



The Scottish Parliament
Pàrlamaid na h-Alba

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Bankruptcy (Scotland) Bill: Parts 1-4

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 17 November and seeks an explanation of the following matters:

Definition in Parts 1 to 4

2. The definitions used in Parts 1 to 4 remain largely in the provisions in which they appear in the 1985 Act. Examples include the definitions of “money adviser” (section 4(2) of the Bill), “qualified creditor” (section 7 of the Bill), and “date of sequestration” (section 22(7) of the Bill), all of which are restated as ‘embedded’ definitions (following the approach in the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”)).

3. By contrast, the definition of “debt advice and information package” has been moved from where it originally appeared in section 5(2D) of the 1985 Act (restated as section 3 of the Bill) to the interpretation section (section 228 of the Bill).

4. **The Committee asks the drafter:**

Why the approach has been taken of moving the definition of “debt advice and information package” to the interpretation section of the Bill? This can be contrasted with the approach taken to other definitions used in Parts 1 to 4, which are restated as they appear in the 1985 Act.

Part 1

Section 2(1)(b)(i)

5. Section 2(1)(b)(i) of the Bill is derived from section 5(2)(b)(i) of the 1985 Act (as amended). The original 1985 Act provision explicitly states that the right of the qualified creditors to make a petition is “subject to” the requirement to provide debt advice. The explicit “subject to” wording is not restated in section 2(1)(b)(i) of the Bill.

6. **The Committee asks the drafter:**

Why the “*subject to*” wording which appears in section 5(2)(b)(i) of the 1985 Act has not been restated in section 2(1)(b)(i) of the Bill, and whether the provision (as restated) is sufficiently clear, as regards the qualification set out in section 3 of the Bill?

Section 7(1)

7. Section 7 defines “qualified creditors” for the purposes of section 2 of the Bill.

8. **The Committee asks the drafter:**

To consider whether replacing the words “at the date of the presentation of the petition, or as the case may be at the date the debtor application is made” in the definition of “qualified creditor” in section 7 with a defined term (for example, “the relevant date”) would make this definition clearer for the reader.

To consider whether the meaning of the words “at the date in question” in the definition of “qualified creditors” is sufficiently clear, and whether the use of a defined term, as discussed above, would also make the definition of “qualified creditors” clearer for the reader.

Section 8(1)

9. Section 8(1) of the Bill provides that “any debtor application [for sequestration] must be made to AiB”. This restates section 5(4B) of the 1985 Act, which provides that “a debtor application must be made to AiB”.

10. **The Committee draws the attention of the drafter to the wording of section 8(1) of the Bill, which restates the words “a debtor application” as “any debtor application”. The Committee asks for explanation as to why this change has been made.**

Section 12(1)

11. It is noted that section 12(1) makes almost identical provision to section 11(1) and (2) of the Bill, but a different drafting approach is taken.

The Committee draws the attention of the drafter to the drafting approach taken in section 12(1) of the Bill, and compares this with the different drafting approach taken to almost identical provision in section 11(1) and (2). The

Committee suggests that, in the interest of consistency, it would be preferable for the same drafting approach to be taken.

Section 13

12. It is noted that there is some inconsistency in drafting between subsections (2), (3) and (4) of section 13, which otherwise make very similar provision (for example, alternatives are presented in a different order and are sometimes separated by an “or” and sometimes not).

13. The Committee draws the attention of the drafter to the lack of consistency in drafting style between subsections (2), (3) and (4) of section 13. The Committee suggests that, in the interest of consistency, it would be preferable for the same drafting approach to be taken.

Section 16(6)

14. Section 16(6) of the Bill provides that, notwithstanding section 6(2) of the Bill, the apparent insolvency of an entity mentioned in “*that subsection*” may be constituted under section 16. Section 6(2) provides that it is not competent to sequester the estate of (a) a company registered under the Companies Act 2006, (b) a limited liability partnership or (c) any other entity in respect of which an enactment provides that sequestration is incompetent.

15. Section 16(6) is derived from section 7(4) of the 1985 Act (as amended). Section 7(4) of the 1985 Act provides that notwithstanding section 6(2) of that Act, the apparent insolvency of an entity mentioned in “*paragraph (a) or (b) of that subsection*” may be constituted under section 7. Section 6(2) of the 1985 Act provides that it is not competent to sequester the estate of (a) a company registered under the Companies Act 2006, (aa) a limited liability partnership or (b) any other entity in respect of which an enactment provides that sequestration is incompetent.

16. It appears that section 16(6) of the Bill goes further than section 7(4) of the 1985 Act which it restates. Section 7(4) of the 1985 Act provides that the apparent insolvency of a Companies Act company and any other entity in respect of which an enactment provides that sequestration is incompetent may be constituted under section 7. Section 16(6) of the Bill, on the other hand, provides that the apparent insolvency of a Companies Act company, a *limited liability partnership* and any other entity in respect of which an enactment provides that sequestration is incompetent may be constituted under section 16.

17. The Committee draws the attention of the drafter to this point and asks for explanation of why it is considered that section 16(6) of the Bill properly restates section 7(4) of the 1985 Act?

Section 16(7)(b)

18. Section 16(7)(b) of the Bill provides that a debtor’s apparent insolvency continues, if constituted under section 16(1)(c), (e), (f), (g), (h) or (i) of the Bill, until the debtor becomes able to pay off the relevant debts.

19. Section 16(7)(b) of the Bill is derived from section 7(2)(b) of the 1985 Act (as amended). Section 7(2)(b) provides that the debtor's apparent insolvency continues, if constituted under section 7(1)(b),(c) or (d), until the debtor becomes able to pay off the relevant debts.

20. Section 16(7)(b) seems to go further than section 7(2)(b) which it restates, in that it provides for more situations in which a debtor's apparent insolvency will end when the debts are paid off.

21. The Committee draws the attention of the drafter to this point and asks for explanation of why it is considered that section 16(7)(b) of the Bill properly restates section 7(2)(b) of the 1985 Act.

Part 2

Section 22(5)

22. Section 22(5) of the Bill provides that a sheriff must forthwith award sequestration on a petition (presented under this section) if satisfied on a number of points.

23. One of the points (at section 22(5)(d)) on which the sheriff must be satisfied is that, in the case of a petition by a trustee, (i) at least one of two specific conditions applies (these are that the debtor has failed to comply, either with an obligation under a trust deed, or with an instruction given by the trustee in respect of a trust deed) *and* (ii) the petition contains a declaration by the trustee that sequestration would be in the best interest of creditors.

24. This provision is derived from section 12(3)(e) of the 1985 Act. Section 12(3)(e) provides that the sheriff must be satisfied that, in the case of a petition by a trustee, (i) at least one of the two specific conditions applies *or* (ii) the petition includes a declaration by the trustee that sequestration would be in the best interest of creditors

25. The Committee asks the drafter:

Why section 22(5)(d) requires the sheriff to be satisfied on *both* points set out in this subsection, while the equivalent provision of the 1985 Act appears to require the sheriff to be satisfied on *one or the other* point (but not both)?

Section 23(1)(b)

26. Section 23 sets out circumstances in which sequestration is not to be awarded by the sheriff. Section 23(1)(b) provides that sequestration must not be awarded if, *without delay*, the debtor pays off the relevant debts.

27. The equivalent provision in the 1985 Act uses the term “*forthwith*” rather than “*without delay*”. It is noted that, elsewhere in the Bill, the word “*forthwith*” has been retained (see section 22) from the original 1985 Act provision.

28. The same comment applies in respect of the use of the phrase “*without delay*” (rather than “*forthwith*”) in sections 26(1) and (2), 27(11)(b) and 30(7). It is also noted that section 70(1)(a) of the Bill changes the word “*forthwith*” in the 1985 Act to “*immediately*” in the Bill.

29. **The Committee asks the drafter:**

For further explanation as to why the word “*forthwith*” has been changed to “*without delay*” in section 23 and elsewhere in the Bill (and to “*immediately*” in section 70(1)(a))? The Committee asks the drafter to comment on what effect this is considered to have on the meaning of the relevant provisions and on the consistency of the Bill as a whole.

30. *Section 24(7)*

31. In this section the name of the Debtors (Scotland) Act 1987 is incorrectly given as the “*Debtor’s (Scotland) Act 1987*”.

32. **The Committee draws attention to this point.**

Section 27(12)

33. Section 27(12) provides that, where sequestration has been awarded, the process of sequestration is not to “*fall asleep*”.

34. **The Committee asks the drafter:**

To consider whether the use of the phrase “*fall asleep*” in section 27(12) is sufficiently clear to the reader, or whether further explanation could be helpful?

Section 32

35. Section 32 of the Bill restates section 17B(1) to (8) of the 1985 Act. However, subsection (9) of section 17B does not appear to be restated in section 32 or elsewhere in the Bill.

36. **The Committee asks the drafter:**

For explanation of whether (and where) section 17B(9) of the 1985 Act is restated in the Bill?

Part 3

Section 46(4)(a)

37. It appears that the word “have” in section 46(4)(a) may be an error and that this should instead be “has”.

38. The Committee draws the attention of the drafter to this point.

Section 48(5)

39. Section 48(5) provides that the trustee must, in the circumstances outlined, send a copy of the revised statement of the debtor’s affairs to every creditor known to the trustee “*as soon as may be*”. This section derives from section 23 of the 1985 Act which provides that the trustee must send the revised statement “*as soon as possible*”.

40. The Committee asks the drafter:

To explain why the words “as soon as possible” in section 23 of the 1985 Act have been restated as “as soon as may be” in section 48(5) of the Bill? The Committee asks what effect this change is considered to have on the meaning of this provision?

Part 4

Section 71(2)

41. Section 71(2) provides that “*any* application [for review] must be made within 14 days”. This restates section 29(3B) of the 1985 Act, which provides that “*an* application [for review] must be made within 14 days”.

42. The Committee draws the attention of the drafter to the wording of section 71(2) of the Bill, which restates the words “an application” as “any application” and asks for explanation as to why this change has been made.

43. Please email your response to the Delegated Powers and Law Reform Committee e-mail address above by **5pm on Friday 20 November**.

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