

Drafter's response as regards the explanations sought by the Delegated Powers and Law Reform Committee in their e-mail to him of 8th December with regard to Parts 15 to 18, and the schedules, of the Bankruptcy (Scotland) Bill

Paragraphs 2 to 5: the drafter agrees that, in context, in section 1A(c)(i) of the Bankruptcy (Scotland) Act 1985 the words “of which particulars have been registered in the register of insolvencies during the year to which the report relates” must be taken to apply both to “the state of all sequestrations” and to “the winding up and receivership of business associations” (and not only to the latter). Section 200(3)(a) of the current Bill requires to be re-formatted to make that clear.

Paragraphs 6 and (first) 28: it had been supposed that the reference, in section 200(5)(a) of the current Bill, back to subsection (1)(a) of that section sufficed to carry across the context of that subsection (which is the performance by interim trustees, trustees in sequestrations, trustees under protected trust deeds and commissioners of functions conferred on them) without the need to repeat all that was said in subsection (1)(a) itself. However on reflection it seems best to put matters beyond doubt. It is considered that this can at least be done in fewer words (by adding to paragraph (a) of section 200(5) some such words as: “in the performance of such functions conferred on the person as are mentioned in that subsection”).

Paragraphs (first 29) and 31: the occurrence of “suppose” rather than “suspect” in section 200(5) of the current Bill is a typing error. Though it is not thought that the error gives rise to a change in meaning, it is clearly appropriate to reinstate the word “suspect” used in section 1A(3) of the Bankruptcy (Scotland) Act 1985.

Paragraphs 7 and 8: it was considered that what was narrated in subsection (1) of section 206 of the current Bill sufficed to set the scene. The creditor and the obligant (both of whom are in fact co-obligants) are sufficiently differentiated and there is no need to take the further step, as section 60 of the Bankruptcy (Scotland) Act 1985 does, of calling the latter “the co-obligant”. Subsections (1) to (4) of section 206 then take up the terminology introduced by subsection (1). Subsection (5) of section 206 is distinct in that it refers to any right under any rule of law: and in terms of any such right the creditor and the obligant are both co-obligants and it would be confusing to refer to them in any other way.

It should be noticed that in subsection (3) of section 60 of the Bankruptcy (Scotland) Act 1985, the first reference to a co-obligant is a reference to a co-obligant in that same general sense (by reference to “any rule of law”) rather than a reference to a member of the particular category of co-obligants defined in subsection (1) of that section.

Paragraphs 9 to 11: section 71B of the Bankruptcy (Scotland) Act 1985 was inserted into that Act by section 5 of the Bankruptcy and Diligence etc. (Scotland) Act 2007. It has become section 223 of the current Bill. In transposing it, the words identified by the Committee have been lost. That is to say, there is no doubt that the words in parenthesis in subsection (2) of section 223 should include the words “and whether absolutely or conditionally”. The Bill requires to be amended accordingly.

Paragraphs 12 to 14: the drafter refers to paragraph 81 of the notes submitted by him at Introduction and adheres to the explanation given there. It is not considered that the change referred to by the Committee affects the meaning of paragraph 5(4) of schedule 2 of the current Bill in any way.

Paragraphs 15 and 16: it is agreed that, in paragraph 10(3) of schedule 3 of the current Bill, “by virtue or” should instead read “by virtue of”. The drafter is grateful to the Committee for drawing attention to that typographical error.

Paragraphs 17 and 18: it is agreed that the reference in paragraph 27 of schedule 5 of the current Bill to section 129 of the Bill ought instead to be a reference to section 127 of the Bill. The drafter is grateful to the Committee for drawing attention to that mistaken cross-reference.

Paragraphs 19 to 21: the words “or receives payment in respect of an attached article upon its redemption” were inserted into paragraph 24(3) of schedule 7 of the Bankruptcy (Scotland) Act 1985 by paragraph 28(a) of schedule 6 of the Debtors (Scotland) Act 1987. Further amendments affecting paragraph 24(3) were made by paragraph 15 of schedule 3 of the Debt Arrangement and Attachment (Scotland) Act 2002 and by provisions of other Acts. The drafter observes that although all those amendments were duly noted in the tables of derivations and of destinations, they were not all given effect to in paragraph 1(4)(b) of schedule 7 of the current Bill. It is proposed that paragraph 1(4)(b) should therefore be replaced with the words “(b) an attaching creditor carries through an auction or receives payment in respect of an attached article upon its redemption, that attaching creditor.”.

As to paragraph 24(7) of schedule 7 of the Bankruptcy (Scotland) Act 1985, that provision is considered to be spent relating as it does to the consequences, for the equalisation of arrestments and poindings, of the constitution of notour bankruptcy under the Bankruptcy (Scotland) Act 1913.

Paragraphs 22 and 23: schedule 2B of the Further and Higher Education (Scotland) Act 2005 was inserted into that Act by section 11(2) of the Post-16 Education (Scotland) Act 2013. The Committee are quite right in stating that paragraph 27 of schedule 9 of the current Bill should relate to schedule 2B of that Act of 2005. The amendments to schedule 2B will then require to be moved to their proper place, chronologically, in schedule 9. The drafter is grateful to the Committee for drawing attention to the need for those changes.

Paragraphs 24 and 25: it is agreed that regulation 45 of the Debt Arrangement Scheme (Scotland) Regulations 2011 has already been revoked (by regulation 22 of the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014) in consequence of paragraph 7 of schedule 3 of the Bankruptcy and Debt Advice (Scotland) Act 2014 which implemented the Scottish Law Commission’s recommendation 5. Accordingly the reference to regulation 45 in column 2 of Part 2 of schedule 9 of the current Bill is otiose and falls to be deleted. The drafter is grateful to the Committee for drawing attention to the need for that deletion.

Paragraphs 26 to (second) 28: the drafter is content to have amendments remove the “or”s referred to by the Committee. The conjunctions in question were inserted in an attempt at stylistic consistency in the current Bill as a whole. It is not considered that removing them will alter the meaning of the provisions in which they occur in any way.

Gregor Clark
Parliamentary Counsel
Scottish Law Commission.