors, from a trust deed, giving them security without the threat of homelessness hanging over them, possibly for the duration of their trust deed. Section 10 will therefore allow debtors who are home owners, often with families, to establish at the outset of the trust deed process that they will not require to lose their home and they will be able to obtain the huge relief of knowing that their home is thereby secure. When people have serious debt problems, timing is crucial to allow the issue of future occupation of the home to be resolved at the beginning. It removes a potentially protracted period of uncertainty and takes a massive weight of worry and tension from the debtor and, where appropriate, the debtor's family. For example, a debtor might be married with children of school age. Very often, the loss of a home where the debtor is required to remove himself, his partner and his family will also mean the children having to move to another school. That can be hugely disruptive to the education of the debtor's children and to their general welfare. Section 10 will give the debtor, where he is able to pay the mortgage, an improved opportunity to prevent all that disruption and uncertainty.

Those are real-life scenarios that, along with other examples of hardship, have been cited by Citizens Advice Scotland in its submission to committee members. Citizens Advice Scotland strongly supports section 10 and believes it to be of real benefit to its clients. I contend that if there is any one organisation in Scotland that understands the problems of debt and the hardship that it causes for the people of Scotland, it is Citizens Advice Scotland. It provides a comprehensive service to the people of Scotland, free of charge.

Delaying the introduction of the section 10 provisions could result in thousands of people losing their homes unnecessarily. The Scottish Government had envisaged that section 10 would be used principally in relation to the debtor's home, which would mean that to exclude the home from the trust deed would primarily require the consent of any creditor holding a security over the home to be excluded from the trust deed. Following discussions with and evidence from stakeholders, including the Scottish Law Commission and ICAS, we acknowledge the value of making our intention plain in the bill and thereby confining the provision of exclusion to that one class of asset—the home. Amendment 50, therefore, restricts the class of assets that may be excluded from a trust deed to the whole or part of the debtor's dwelling-house, which is his or her sole or main residence. It also restricts the category of creditors who may be excluded from the trust deed to those who hold a security over a debtor's dwelling-house and who have agreed not to make a claim at the debtor's request. In doing that, the amendment clarifies the process by which assets are excluded from a trust deed on the one hand and the process by which creditors are excluded on the other.

In amendment 50, the proposed inclusion of the definition of "debtor's dwellinghouse" in place of "family home" is the result of engagement with a cross-section of stakeholders. I acknowledge that that might create another definition of the word "home", but I also think that the move will bring many advantages. First, in response to evidence from Money Advice Scotland and Citizens Advice Scotland, we thought it important to develop a definition that could include single people and cover, for example, young people and the elderly.

According to the money advice sector, increasing numbers of single people are experiencing difficulties with debt, and I believe that our response is appropriate and proportionate.

Secondly, the definition of "debtor's dwellinghouse" for the purposes of this bill ensures that only the debtor's sole or main residence is protected, not land that might be sold separately and have a value to the estate. Moreover, the definition does not allow for the exclusion of more than one property from the trust deed. It might seem unlikely that a debtor would own more than one property, but they might in fact have an interest in different properties as a result of, say, divorce and/or remarriage. Finally, lay people more easily understand the concept of the "debtor's dwellinghouse" as sole or main residence. As a result, the new definition provides a clearer and more robust statement of the class of property that can be excluded and directly addresses stakeholders' concerns.

Recent press articles about the number of home owners seeking money advice and debt relief have shown how the recession is beginning to impact on the people of Scotland. Over the coming months, I am sure that many constituents will be calling at our surgeries, looking for guidance and help on this matter, and I encourage members to recognise that amendment 50 addresses effectively the majority of concerns that stakeholders have raised. In view of that, I ask David McLetchie not to move amendment 59; if he moves the amendment, I encourage the committee to reject it.

I move amendment 50.

David McLetchie: It is fair to say that the process of consultation on part 2 has been fiercely criticised for its inadequacy. It is also fair to point out that, in response to some of those criticisms, the Government has lodged amendments or given assurances that have resolved certain standing issues about sections 9, 11 and 12.

However, I regret to say that, even with the amendment that the minister has proposed this morning, section 10 remains beyond redemption. The minister said that amendment 50 delivers clarity and addresses concerns. It does not, and there remains a complete lack of consensus among professionals in insolvency practice on the merits of section 10. Indeed, just this morning, the committee received from the Institute of Chartered Accountants of Scotland, which has been heavily involved in the process from the start, a submission demonstrating in great detail how, even as amended in the way that the minister has proposed, section 10 is still riddled with unresolved technical anomalies and inequities.

The fact is that there was no consensus on this matter in the debt action forum, whose report was the supposed genesis of these proposals. Indeed, the forum recommended a fuller public consultation on issues related to debt and the family home. However, the Government, determined to accelerate the bill's introduction to Parliament, did not undertake such a consultation. Moreover, the consultations that the Government undertook following the publication of the debt action forum's report did not yield a better degree of consensus. Clearly this measure was not specifically discussed or supported, despite all the sophistry and equivocal language that the Government has employed with the committee and others to try to demonstrate that it had been.

The fact is that the appropriate context for discussion and resolution of the policy issues that section 10 raises is a wider consultation on the subject of debt, the family home and protected trust deeds, which the Government promised to undertake this year. As was said in evidence to the committee and as was highlighted in the committee's report, by legislating in isolation in section 10 for the position of the family home in relation to protected trust deeds, we risk putting the whole system seriously "out of kilter", as the Law Society of Scotland said in its written submission to the committee—and for what?

11:30

Section 10 as drafted does not give debtors any more legal protection than they currently enjoy, because, as the minister has repeatedly told the committee and Parliament, the exclusion of the family home can take place only with the consent of creditors. Debtors will have no more rights that are legally enforceable at their instance than they presently enjoy. It was interesting that the minister did not use the term "legal right"; rather, in that equivocal way with which we have become familiar in discussions on the bill, he used the term "improved opportunity". It is a gross exaggeration to say, as the minister did, that without section 10 thousands of people will lose their homes unnecessarily. There is no substance to that whatsoever.

The bill was introduced to Parliament by ministers without the full consultation that is normally required for measures that are brought before the Parliament, because it was maintained that the provisions in the bill were a matter of urgency and had to be enacted to deal with the threat of a rising tide of repossessions that would threaten the security of many people who might otherwise be able to remain in their family home. However, section 10 is not necessary to achieve that policy objective. We can certainly accept that the measures in part 1 facilitate that objective and

that the modest provision in section 11 goes some way towards that objective in extending the courts' discretion to consider matters. However, as the debt action forum acknowledged, that is not true of section 10.

In our consideration of the bill so far, we have achieved a situation whereby, without section 10, the measures in the bill, as amended by our proceedings today, could go to the Parliament for final approval with the approval and blessing of all the interested parties who have been involved in the process from the outset, including all those who participated in the debt action forum, and—I believe—with cross-party support in the chamber. However, that is still not the case with section 10, which is a measure that is out of place and out of kilter with the bill. As Cathy Jamieson said, appropriately, in her speech in Parliament at stage 1, section 10 is a provision that should have been repelled as extraneous to the core and purpose of the bill. Section 10 should not be rejected for ever and a day, but it should be rejected now so that it can be considered in its proper context, which is the wider consultation that we were promised at the outset. If we do that, we can ultimately reform the law for the better without prejudicing the rights of home owners or people in financial distress.

Bob Doris: I have a few comments on Mr McLetchie's amendment 59, which would remove section 10. I listened with interest to Mr McLetchie and the minister, and I was struck by the fact that there is an individual voluntary arrangement in England that means that there is no legal barrier to someone's property being excluded from the equivalent of a protected trust deed.

Mr McLetchie said that section 10 would not extend legal rights, but it will remove a legal barrier that exists in Scotland. We should be thinking about best practice elsewhere in the United Kingdom and the world and, if there is in England a provision that means that there is no legal restriction to the exclusion of a property, we should be moving towards that.

Mr McLetchie referred to Cathy Jamieson's remarks about section 10 not being part of the central core and purpose of the bill. I ask members to decide whether it is desirable to remove a legal barrier from home owners who are in trouble with their finances and who seek to protect their home. Even if creditors decide that it would be desirable to exclude a family home from a protected trust deed, they are forbidden by law from doing that. Section 10 would remove that barrier. I am grateful for the Government's clarification of that matter in section 10. I ask members to reject amendment 59 and to support the other amendments in the group, which clarify the section.

Mary Mulligan: The committee clearly faces a dilemma. The minister made a sound argument for wanting to support debtors, particularly in relation to protecting their home, residence, dwelling-house or whatever we want to call it. I do not think that anyone on the committee would disagree with him in that regard. However, we have a difficulty in deciding whether section 10, even with the amendments that the minister has helpfully lodged, will achieve that aim.

I listened carefully to the minister and David McLetchie, and it seems to me that the argument revolves around the question of what the creditor will accept with regard to the trust deed. Section 10 does not change the present situation with regard to that agreement. The submission that we received this morning from the Institute of Chartered Accountants of Scotland suggests that section 10 does not improve the situation for the debtors and could, in fact, make it worse because, when there is a dispute around what constitutes the family home and second homes are included, the family could end up losing out. Therefore, I am not convinced that we are taking the right step with regard to section 10.

I hear what the minister says about section 10 having received strong support from Citizens Advice Scotland; I welcome that, because I appreciate that the organisation deals with individuals who are in the circumstances that the section addresses. However, I do not know whether Citizens Advice Scotland has answered the concerns that have been raised about whether section 10 will achieve the aims and whether it has unintended consequences.

At stage 1, we discussed whether sufficient consultation had taken place on the matter. Concerns have been expressed about that. The debate between the minister and David McLetchie shows that there is still no consensus. The problem for committee members is that this is not just a debate in which we voice our opinions, but a debate that will result in legislation being made. None of us wants to be in a situation in which not only do we fail to achieve what we are seeking to achieve but we create a system that makes things more difficult for the debtors whom we are trying to support. We still need to hear something from the minister that answers David McLetchie's points and convinces us that we need to make this decision today rather than putting it off until future legislation can be brought to the Parliament.

We know that there are people who are in the circumstances that we are discussing, but there seems to be a question about how many of them will be protected. Information about that would sway me with regard to whether I think that we need to progress the proposal at this stage, so I would appreciate further clarification of that point, too.

Fergus Ewing: I thank members for contributing to the debate. Mr McLetchie began by referring to the criticism that was made at stage 1. There were criticisms from one stakeholder especially—ICAS—but we have addressed them effectively. We have also listened to and taken to heart what the committee said and recommended in its report, as I indicated in the stage 1 debate. However, it is time to move on from that and decide whether what we propose today is correct and will help people who face losing their homes. I have no hesitation in inviting members to the view that section 10 will be essential to bring some peace of mind to debtors about their homes.

Mr McLetchie said that I was shying away from using the term "legal right" and that section 10 would confer a legal right upon debtors. I have had some advice from Professor George Gretton, an expert in the field, who has confirmed to me that it will provide debtors with a right to have the opportunity to be considered. It is, if you like, a conditional right, but the law is not always as simple as we might wish it to be.

However, that is perhaps not the most important point. Mary Mulligan raised a number of questions, and I am happy to endeavour to answer them, as well as Mr McLetchie's other points.

Members commented on the levels of support. There is strong support from Citizens Advice Scotland. The Scottish Association of Law Centres also supports the section in writing. Those organisations deal with the type of clients who are likely to need to avail themselves of the protection that section 10 provides. Max Recovery, a debt collection agency, has indicated its support, and some insolvency practitioners also recognise that section 10 could offer valuable help to debtors. It would be invidious to name names, but we have had support from individual insolvency practitioners.

Only one stakeholder has recommended the removal of section 10 from the bill—that is, ICAS. We are not aware of any other creditor bodies that have advocated that approach. The Law Society of Scotland expressed concerns about clarification, and technical aspects, of the exclusion of creditors, but we understand that it welcomes the clarification that the amendments that we are debating provide. Therefore, it is fair to say that the Law Society recognises that we have brought clarity, contrary to what Mr McLetchie suggested.

I will address the reasons why it is essential that amendment 50 should be agreed to. In the briefing that it has sent to members, Citizens Advice Scotland alludes to the reason why section 10 should enjoy their support. First, it will ensure, at the beginning of the trust deed, that the client has the certainty of knowing whether their home is included. Timing is key in debt. From our experiences of assisting constituents, we probably all know that, if a debtor does not take action, it becomes too late to do anything after a certain stage. Timing is also key in that, at least in my recollection of practice, debtors face huge anxiety and worry—usually vicariously for the effects that the debt may have on their family—and there is no greater anxiety than the threat of the loss of a home. Any measure that introduces the opportunity to remove that anxiety, worry and stress at the earliest opportunity is surely to be welcomed.

11:45

Citizens Advice Scotland points out that section 10 should help debtors who have little or no equity in their homes, where it would not be financially viable to sell the home, nor would there be any purpose in doing so. CAS argues that the provision would avoid the need for clients to suffer the costs of moving home, and to move themselves and other members of their household, which could lead to the loss of a support network from family members who may be near at hand, the need for children to change schools and difficulties in getting to and from work. Those are the practical real-life difficulties for people who face the prospect of losing their home in circumstances in which—I emphasise—the debtor is able and willing to seek to maintain mortgage payments.

Citizens Advice Scotland has further advised that clients who have adapted their properties for disabilities are reassured, under section 10, that their home may not have to be automatically included in trust deeds.

David McLetchie and Mary Mulligan argued that the proposal in section 10 is entirely dependent on the position of creditors, and should therefore, in Mr McLetchie's eyes, be discounted as not constituting a demonstrable benefit—which I believe it does—to home owners.

I invite members to focus on the scenario in which section 10 will apply. It will apply where there is low or no equity: where the house, on paper, may be worth a couple of thousand quid more than the accumulated mortgage, but where in practice, if someone had to sell the house tomorrow, they would probably not receive enough to pay off the mortgage. In those circumstances, the secured creditor has nothing to lose by agreeing to exclude the asset, and potentially everything to gain.

The respectable and responsible secured creditors with which we as a Government have engaged assure us that eviction is the last resort. They do not want to evict people unnecessarily—

in fact, some of them even said that they give points to the lawyers who act for them if those lawyers can effect a solution that avoids an eviction.

The solution in section 10 allows those secured creditors another way to seek to avoid eviction. If secured creditors were to proceed to eviction, they may well—particularly in the current distressed property market—incur a huge loss rather than realise the paper value of a property. Amendment 50 makes clear that we are applying the vehicle only to secured creditors, which is a condition that ICAS specifically sought. Secured creditors have not only nothing to lose, but potentially everything to gain as they can avoid taking a big hit in the event of a forced sale.

I wanted to make that point at some length, convener, because Mary Mulligan and David McLetchie indicated that that was a significant point in their reasoning process.

I claimed that potentially thousands of people would be affected. We do not have the luxury of perfect foresight, and none of us can say exactly how many people will be affected, but I can say with certainty that if we do not include section 10 in the bill, there will be no possible protection afforded by it. That opportunity will not exist, and it will not be possible to bring forward that legislation in time to help people who will, in the interim, become the victims of the recession.

For all those reasons, I invite members to support the amendments. I have not received the communication from ICAS that members have apparently received today. However, we received from ICAS a list of points, which consist of somewhat technical objections and alleged anomalies. I have gone through those points one by one, and we will continue to engage with ICAS.

I assure members that I am completely satisfied, after detailed briefing from officials and a lengthy discussion, that none of the points that ICAS has raised—at least none of those points that it has raised with us, which I believe are the same points that members have seen today, as they were raised with us just last week or fairly recently—has any merit. All of them either raise worries that I respectfully suggest are not real concerns at all or are matters that will be dealt with in the normal course of secondary legislation or in guidance that is issued by the Accountant in Bankruptcy.

I have a list of those points with me and I am ready to go through them painstakingly, one by one, but rather than extend my submission by 30 minutes, I will just say that we are absolutely satisfied that those are technical matters that should not and do not mean that section 10 is flawed or will create any anomalies.

For those reasons, I hope that members are persuaded that we have sought to listen to the committee and have acted on its advice, and that they are prepared to give amendment 50 their support.

Amendment 50 agreed to.

Amendment 59 moved—[David McLetchie].

The Convener: The question is, that amendment 59 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McLetchie, David (Edinburgh Pentlands) (Con)

AGAINST

Allan, Alasdair (Western Isles) (SNP)
Doris, Bob (Glasgow) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Mulligan, Mary (Linlithgow) (Lab)
Tolson, Jim (Dunfermline West) (LD)
Wilson, John (Central Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 59 disagreed to.

Section 10, as amended, agreed to.

Section 11 agreed to.

After section 11

The Convener: Amendment 51, in the name of Pauline McNeill, is in a group on its own.

Pauline McNeill (Glasgow Kelvin) (Lab): Amendment 51 deals with an issue that I had intended to raise at stage 1. I apologise to members for bringing it to their attention at stage 2, but I had to withdraw from the stage 1 debate because of illness. Had that not been the case, I would have flagged up the matter then. I felt that today's proceedings were too good an opportunity not to alert the committee to an issue that I think needs further examination.

Amendment 51—which I thank the clerks for their assistance in drafting—seeks to limit the remuneration of trustees, in relation to which I strongly feel that there are issues that should at least be examined during the passage of the bill. It seeks to restrict the charges that an insolvency practitioner can apply when a debt is concluded so that they are proportionate to the original debt. It was quite tricky to come up with an amendment that does what I wanted it to do. I realise that amendment 51 is not perfect, but it allows me to speak to the issues.

On the basis of recent experiences, it is my belief that, when they are referred to a private

insolvency practitioner, debtors can face fees that are excessive and unnecessary, certainly in comparison with the fees faced by those debtors whose sequestration is nominated to be dealt with by the Accountant in Bankruptcy. Given that the Scottish Parliament already regulates certain fees, such as fees for sheriff officers who are in private practice and lawyers' legal aid fees, I do not believe that there is anything wrong in principle with the Parliament ensuring that its principles of fairness and transparency are applied when it comes to the fees that can be charged, particularly in relation to a small debt.

I know that hard cases can make bad law, but I would like to give the committee—without providing details of the person concerned—the salient facts of a case that brings to light a number of issues. The case involves an unpaid council tax debt of £4,000, which should have been £3,000 if the single person discount—to which the person was entitled—had been applied.

The matter was referred to a private insolvency practitioner and a trustee was appointed. The case involved a single creditor—Glasgow City Council—and an individual debtor, who discovered the sequestration through his bank, although I believe that such matters are advertised in the *Edinburgh Gazette*. He admits the debt and that he was at fault for incurring it, although his plea in mitigation is that difficult personal circumstances underlay his failure to address it.

In just over a year, the £3,000/£4,000 debt concluded in a final debt of £24,000. It is fair to say that the trustee's position is that my constituent was unco-operative; that said, my constituent claims that he was not served various notices. When he finally tried to settle the debt, he was advised that it had reached £24,000. I am still unclear on how the debt was arrived at. I asked for a breakdown, which showed that fees of in excess of £200 an hour had been charged to pursue this very simple debt.

When I started to ask questions in relation to the Accountant in Bankruptcy, the debt seemed to spiral further. I was advised that any reference to the Accountant in Bankruptcy, who could audit the fees, would result in a further 17.5 per cent charge. Indeed, everything done thereafter seemed to incur a further charge, including a phone call that the insolvency practitioner made to advise me that that call—made to me in representing my constituent—would be charged for. That was the point at which alarm bells began to ring in my head on whether the system is fair and transparent.

How can a council tax bill of £4,000—which should have been £3,000—end up with a debt to my constituent of £27,000, £20,000 plus of which is legal fees that were charged towards the end of the process? I find it difficult to understand how a charging regime for insolvency practitioners of this kind can be justified. Perhaps one could understand it if more than one creditor had been involved or the case had been a complex one.

At the very least, there is need for parliamentary scrutiny of the level of insolvency practitioner fees. I know that such fees are the subject of an agreement by private insolvency practitioners, but the process is not regulated by any Parliament. If the debt had been referred instead to the Accountant in Bankruptcy, the fees would have been nowhere near the amount that the practitioner charged. I ask ministers to probe the system to establish whether it is fair in all circumstances and whether a limit should be set on the remuneration for trustees that bears relation to the original debt.

I welcome any positive comments that the minister can make, at least in probing the issue and taking it further.

I move amendment 51.

Bob Doris: I thank Pauline McNeill for bringing the matter to the committee's attention. It needs to be looked into. I am happy to be involved constructively in doing that with whoever—Pauline McNeill, the Government and the committee. It is scandalous that this can happen.

I will not support the amendment for the sole reason that I want the issue to be tackled and given full and proper scrutiny; it should be looked at in the round. The committee, Government or someone has to do that.

In trying to draw attention to the issue, Pauline McNeill has bolted it on to the bill, by way of her amendment. I appreciate why, but it is not the way in which to deal with the issue, which should be looked at in its own right. Again, I thank Pauline McNeill for bringing the issue to our attention.

David McLetchie: As Bob Doris said, Pauline McNeill raises a serious issue. We should explore it, and I hope that the Government will take up the matter. The case that she highlighted is a disturbing one that merits scrutiny. We need to find any further examples and whether the practice justifies a measure of regulation.

I agree with Mr Doris on what we should do with the amendment. I am mindful of Cathy Jamieson's entreaty in the stage 1 debate to repel all boarders. As she said, we should not debate amendments that do not go to the core purpose of the bill. Regrettably, this was not followed in respect of section 10, but we can, nonetheless, apply the maxim and our good discipline to Pauline McNeill's amendment. Having raised the issue—which she has done quite properly in an exploratory manner—I ask Pauline McNeill not to

press her amendment to the vote. As I said, the matter that she raised is worthy of further consideration by the Government and perhaps by this committee on another occasion.

12:00

Fergus Ewing: I acknowledge the thorough representation that Pauline McNeill has plainly provided to her constituent. It is appropriate for her to raise the issue as part of the bill process to stimulate discussion. That has already brought about cross-party recognition that the issue is serious. I thank her for the discussions that we had yesterday afternoon, which helped me to gain a fuller understanding of amendment 51.

It would be helpful, particularly for those who are listening outwith the room, if I set out the Government's formal response. Please excuse me if parts of what I say are of a somewhat technical nature.

Amendment 51 seeks to limit the fees that are charged by trustees in sequestration cases to a proportion of the value of the original debt, on the assumption, we presume, that more funds would be realised for the benefit of creditors. The proposal is based on the circumstances of a particular case, as Pauline McNeill helpfully outlined, and the case has been highlighted to the Accountant in Bankruptcy. The fees in the case were of the order of £12,000 or £13,000, although I should say that the element of those fees that were charged by the Accountant in Bankruptcy came to £1,204 in total.

The Government's position on fees for trustees in sequestration cases remains in line with the current policy. Fees for the valuable services that the Accountant in Bankruptcy provides are already prescribed by regulation, which is of course subject to parliamentary control and in line with the efficient delivery of public services. Fees that are charged by trustees in private practice are decided on a commercial basis and vary widely throughout the profession. Numerous safeguards in the Bankruptcy (Scotland) Act 1985 allow a debtor to appeal in sequestration cases. To name a few, the debtor can appeal against a decision of his trustee, the trustee's accounts or his fees. I think that I am right in saying that the debtor has a right to appeal against the level of fees. However, my understanding is that the remedy is used very rarely, although I do not have statistics to back that up.

I am concerned that, in practice, several negative and unintended consequences would flow from amendment 51 and that the intention of releasing increased funds for creditors might not in fact be realised. First, there is a potential increased cost to the public purse. The Accountant in Bankruptcy's fees and hourly rates are set by the Bankruptcy Fees (Scotland) Regulations 1993 in cases in which the Accountant in Bankruptcy is trustee. If fees were capped and the cost of work to administer a case exceeded the maximum level, the cost of carrying out that additional work would be met by the public purse. The measure would result in an increase in the resources that are required to fund the agency, and the taxpayer would have to foot that extra bill.

Furthermore, it is unlikely that any insolvency practitioner would agree to act as trustee in a case in which the debtor had little in the way of liabilities. In the case on which amendment 51 is based, the debtor owed only £4,000. I accept that Pauline McNeill has lodged an enabling amendment that does not specify the particular percentage that should be the cap, but if the fee was capped at, say, 10 per cent, the fee in that case would have been £400. That would be insufficient to cover an insolvency practitioner's costs and could lead to an increase in cases in which the Accountant in Bankruptcy acted as trustee. I accept that that argument rests entirely on the percentage that is applied and that a debate on that has not yet taken place. However, the amendment might result in an additional draw on public funds to cover costs.

Secondly, essential work would not be done in many sequestration cases. It can be difficult to predict at the outset how a case will progress. Progress is not necessarily determined by the value of the original debt. The work in a sequestration is not necessarily proportionate to the amount of debt—there can be a lot of work in a case involving small debts and little work in a case involving debts of high value. Costs might rise as a result of a lack of co-operation by the debtor. The fee in sequestration cases is currently determined with regard to work that is reasonably undertaken and the trustee's level of responsibility in administering the estate. That enables trustees to undertake work in discharging their duty and to receive reasonable recompense in return.

Any blanket or arbitrary maximum limit might in practice bear no relation to the work that needs to be undertaken. A fee system that is based on a maximum level might lead to that level being seen as the norm. In high-level cases, there might be a temptation to work to the maximum fee level that is permitted as opposed to that which is directly related to work reasonably undertaken.

Thirdly, the trustees may maximise expense. Placing limits only on fees means that debtors will remain liable for what can be quite considerable expenses and other outlays. Expenses may be maximised by the trustee in a bid to negate the effect of the cap on their fees.

Fourthly, limiting fees could risk inviting debtor manipulation. If a debtor is aware at the outset that, irrespective of the volume of work that the trustee undertakes, his estate cannot be charged more than a percentage of his debt, there is a risk that the debtor will refuse to co-operate and deliberately escalate the fees to manipulate the system, safe in the knowledge that that work cannot be charged for. By refusing to co-operate with the trustee, it would be relatively easy for the debtor to add considerably to the trustee's workload so that, for example, the trustee is faced with demanding a judicial examination of the debtor, which is an extremely expensive process. That might also prevent insolvency practitioners from carrying out necessary work such as obtaining a contribution from the debtor's income, which is an important part of the trustee's work in sequestration when the debtor should be making a contribution towards repayment of the debts owed to his creditors from his surplus income. If there was a fixed fee, a cunning, sly debtor could seek to manipulate the system by engaging the trustee in all kinds of unnecessary work, thus preventing the trustee from carrying out necessary work.

I apologise for being somewhat long winded, but I am sure that the debate will stimulate wider discussion. For those reasons, I sympathise with the sentiment behind amendment 51 as outlined by Pauline McNeill to the committee, but I cannot support it at this time. However, if she is minded to seek to withdraw amendment 51, I will be happy to continue to engage in further discussions with her, other committee members and obviously stakeholders—I am sure that members would like me to consult stakeholders.

I should also say that I do not anticipate there being any realistic possibility of those discussions leading to a stage 3 amendment because they would take much longer than that. Nonetheless, the Government is happy to engage with members, especially since, as we have heard from Mr McLetchie and Mr Doris, Pauline McNeill's concerns are born out of a serious issue that she has quite rightly raised today on behalf of her constituents.

Pauline McNeill: I thank the committee and committee members David McLetchie and Bob Doris for their comments on amendment 51. I said from the outset that this was an attempt to raise the issue and the fairness of it since there has been no consultation on it. I am happy to seek leave to withdraw the amendment on the basis that the minister has said that he is not dismissing the matter and that he will engage with me and other interested parties.

As the minister said, private insolvency practitioners work on a commercial basis. In my opinion, fees vary too widely. The debtor has a right to appeal, but it seems that that appeal can be undermined by additional costs, and that is one aspect that I hope we can look at. Transparency and scrutiny of fees, even in the private sector as it relates to debt, are issues that should be considered so that the situation is fair for insolvency practitioners and debtors. With that, I am happy to ask the committee whether I can withdraw amendment 51.

Amendment 51, by agreement, withdrawn.

Section 12 agreed to.

Section 13—Regulations under the 1985 Act

Amendment 52 moved—[Fergus Ewing]—and agreed to.

Section 13, as amended, agreed to.

Section 14 agreed to.

Section 15—Ancillary provision

The Convener: Amendment 53, in the name of the minister, is grouped with amendment 54.

Fergus Ewing: I will be uncharacteristically brief. Amendments 53 and 54 make modifications to the powers of the Scottish ministers under section 15. Section 15 contains ancillary provisions relating to the Scottish ministers' powers to make

"supplemental, incidental or consequential provision"

and provision

"for transitory, transitional or saving purposes"

in relation to the bill.

The powers include the power to modify other enactments, and statutory instruments will be subject to affirmative procedure when a supplemental, incidental or consequential provision is used to make a textual amendment to an act. As the bill is currently drafted, powers will otherwise be subject to negative procedure.

Amendments 53 and 54 provide that the power to make any supplemental, incidental or consequential provision is subject to affirmative resolution. We lodged the amendments in response to comments from the Subordinate Legislation Committee, which recommended such an approach in its report. We considered the issue and agreed that the powers under the bill ought to be subject to affirmative procedure, to give the Parliament reassurance by increasing parliamentary control over such subordinate legislation.

I move amendment 53.

David McLetchie: Anything that I could add to the debate will be supplemental and I am sure that it will be inconsequential. I am happy to support the amendments.

Amendment 53 agreed to.

Amendment 54 moved—[Fergus Ewing]—and agreed to.

Section 15, as amended, agreed to.

Sections 16 and 17 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank everyone for their co-operation.

Meeting closed at 12:12.

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