Drafter's response as regards the explanations sought by the Delegated Powers and Law Reform Committee in their e-mail to him of 17th November with regard to Parts 1 to 4 of the Bankruptcy (Scotland) Bill

Paragraphs 1 to 4: there is no special reason for positioning the definition of "debt advice and information package" in the Interpretation section rather than in section 3 of the current Bill: and it makes no difference as a matter of law. If there was thought to be any advantage to users in having the definition in section 3 and merely referring to it in the Interpretation section then that could certainly be done.

Paragraphs 5 and 6: it is considered that the words "subject to subsection (2D)" in section 5(2)(b)(i) of the Bankruptcy (Scotland) Act 1985 read awkwardly (and besides, why should just this one provision merit such a cross-reference when other provisions of section 5 are also subject to other provisions of that section). There is perhaps some justification for the cross-reference in what is presently an exceedingly long section. (It has 29 subsections). But in the current Bill the 29 subsections become nine sections with subsection (2D) becoming a section in its own right (the one immediately following that in which the qualified sub-paragraph occurs) and therefore having much greater prominence. It is therefore thought that the cross-reference can be dispensed with as of no particular utility. The terms of section 3 of the current Bill put the matter beyond doubt. Removing the cross-reference has no legal effect.

Paragraphs 7 and 8: the use of the words "at the date in question" in a reference back of this nature is very common in primary legislation and is believed to be well understood. (A search of the database shows there are in excess of 200 occurrences). Yes, we could introduce and define a term such as "relevant date" but that would take considerably more words and would be further from the Bankruptcy (Scotland) Act 1985 text. There the wording is "said date" which we have not adopted since it has a legalese flavour (though its meaning seems clear enough). Besides, we already have, in section 7 of the current Bill, the defined term "relevant debts" and to have two such expressions in a single brief section would, it is submitted, be more than a little clumsy.

Paragraphs 9 and 10: the Committee are referred to the answer given below in relation to paragraphs 41 and 42.

Paragraph 11: it is acknowledged that, just as there were differences between sections 6A and 6B of the Bankruptcy (Scotland) Act 1985 so there are differences between the sections which restate them (sections 11 and 12 of the current Bill). Sections 11 and 12 could be brought more closely into line though it is not thought that such differences as there are could give rise to difficulties or uncertainties in construing the two sections.

Paragraphs 12 and 13: it is agreed that subsections (2), (3) and (4) of section 13 of the current Bill make very similar provision. As regards the order of alternatives, subsections (2) and (3) are consistent with each other whereas in subsection (4) (following section 8(3) of the Bankruptcy (Scotland) Act 1985) the order of paragraphs (a) and (b) reverses the order in (2) and (3). It is not thought that the inconsistency gives rise to any difficulty.

As to the use of "or" where there are three items, the approach followed is "Tom, Dick or Harry" as opposed to "Tom or Dick or Harry". In subsection (2) there is an "or" between paragraphs (a) and (b) but in the sub-paragraphs there is no "or" between sub-paragraphs (i) and (ii) and is one between sub-paragraphs (ii) and (iii). So too in subsection (3). For consistency there should be an "or" between paragraphs (a) and (b) of subsection (4). This might perhaps be allowed as a matter of printing.

Paragraphs 14 to 17: section 16(6) of the current Bill follows the wording of section 15(6) of the Bill appended to the Scottish Law Commission's 2013 Report on the **Consolidation of Bankruptcy Legislation in Scotland**. Account was taken of recommendation 4 of that Report (a recommendation that limited liability partnerships should be mentioned expressly in section 6 of the Bankruptcy (Scotland) Act 1985) in section 15(6)'s cross-reference to subsection (2) of that section. However when recommendation 4 was ostensibly implemented by paragraph 6(a) of schedule 3 of the Bankruptcy and Debt Advice (Scotland) Act 2014 the need for a consequential amendment of section 7(4) of the 1985 Act was lost sight of. On one view, without the consequential amendment recommendation 4 has not yet been fully implemented and is in consequence still in play so that we are warranted simply in following, in the current Bill, the wording of section 15(6) of the Commission's Bill. But if that view is rejected and it is therefore thought that section 16(6) of the current Bill does not properly restate section 7(4) of the 1985 Act, the necessary consequential amendment could still, it seems, be made under section 55 of the 2014 Act. (That would be a matter to be explored with the Scottish Government). Only if it is not practicable to proceed in either way will it be necessary to narrow section 16(6)'s cross-reference to subsection (2) of section 6 so that it is instead a cross-reference only to paragraphs (a) and (b) of that subsection (which in terms of the overall utility and understandability of the provisions would be unfortunate).

Paragraphs 18 to 21: section 16(7)(b) of the current Bill (largely) follows the wording of section 15(7)(b) of the Bill appended to the Scottish Law Commission's 2013 Report on the **Consolidation of Bankruptcy Legislation in Scotland**. Account was taken of recommendation 5 of that Report (a recommendation for re-wording of section 7(1) of the Bankruptcy (Scotland) Act 1985) in subsections (1)(e) to (g) and (2) of section 15 of the Commission's Bill and in section 15(7)(b)'s consequentially amended cross-reference to section 15(1). However when recommendation 5 was ostensibly implemented by paragraph 7(a) and (b) of schedule 3 of the Bankruptcy and Debt Advice (Scotland) Act 2014 the need for a corresponding consequential amendment to the cross-reference was lost sight of. On one view, without the consequential amendment to the cross-reference recommendation 5 has not yet been fully implemented and is in consequence still in play so that we are warranted simply in following, in the current Bill, the wording of section 15(7)(b) of the Commission's Bill. But if that view is rejected and it is therefore thought that section 16(7)(b) of the current Bill does not properly restate section 7(2)(b) of the 1985 Act, the necessary consequential amendment could still, it seems, be made under section 55 of the 2014 Act. (Again that would be a matter to be explored with the Scottish Government). Only if it is not practicable to proceed in either way will it be necessary to narrow section 16(7)(b)'s current cross-reference to paragraphs (c), (e), (f), (g), (h) and (i) of subsection (2) of section 6 so that it becomes instead a cross-reference only to paragraphs (c), (e) and (i) of that subsection (which would have the unfortunate effect of leaving the duration of a debtor's apparent insolvency unprovided for in some instances).

Paragraphs 22 to 25: paragraph (e) of section 12(3) of the Bankruptcy (Scotland) Act 1985 was inserted by section 47 of the Bankruptcy and Debt Advice (Scotland) Act 2014. It is clear from the text of section 47 that the conjunction between sub-paragraphs (i) and (ii) of that paragraph ought indeed to be "or" and not "and". The text of the current Bill therefore requires to be adjusted accordingly.

Paragraphs 26 to 29: the word "forthwith" has an archaic flavour and with a requirement for plain English it might be thought to require to be replaced in any Act of the Scottish Parliament: preferably by the same word (or words) in each instance. As to what it should be replaced with, the Oxford English Dictionary gives as synonyms "immediately", "at once" and "without delay or interval". All involve immediacy but on reflection the drafter considers that in the context of a legal process such as sequestration "immediately" and "at once" are, from practical considerations, too abrupt. (At the very least they do not allow for the thinking time which undoubtedly is involved for those engaged in the sequestration process). Of course, if we opt for "without delay" or "without delay or interval" then the question arises: what is delay (or interval) in any particular context?
It has been thought necessary to retain "forthwith" in section 22 of the current Bill because there has been, and is, much debate (see paragraphs 25 and 26 of the drafter's note) about what it means in the context of the extremely important subsection (5) of section 22: extremely important because subsection (5) is at the heart of the definition of the key term "the date of sequestration". The debate would seem to centre on what constitutes delay if the meaning of "forthwith" is accepted as either "without delay" or "without delay or interval". But just because we retain "forthwith" in section 22 (so as not to be seen to resolve the debate) doesn't mean we are obliged to retain it throughout the Bill. The need for plain English (and in particular for modern English) is important. So too, the special treatment of section 22 aside, is the need for consistency. The drafter therefore proposes that, except in section 22 of the current Bill, the word "forthwith" in the Bankruptcy (Scotland) Act 1985 be replaced, in the equivalent provisions of the current Bill, with "without delay" (there being no obvious advantage in opting for, or attempting to justify, the longer "without delay or interval"). It is considered that replacing "forthwith" uniformly (or at least almost uniformly) throughout the Bill in such a way is purely a drafting change and would not change the law or the practical consequences of the provisions affected. And (taking up the question asked by the Committee at paragraph 29) there would seem to be no practical reason for distinguishing, in that regard, section 70(1)(a) of the current Bill.

Paragraphs 30 to 32: this matter of punctuation is agreed and can perhaps be dealt with as a matter of printing.

Paragraphs 33 and 34: the statement that a sequestration is not to "fall asleep" follows the wording of section 15(7) of the Bankruptcy (Scotland) Act 1985 which in turn restated section 42 of the Bankruptcy (Scotland) Act 1913. It was originally formulated (and then retained in the 1985 Act) because, as I am informed "the general rule in the sheriff court used to be that if no interlocutor was pronounced or motion made in a cause for a year and a day it would normally fall asleep [and it would be] necessary to have the cause awakened before further procedure would take place. Falling asleep was highly undesirable in a sequestration process.". The concept of falling asleep is believed to be well understood by insolvency practitioners (as indeed it should be after all this time). Any attempt to provide further explanation in the Bill itself might conceivably give rise to confusion. So too might the removal of the provision.

Paragraphs 35 and 36: section 17B of the Bankruptcy (Scotland) Act 1985 is one of seven sections inserted by section 27 of the Bankruptcy and Debt Advice (Scotland) Act 2014. Subsection (9) of section 17B has inadvertently not been carried across into the current Bill with the rest of that very substantial body of provisions. Clearly there is no legal reason for it not to have been and it will therefore be necessary, if the law is not to be changed, to add the subsection to section 32 of the current Bill.

Paragraphs 37 and 38: it is not thought that the word "have" is used erroneously in section 46(4)(a) of the Bill since the preceding "does" qualifies both "reside" and "have a place of business".

Paragraphs 39 and 40: while it is not thought that the change in wording would have had any practical effect, the drafter would on reflection propose that the words "as soon as possible" be restored for whatever meaning the courts might assign to them. The thought had been that the requirement imposed was unrealistically high (especially in the context of section 48(5) of the current Bill).

Paragraphs 41 and 42: at first glance section 29(3B) seems to **require** that an application be made before the expiry of [a certain period] whereas a moment's thought will make one realise that the true sense must be that **if** an application is made it must be made before the expiry of [that period]. Commencing with the word "Any" rather than "An" in section 71(2) is thought better to bring out that true sense and therefore to aid the reader.

Gregor Clark
Parliamentary Counsel
Scottish Law Commission.