THE LAW SOCIETY of SCOTLAND
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Written Evidence

B6

The Bankruptcy (Scotland) Bill

The Law Society of Scotland's written evidence

December 2015

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors.

With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession

We have a statutory duty to work in the public interest[1], a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

The Banking, Company and Insolvency Committee ("the committee") of the Law Society of Scotland welcomes the opportunity to consider and respond to the Scottish Parliament's Delegated Powers and Law Reform Committee's call for evidence on the Bankruptcy (Scotland) Bill.

The committee would like to respond to the call for evidence as follows:

1. Do you think bankruptcy law should be consolidated?

It is in the interest of the legal system of Scotland for such an important piece of legislation to be coherent, consistent and complete. As a result, consolidation as well as the inclusion for the first time of the provisions relating to Protected Trust Deeds is very much to be welcomed.

2. Is it the right time to consolidate bankruptcy law?

Consolidation has been delayed on previous occasions in 2011/12 and again in 2013 as a result of then forthcoming changes to the legislation. It is to be hoped that the substantial

[1] Solicitors (Scotland) Act section 1

changes introduced since 2007 (the Bankruptcy and Diligence etc. (Scotland) Act, 2007, the Home Owner and Debtor Protection (Scotland) Act, 2010 and the Bankruptcy and Debt Advice (Scotland) Act, 2014) are now to be given an opportunity to "bed in" but, in any event, consolidation is long-past overdue.

3. Has the Bill captured everything it should? Is the list of statutes consolidated complete? Has everything from those statutes that should be consolidated, been consolidated?

The list of statutes and statutory instruments to be consolidated and the relevant provisions from each do seem to encompass the totality of the legislative framework of personal insolvency in Scotland.

The committee also has the following further more detailed comments to make on the bill:

The committee has had the benefit of reviewing the exchange of correspondence between the Delegated Powers and Law Reform Committee (the "Parliamentary Committee") and the Parliamentary Counsel of the Scottish Law Commission dated 17th November and 24th November which has been published on the Scottish Parliament website and the committee notes its contents. The Parliamentary Committee is obviously working its way through the draft Bill in detail and the committee commends that task.

The Parliamentary Committee has already considered sections 10, 14, 46, 47, 63, 69 to 73 and 104 to 106 and will undoubtedly consider section 113 of the Bill in due course but the committee would like to draw to the attention of the Parliamentary Committee the infelicity of the use of designatory letters.

The use of "OC" for "other creditor" in section 10 seems unnecessary. The first use is to define the reference and then it is only used on two other occasions – once in the same sub-section and once in the following subsection. It is then defined again in section 14(7) and used twice in that subsection. All this seems an unnecessary distraction from a clearly understood term which appears in a context of no apparent complexity. Apart from that, the

use of the same designatory letters for what could be two totally different parties gives rise to the potential for confusion rather than relieving it.

In sections 46 and 47 the letter “C” is used to define “creditor” for no good reason, it appears. The wording of section 22 of the existing Act is clear and concise and there would appear to be no reason to deviate from it.

In section 63 the letters “RT” and “OT” are used to define “replacement trustee” and “original trustee” but, once again, the committee can see no need for this change as the wording of section 26 of the existing Act is both clear and concise. Indeed, section 65 of the Bill reverts to using the words “replacement trustee” and “original trustee” rather than the designatory letters.

In sections 69 to 73 (after being defined in both section 69 and again in section 70) of the Bill the letter “T” is used to replace the word “trustee” for no good purpose that is apparent to the committee. The word “trustee” is used throughout the Bill – why create the risk of confusion by selecting certain sections for the use of the designatory letter and not others.

In sections 104 to 106 the letters “TR” and “TE” are used to designate “transferor” and “transferee” but these designations are unnecessary and could cause confusion when the words that they replace are so clearly understood and widely used, beyond the bankruptcy legislation, particularly in relation to pensions, to which these provisions of the Bill relate.

Section 113. There is no difference in the provisions applied by this section to trustees in sequestration (defined therein as “T”) and to trustees acting under a trust deed (designed therein as “TU”). It seems unnecessary and overly complicated, therefore, to continue to refer to the two different types of trustee in this fashion. The far simpler approach would be to commence section 113(1) with the words:

“Before the trustee in the sequestration, or the trustee acting under the trust deed (both in this section referred to as “trustee”) …”

The alternative would be to insert a new section 113(1) (and re-number the subsections accordingly) as follows:

"This section applies to both to a trustee in the sequestration and to the trustee acting under the trust deed (the "trustee")."

Either of these approaches would then see the removal of "T or TU" from the text of the section, to be replaced by the single word "trustee"

This is both in keeping with the terms of the current Act and (with the exception of the other comments made) with the rest of the Bill (other than the use of "AiB" to denote the Accountant in Bankruptcy, which the committee accepts is a better choice than the use of "Accountant" in the existing Act), and also avoids an unnecessary introduction of complexity.

The definition of "associate" in section 229 seems to be unnecessarily unwieldy with the use, once again, of designatory letters. The terms of section 74 of the existing Act were clear and the committee is not aware of any confusion in their interpretation or application. The committee would recommend returning to the language of the existing section 74 to avoid unnecessary confusion.

Part 2 of Schedule 6 also use the letter "C" to denote the person chairing a meeting without any need to do so.

In sections 44, 170, 171 and 181 it was a surprise to see numerical fractions appear ("1/4" and "1/3") rather than the words "one quarter" and "one third" and their use seems slightly out of keeping with the rest of the Bill. A "fraction" (as referred to in section 227) does not require to be expressed in numerals. The same is true of the use of numeric fractions in Schedule 6, paragraph 1.

4. Do you have any views on the approach taken in the Bill to consolidation?

As previously stated, coherence and consistency are extremely important in all legislation and particularly so in an area such as this. It might therefore be more appropriate if Part 13 (Bankruptcy Restriction Orders) appeared before Part 11 (Discharge) and possibly even before Part 10 (Claims, Dividends and Distributions). Otherwise, the approach taken by the draftsman would appear to be sensible and whilst a different approach might have been equally valid, the current structure delivers the clarity that is sought.

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