



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 1 November 2022

Session 6



The Scottish Parliament
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot or by contacting Public Information on 0131 348 5000

Tuesday 1 November 2022

CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	1
MOVEABLE TRANSACTIONS (SCOTLAND) BILL: STAGE 1	2
INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE	23
Police Act 1997 (Offences in Schedules 8A and 8B) Amendment (Scotland) Regulations 2022 [Draft] ...	23
Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment (No 2) Order 2022 [Draft]	23
INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE	24
Scottish Child Payment (Saving Provisions) Regulations 2022 (SSI 2022/302)	24
Town and Country Planning (Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/286)	25

DELEGATED POWERS AND LAW REFORM COMMITTEE

27th Meeting 2022, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
*Paul Sweeney (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Tom Arthur (Minister for Public Finance, Planning and Community Wealth)
Hamish Goodall (Scottish Government)
Vuyi Stutley (Scottish Government)

CLERK TO THE COMMITTEE

Lucy Scharbert

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 1 November 2022

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 27th meeting in 2022 of the Delegated Powers and Law Reform Committee. I ask everyone present to switch their mobile phones to silent.

Agenda item 1 is a decision on whether to take items 5, 6 and 7 in private. Is the committee content to do so?

Members indicated agreement.

Moveable Transactions (Scotland) Bill: Stage 1

The Convener: Item 2 is our final evidence session on the Moveable Transactions (Scotland) Bill. Today, we are taking evidence from Tom Arthur, the Minister for Public Finance, Planning and Community Wealth, who is accompanied by three Scottish Government officials: Hamish Goodall, who is the bill team leader, and Rob McConnell and Vuyi Stutley, who are solicitors in the Government's commercial and competition law branch. I welcome you all to the committee.

I remind all attendees not to worry about turning on the microphones during the session, as they are controlled by broadcasting.

I invite the minister to make some opening remarks.

The Minister for Public Finance, Planning and Community Wealth (Tom Arthur): Good morning. It is a pleasure to be in front of the committee. I have many fond memories of being a member of this committee, and I can only hope that I am still saying that it is a pleasure to appear before it when we get to the end of the evidence session.

The committee will be aware that there is significant support for reform and modernisation of Scottish moveable transactions law among those who use it, since it is out of date and inadequate by international standards. If implemented, the bill would make various types of commercial transactions more efficient, less expensive and less complicated than they currently are.

Moveable transactions law enables businesses and individuals to use their assets to raise finance by selling debts or by granting security over moveable property. For example, a business may wish to acquire funding by transferring to a financial institution its claim to payment of existing and future customer invoices. That would be done by means of an assignation. Alternatively, it might want to retain assets such as vehicles, equipment and intellectual property, but to use those as collateral to obtain loan finance. That would be done by means of the new statutory pledge. That would lead to greater access to finance for businesses in Scotland, thus benefiting the general economy.

I am aware that the committee has heard evidence from Citizens Advice Scotland and money advice agencies, and that they have suggested that the bill should apply only to businesses and not to individual consumers. They have also suggested that, if the bill is to apply to individual consumers, the consumer protections in the bill should be strengthened.

When the Economy, Energy and Fair Work Committee took evidence on the proposals in the previous session of Parliament, the vast majority of respondents indicated that they thought that the consumer protections in the bill were perfectly adequate, and I understand that many respondents to the committee have repeated that view.

However, last week, I met Citizens Advice Scotland and some of the debt advice agencies and listened carefully to what they had to say about the application of the bill to consumers. I am certainly well disposed to strengthening the consumer protections in the bill and, in particular, I believe that the monetary threshold under which it will not be possible to grant a statutory pledge should be raised from £1,000.

I am also in no doubt that the policy of the Government should be that it should not be possible to grant a statutory pledge over ordinary household goods. We can look to see how the bill might be amended at stage 2 to ensure that that is not possible.

On that note, I will conclude. I am happy to take any questions that the committee might have.

The Convener: Thank you, minister. I will open with some initial questions.

Can you provide any up-to-date figures on the likely impact of the bill on businesses in Scotland?

Tom Arthur: I am conscious that the committee has received a range of evidence and that it had engagement with the Federation of Small Businesses last week, so you will be well familiar with what the provisions of the bill aim to do with regard to opening up finance to business. Therefore, I will not rehearse all the aspects of the bill, but I will give an example of one particular area that is relevant in this regard. A Scottish Enterprise survey estimated that intellectual property assets form around 80 per cent of Scottish businesses' value, and that that will continue to increase. That shows some of the opportunities that the bill will open up in relation to using IP as security.

The bill could be positive in a range of ways. The Scottish Government's small business survey in 2015 showed that only 2 per cent of the businesses that were surveyed applied for an invoice discounting or factoring facility, with most—34 per cent—applying for bank overdrafts and 32 per cent applying for loans. If Scottish businesses utilised invoice factoring to the same extent as UK businesses as a whole do, they might assign invoices worth nearly £18 billion. The figure for invoice factoring in 2018 and 2019 was still only 4 per cent. Those figures demonstrate that there is significant room for growth in that

sector and for access to finance to be opened up for business.

The Convener: Thank you. What evidence has the Scottish Government received from lenders that they are planning to offer a broader or cheaper range of products to businesses in Scotland?

Tom Arthur: I note as an example the evidence that the committee received last week from NatWest. The reality is that the current arrangements in Scotland, given their complexity, do not make it as attractive an environment to offer such products as other jurisdictions, such as England.

Through the bill—I know that this has been commented on by witnesses—we are proposing to move from having a system that is perhaps significantly far behind what is available in other jurisdictions to having one that is significantly more advanced, up to date and modern. That would create the opportunity for those new products to be offered, which in turn would give business more options for raising finance. We recognise that that is extremely important.

Hamish Goodall will be able to comment on some of the evidence that we have received with regard to what lenders hope to do.

Hamish Goodall (Scottish Government): I think that, in the evidence that it gave last week, NatWest said that it would be looking at offering new products.

Generally speaking, there has been a positive response to what is proposed. Going back to the Scottish Law Commission's report, there were comments from the Confederation of British Industry Scotland and UK Finance, as well as the Law Society of Scotland. In a letter that was sent in August 2019, the then president of the Law Society said:

"this is a critical piece of legal infrastructure. It is required to enable small and growing businesses in Scotland to thrive and stay here and to ensure that Scotland is an attractive investment destination in the future for relevant businesses coming from abroad.

At the moment, it can be extremely cumbersome for Scottish businesses to use their intellectual property, plant, equipment and stock, debts owed by their customers, bank account balances and shares as collateral to fund their businesses. Our members report that this means that some considering starting or growing businesses in Scotland or considering coming here to do so instead locate to England or move there to use English contracts, bank accounts and other assets or English companies—as it is much more straightforward under English law to use those assets to support funding for their businesses."

That applies across all sectors, including, in particular, data, technology, energy and food and drink, in which Scotland currently enjoys, or has the potential to establish, a strong reputation.

The then president of the Law Society went on to say that it would be extremely unfortunate if Scotland were hampered by failing to take the opportunity to replace inadequate, antiquated legal infrastructure with something better than what some of our competitors have.

The Convener: I genuinely welcome the comments that have just been reiterated to the committee, but has the Government received any up-to-date recommendations, suggestions or advice from the financial sector? I note that those comments that were made to the SLC were made in the past.

Tom Arthur: I note that the body in possession of the most up-to-date opinion is this committee, because of the evidence that it has received as part of its stage 1 inquiry. I refer again to the evidence that the committee received from the representative of NatWest last week.

The Convener: Stakeholders from the consumer and money advice sector have raised concerns about the impact of the assignment reforms on consumer credit debts. From your consultations with lenders and other potential users of the register of assignments, can you tell us to what extent you expect the register to be used for the assignment of consumer credit debts?

Tom Arthur: I am conscious of the concerns that have been raised by consumer advice and money advice stakeholders. I have studied carefully the evidence that was given to the committee at the start of October, and, as I said, I had a meeting with organisations that work in that area last week. I want to reflect carefully on those concerns, and I recognise that the committee will want to touch on other areas around the statutory pledge.

I also want to be clear at the outset that I will consider very carefully the committee's stage 1 report, because I recognise that you have had to contend with evidence that, in some contexts, may be conflicting or may come from different perspectives. That includes some of the written evidence that you have received in recent days. I will want to fully reflect on that matter.

With regard to assignment in the context of consumer credit, Hamish may have up-to-date information.

Hamish Goodall: From the indications that we have had, particularly from Registers of Scotland, which has been doing work on the likely usage of the new registers, we believe that early and heavy usage of the new register of assignments will be made for assignments of consumer debt; we believe that it will possibly be used more quickly and more readily than the new register of statutory pledges. That is simply because the new register of assignments will make it possible to assign debt

without using English law. It will be possible to register the assignment in the new register, and people who are looking to find out whether a debt has been assigned will be able to search that register.

The indications were that usage of the register of assignments would be early and heavy partly because, under the existing law of Scotland, an existing debt can be assigned but a future debt cannot, because it is necessary to intimate to the debtor; that cannot be done if it is not known who the debtor is. For those two reasons—the use of the register and the possibility of assigning future debt—we think that the usage of the new register will be quite heavy indeed.

Tom Arthur: Convener, that speaks to your earlier question about what the anticipated uptake by business will be of the new provisions.

The Convener: Another aspect is the waiver of defence clauses, which would appear to work against the interests of debtors in an assignment. Why has the Scottish Government chosen to formulate the proposed law in that way? Why have protections for individual debtors not been included, as they have elsewhere in the bill?

Tom Arthur: It is important to note that the bill changes nothing in relation to waiver of defence clauses. It simply puts the existing common law into statute.

I stress that the existing common-law position is that the ability of parties to agree to have a waiver of defence clause is subject to any legislation that restricts or prevents that, including any and all consumer protection legislation.

The correct place for the regulation of assignments of consumer credit agreements is consumer credit law. More generally, the place for protecting consumers from unfair contract terms is the Consumer Rights Act 2015. That legislation holds that an unfair term in a consumer contract or a consumer notice is not binding on the consumer. The result is that the potential for a waiver of defence clause in a consumer context is checked by the consumer protection legislation—in particular, the 2015 act. An unfair term in such a consumer contract would not be binding on the consumer. The bill as drafted allows consumers the contractual freedom to contract as they feel appropriate, all with the consumer protections of part 2 of the 2015 act.

However, I appreciate that there are concerns, which have been raised with the committee, about the drafting of section 15. I am happy to consider that at stage 2, and we will be keen to study the committee's thoughts and reflections in its report.

The Convener: Under the information provisions in the bill, a debtor in an assignment

would have no direct right to find out whether the obligation to which they are subject has been transferred. They could also be charged for that information by the assignee. Will the Scottish Government commit to addressing that?

Tom Arthur: I will of course be happy to consider that, but you will have heard the evidence from Professor Steven that it is not anticipated that the average debtor will need to search, or have an interest in searching, the register. Indeed, we know from the way in which the land register operates that information registers tend to be accessed only by advisers, and legal advisers in particular.

10:15

In addition, as the committee understands and appreciates, a debtor would be protected under the terms of the bill if they continued to perform in good faith, meaning that it is a debtor's requirement to know in the absence of notice that an assignation is diminished. However, the provisions in the bill permit a debtor who has received notice of an assignation, or who has reasonable grounds to believe that an assignation has been granted, to request reasonable evidence of the granting of an assignation document. The debtor is entitled to withhold performance—usually, payment of the debt—until that evidence is received.

The bill also allows a debtor, having obtained consent from the assignor, to make inquiries of a registered assignee as to whether a claim has been assigned and whether a condition to which the assignation is subject has been satisfied. That protection sits along with a general ability to search the register.

Jeremy Balfour (Lothian) (Con): Good morning, minister, and good morning to your team. I want to look at something in relation to financial instruments that was in the draft bill and has been taken out. I know that you are working with the United Kingdom Government to use a section 104 order to extend the bill's provisions. Can you tell us why it would not be appropriate for that to be in the bill and why you think that it has to be done through Westminster?

Tom Arthur: You will appreciate that the view that the Scottish Government has come to is that the matter is outwith our competence, and you will understand that I cannot go into the internal processes that informed that decision in front of the committee. That is the view, but we want those provisions to be in the legislation, which is why we have sought at the earliest stage to engage with the UK Government in relation to a section 104 order.

I hope that, notwithstanding the particular areas of concern that I know that the committee and stakeholders have raised, the general thrust of the bill and what it aims to achieve will command the broadest support across Parliament. Given that we can get to that place of consensus, I hope that the UK Government would be agreeable to engaging constructively on the matter through a section 104 order, to ensure that we can get financial instruments into the operation of the final legislation.

Jeremy Balfour: Can I push you slightly on that, minister? It is clear that, if you get four lawyers into a room, you get 12 different opinions, but there is a lot of legal opinion that including the provision would be competent. Could you give us a wee bit more information on why you have come to the view that it is not competent?

Tom Arthur: Fundamentally, it is because it relates to the reserved matters of financial services and financial markets. I recognise the point that the member raises about the fact that there can be contrasting opinions, but we have sought to take an approach that ensures that the matters that we believe are within competence can be considered as part of the bill, and the one area that we do not believe to be within competence can still be effected, albeit through another process, namely the section 104 orders that are provided for by the Scotland Act 1998.

Hamish Goodall: I will add to that. We have been in liaison with the Scotland Office about the matter. We are still waiting for its initial assessment of whether a section 104 order is required, but it said in an email to me that it is technical and complex stuff and not easy. It is an area where the judgments are finely balanced.

Jeremy Balfour: Just to clarify that point, have we reached an agreement? Has the Scottish Government reached an agreement with the UK Government on the matter? Are you still waiting to hear back from the Scotland Office?

Hamish Goodall: We are still waiting from the Scotland Office. I emailed it again yesterday, but have not heard back.

The Convener: I have a quick question on the issue. I assume therefore that there has been no indication at all that if that matter was covered in the bill and then proceeded through Parliament there would be a challenge from the UK Government or anyone in the legal fraternity?

Tom Arthur: I cannot speak to what opinions others might have privately but we have had no indication that that would be the case. Obviously, we have to be satisfied that the bill is within the Parliament's competence when we introduce it and that is what we have sought to do.

As I said, we seek to engage constructively with the UK Government on the matter and I hope that, notwithstanding the technical and complex nature of the legislation, the merits of what you suggest would be widely recognised and would command support from the UK Government. However, I would be happy to keep the committee updated as and when we receive further correspondence from the UK Government on the matter.

The Convener: That would be helpful, thank you. Clearly, there is still some time before stages 2 and 3. Evidence that we have received has suggested that, whether or not the aspect is addressed in the bill, a section 104 order could be made as the bill passes so that there is a full suite of measures to complement the bill rather than a gap.

Tom Arthur: Indeed. I referred to what I hope will be strong political support within the Parliament but there is evidence from the submissions that the committee has received and from wider commentary that there is significant support for the financial instruments to be covered. I hope that the UK Government will recognise that and engage constructively so that we can achieve the aim as soon as possible.

Hamish Goodall: Vuyi Stutley can perhaps confirm this, but I do not think that the section 104 order can be passed until the bill is passed. Is that right, Vuyi?

Vuyi Stutley (Scottish Government): That is correct. On a practical level, a section 104 order has to wait until there is an act in place. That is the way that the legislation is drafted.

The Convener: Thank you.

Bill Kidd (Glasgow Anniesland) (SNP): The way that the registers that would be set up by the bill would operate will not be entirely clear until detailed regulations are made. Is the minister able to give the committee early sight of those regulations, either now or at some point before the stage 1 debate, which is anticipated to take place in the next six or seven weeks?

Tom Arthur: I will not be in a position to provide early sight of the regulations. We must recognise that it is a live bill and it will be for Parliament to determine its final shape, should Parliament be content to pass it. However, we will, of course, consult on the rule making for both of the registers and, given that it would be an exercise of delegated powers, I am happy to keep the committee informed as the consultation and engagement process develops.

Bill Kidd: That makes sense and, therefore, I am not 100 per cent sure whether my next question will fall under the same provisos.

Several stakeholders have called for there to be links between the registers set up by the bill and Companies House. The committee understands that that is being discussed with the UK Government. Will you update us on any progress?

Tom Arthur: We have raised the issue and I am certainly alive to it. I am also conscious of the comments by the keeper of the registers last week when the committee inquired whether there should be provision in the bill to enable joint registration. I am happy to consider that as part of the stage 2 amendments.

Is there any update on engagement with the UK Government, Hamish?

Hamish Goodall: No. We raised the possibility of reciprocal registration when we raised the possibility of the section 104 order. We are still waiting to hear.

Bill Kidd: So we are waiting to hear about that as well. As I said, the stage 1 debate is anticipated to be within the next six or seven weeks, so I was trying to get an idea about whether there was any movement but you are still holding on for that at the moment.

Hamish Goodall: Yes. We are still waiting to hear from the UK Government. Perhaps it is worth adding that the regulations will probably be quite lengthy when they are finally put out to consultation. I understand that the regulations on rules of procedure for the land register extend to around 80 pages. The regulations might not be as bad as that, but we are not talking about something that is short. That will be a significant piece of work.

Bill Kidd: Thank you very much for that. That is useful to know.

The Scottish Government has proposed that updates to the register of statutory pledges—for example, when a statutory pledge is discharged—will be voluntary. Given feedback that creditors will want to minimise the information that is provided to reduce the risk of errors and that the English experience is that creditors are notoriously slow to deal with discharges, do you think that that is a realistic approach?

Tom Arthur: It is clear that there are incentives for those who will use the register to operate it in such a way that it is, in effect, self-regulating.

I will make two points. The register will be a new one, and we want time for it to bed in and to see how it operates in practice. However, the committee will appreciate that there are provisions in the bill to enable ministers to make regulations to address the points of concern that have been raised. At this point in time, my view is that we would want to see how the registers operate in practice and what sort of behaviour there is, but

there is the option of addressing any clogging-up issues that have been highlighted through delegated powers.

Hamish Goodall might want to add to that.

Hamish Goodall: The provision on decluttering the register was thought to be necessary because, although it will not be possible to create a statutory pledge without registering it in the register, there is no compulsion on registering an assignation, a restriction or a discharge of the statutory pledge. There are two reasons for that. First, that is how things are done internationally. Assignations, restrictions and discharges take place off-register. It is thought that, if registering those things was required to be compulsory, that might be a constriction on business.

UK Finance told us that it thought that requiring registration of those things would be unnecessary bureaucracy. However, it went on to say that it thought that commercial pressure would lead to discharges of standard securities being registered in the register on a voluntary basis.

We can think about a new creditor who comes along to give a person a loan on the basis of the collateral of their whisky sitting in a warehouse. If they searched the register of statutory pledges and found out that the person had already granted a statutory pledge over that whisky, they would want to ensure that that statutory pledge had been discharged, otherwise they would not have a first-ranking security over the whisky. Therefore, there will be commercial pressure for discharges to be registered.

Tom Arthur: That speaks to the point about the principal actors who are going to utilise the bill and what their interests will be. Hamish Goodall expanded on the issue in some detail. Fundamentally, it will be in their interests for the approach to be self-regulating. However, as I have said, we have adopted a proportionate approach in which there is the flexibility to intervene if that is required at a later date.

Bill Kidd: Okay. That is understandable.

There is a worry that the register of statutory pledges could stop working effectively if too many out-of-date statutory pledges remained on it. The Faculty of Advocates has proposed that creditors should be able to set the timescale that a pledge can last for when they register it. Is that something that the Scottish Government might be interested in?

Tom Arthur: I am happy to consider all suggestions in detail. Hamish Goodall might have something to add about the engagement with the Faculty of Advocates on that point.

Hamish Goodall: We have not engaged with the Faculty of Advocates on that point. I remember

that I raised the point about timescales and statutory pledges with Professor Steven and Professor Gretton. Professor Steven definitely does not agree with there being timescales; I think that Professor Gretton took the other view.

I do not know whether the timescales are practical, because you could register a statutory pledge and say that it will expire in 25 years, but a person who searched the register would not know whether it had expired—they would not know whether the money had been paid. Therefore, the best approach would be to discharge the pledge.

10:30

Bill Kidd: On the risk that the register could contain inaccurate or out-of-date information about individuals, is there a commitment to introduce a more user-friendly corrections and dispute resolution process?

Tom Arthur: The rules will be set out through regulations. I am interested to see what views the committee comes to in its stage 1 report. There will be consultation and engagement on the rules. It is clear that there is a lot of detail still to come on the operation of the registers, but we want the system to be as user friendly as possible and to command confidence at the same time as being robust. Hamish Goodall might want to add something on that.

Hamish Goodall: The intention is that the registers will be online and automatic. Therefore, to register your assignation or your statutory pledge, all you would need to do is fill in a field on the screen and send in either the assignation document or a copy of the statutory pledge. If you filled in the field correctly, the application would proceed without any intervention from the keeper's staff. If the field was not filled in correctly, the system would automatically reject it. To that extent, the system would be fairly user friendly, and we do not anticipate that there will be huge scope for mistakes and corrections.

Bill Kidd: That makes sense, but people have different ideas about what is user friendly. We have heard evidence that the cost of accessing the register should be set at a level that encourages and enables use by all potential users. Will charges differ for different types of user? People with different income levels or resources might have better options for access if the costs do not vary widely.

Tom Arthur: The costs will be set out through regulations. The cost of using the register must be seen in the broader context of the savings that can be made and the cost benefit of that new option. Any variation in fees would require careful consideration. Ultimately, we want to be in a position where the fees cover the costs of the

operation of the register. Any shortfall would need to be made up from the consolidated fund. Given the challenging fiscal and economic circumstances, we all appreciate that using Government money to intervene to, in effect, subsidise the register would require careful consideration. Hamish, do you want to add to that?

Hamish Goodall: In its business and regulatory impact statement, the Scottish Law Commission, in conjunction with Registers of Scotland, looked at the question of registration and search fees. At that time—in 2017—they were looking at search fees of less than £4 and registration fees of up to £60. By way of comparison, I believe that it costs £80 to register a standard security in the land register. However, they were talking about fees of up to £60 for the registration of both assignations and standard statutory pledges. That is small beer compared with the value of the assets—thousands or, possibly, hundreds of thousands of pounds—that might be the subject of a statutory pledge. It is also small beer in comparison with the costs of expensive legal workarounds that currently have to be undertaken, which we understand sometimes amount to up to £30,000 per transaction.

Bill Kidd: That gives a pointer to the idea that the process is supposed to be more open and accessible than the present arrangements, and for a wider range of people. I thank you very much for that.

The Convener: On the question about register searches, Alan McIntosh recommended in his evidence that money advice operations be given free access to registers. Obviously, that recommendation deals with consumers, which we will go into in a moment. Would you consider that option?

Tom Arthur: Yes. That is what I alluded to in my response to Mr Kidd. I recognise that that point has been raised in evidence to the committee. I come back to the point that the option would have to be considered in terms of affordability and cost, but, as I have said, I am happy to consider it and am keen to see the conclusions that the committee draws.

Oliver Mundell (Dumfriesshire) (Con): Much of the evidence that we have had centres on concerns about consumers. Minister, you said in your opening remarks that you are happy to consider ways of ensuring that the bill does not apply to ordinary household goods. Do you have any idea at this stage about which option you would go with to take such a provision forward?

There is the £1,000 minimum threshold; there is an option to set out in the bill that ordinary household goods would be excluded from

statutory pledges; and there is the possibility of clarifying that the bill would not apply to anyone who is not acting with a business interest. Which of those options should we consider?

Tom Arthur: This is the area of the bill that people would agree is the most contentious, and on which the most commentary has been made and in which wider interest exists.

I recognise the concerns and I take them very seriously. As I said earlier, I met Citizens Advice Scotland and other stakeholders in the money and debt advice sector this past week to hear their concerns directly. They made many similar points to those that the committee heard in oral and written evidence. I am conscious of the broader concerns that have been narrated that the legislation could create an environment that is favourable to high-cost predatory lenders. It is difficult to specify the form that that environment might take, but the concern is based on those organisations' professional experience and institutional knowledge. I want to be clear that I take that concern seriously. We all agree that we absolutely do not want to see emerge, as an unintended consequence of the bill, the creation of an opportunity for those who have been described as high-cost predatory lenders.

As Mr Mundell suggested, one option is the removal of what has been defined as the application to consumers, although the bill does not make specific reference to consumers but, rather, to individuals. There is a particular point about clarifying certain protections in relation to the statutory pledge, too. I am content to consider those options. I appreciate that I have made this point a few times, but I stress that I am keen to see, and will be informed by, the conclusions of the committee's deliberations.

It is important to recognise that, if we were to seek to effect that aspirational removal of individuals or "consumers" from the bill, there would have to be careful consideration of how that could be done in the drafting.

There is also a specific issue, which the FSB raised, with regard to individuals and sole traders, particularly on access to finance. There would need to be careful consideration of that.

I am conscious that, as we seek to prevent potential risks, we must not generate unintended consequences that would limit the impact and policy objective of the bill, which is about opening up financing opportunities to businesses of all sizes, particularly those that want to grow but that do not have any heritable property and that would rely on using moveable property as collateral.

On the option that you articulated, in which individuals would still be able to make use of the statutory pledge but there would be certain

additional protections, we would certainly look at increasing the monetary threshold if that is where we land. I recognise that £1,000 has been described as a placeholder figure; it dates to 2017 and the amount should be increased. If the committee has any particular views on what the amount should be, I would be keen to hear them. If that is the scenario that ultimately prevails, we must set an amount that precludes the possibility of household goods being used as collateral for a statutory pledge.

Oliver Mundell: I am sensitive to the number of representations that have been made and the seriousness with which the issue is taken by the organisations that you have referenced and the individuals from whom the committee has heard. Given that the issue has come out since the bill was introduced and probably was not anticipated, would you be open to adding reassurance by saying in the bill that it is not intended to cover ordinary household goods, as well as by having the higher threshold? That might give those organisations a sense of reassurance.

Tom Arthur: I take your point. The point that I was coming to is that there is an option in which, in addition to increasing the monetary threshold, we have a prescribed list of goods—similar to the law concerning attachment—that would be exempt from being used as collateral. I should also note that there are regulation-making powers in the bill as drafted to effect outcomes.

Oliver Mundell: The worry with that is that we would play a game of cat and mouse, with the predatory lenders moving and the Government adding things to the list or making new regulations. If there was reassurance up front that a certain category of goods would be excluded, that would probably remove the fear that is out there.

Tom Arthur: I take the point that you seek reassurance by having something put in the bill. However, I am sure that you would agree that the additional provision of regulation-making powers is important to keep pace with any developments that we might not have anticipated. That is another scenario.

I am conscious of the written evidence that the committee has received in recent days, including from Professor Steven. We need to carefully consider how the bill interacts with existing consumer protection regulation—the Consumer Credit Act 1974 being one example. We are absolutely clear on what the potential risks are, and we recognise that there are protections that sit in other legislation or regulatory regimes that operate in wider legal structures, although that might not be explicit in the bill.

Do you want to add anything, Hamish?

Hamish Goodall: I would add that it is unlikely that lenders would be interested in ordinary household goods as collateral for loans, simply because ordinary household goods depreciate in value very quickly—therefore, they would not be of much use as collateral.

10:45

Tom Arthur: The point that I take from the evidence provided by those working in the advice sector is one about risk, and the technical term that I would use is the Rumsfeldian definition of “known unknowns”. We can assume that, in the high-cost creditor lending market, there will always be those who look for opportunities to exploit any loopholes in the law, and we have to be informed by that risk when we are drafting legislation. That is why it is important that we take a considered and careful approach to properly understand and quantify the risk, to the greatest possible extent, recognising that sometimes we can only go so far, and that we should value the constructive input from those in the advice sector, which is based on their professional experience and what they sense to be the potential risks. We need to consider that carefully and consider all the safeguards that we have discussed and, indeed, what other safeguards exist in different legislation.

It is a crucial area and it is absolutely important that we get it right. I will certainly reflect carefully on all the evidence that you have received, and I very much look forward to reading the committee’s considerations on the matter when you publish your stage 1 report.

Oliver Mundell: I have a final question on the £1,000 figure. You said that you will be interested to hear what the committee thinks. We would be interested to hear what you are thinking and what consultation you have done with stakeholders to form a Government view on what would be an appropriate figure. We have heard a variety of figures and we would be interested to know whether you have come to a view on what would be an appropriate amount for the register and other things.

Tom Arthur: I have not reached a settled view, but my reflections are consistent with those of everyone else who has engaged with this argument. Is there a point where, particularly given the provisions on the statutory pledge for individuals, there has to be a list of specific items rather than a category of goods? Is there a situation that arises where we increase the threshold to such an extent that the statutory pledge is no longer a realistic option for any individual who would be seeking to use it? I am also conscious that there is a particular focus on motor vehicles being a potentially high-value good that individuals own.

I have not settled on a particular amount. I am conscious of the £3,000 figure in the regulations and the Debt Arrangement and Attachment (Scotland) Act 2002, but I would want to give the matter further consideration. To say any particular amount at the moment would be somewhat arbitrary. Yes, we can have reference to the £3,000 figure in other legislation, but I want to give the matter fuller consideration.

In addition, any increase in the threshold would have to be considered in relation to any list of items that are excluded, as there would be an interaction there.

I want to give the matter further consideration. Although I have not given you a number, I hope that, in that answer, I have been able to demonstrate some of what I am wrestling with and thinking through, in a similar way to what the committee and other stakeholders have been doing, I would hope.

Oliver Mundell: That is helpful. Ultimately, we will have to arrive at a number if we proceed with the bill as it is currently drafted.

Paul Sweeney (Glasgow) (Lab): Inevitably, the minimum threshold will be a somewhat arbitrary figure, although modelling can be undertaken on, for example, the basket of typical household goods, which could assess the debt loadings that a typical household might take out on consumer goods.

One remedy that we have been considering is the inclusion of an automatic deflator in the legislation. In the context of the current high-inflation environment, the figure that would eventually be arrived at would automatically adjust to the retail price index or consumer price index, over time. Secondary legislation would not be required to uprate the amount, which would inevitably lag behind reality. Would the Government give consideration to that?

Tom Arthur: I would be happy to reflect on that. As you highlighted in your question, there are two approaches: either we develop an automatic mechanism or we have periodic uprating that would be effected by statutory instrument. However, with regard to an automatic instrument there would be a wider range of considerations on matters such as its design and its reference to other statistics—for example, the RPI, which you mentioned. I would be happy to consider the matter in general and to come back to the committee on it in my response to its stage 1 report.

Paul Sweeney: You mentioned the difficulty in defining sole traders. It has been indicated that a couple of pieces of existing legislation—the Consumer Scotland Act 2020 and the 1974 act—include such a definition. A good example of

where there might be difficulty is when a motor vehicle is used both as a family car and a taxi. Have you considered what remedies there could be in such a situation, and how we could better protect such traders? The FSB said that if consumers were to be carved out, that could exclude people who are raising finance who are sole traders or early start-up businesses. On the other hand, we have seen examples in which the seizure of business-critical equipment destroyed a business overnight simply because a particularly aggressive lender decided to close in on it. Have you considered how that balance could be better struck?

Tom Arthur: I am giving active consideration to that, at the moment. I cannot yet offer you a model of what such a balance would look like—it is the subject of live discussion. I take your point about early start-ups, sole traders and microbusinesses, where the lines between individual use and business use of property can be vague and hard to define. From reflection on my own professional background in music before I entered politics—I am sure that the convener will empathise with this example—it is clear to me that a musical instrument can be for both personal and professional use. I am not saying that that is the best example. However, it is an area for consideration, particularly in respect of people who are establishing themselves in business. Reference was made to a vehicle that could be for both personal and business use. It can be hard to distinguish between the two.

I recognise the points that have been made by the FSB. We would not want there to be an unintended consequence whereby, in seeking to afford consumers greater protection, we disapplied the bill's provisions to businesses—especially start-ups with a high concentration of moveables that they cannot use as collateral. We want to avoid that. That needs to be given careful consideration, so we are actively doing that.

Hamish Goodall might want to add to that, or Vuyi Stutley might want to come in with her reflections on those points.

Vuyi Stutley: One point to make is that there are protections in the bill, even without our knowing exactly what any carve-outs for sole traders might look like. One would hope that the existing protections on enforcement would continue to apply to them in the future.

Hamish Goodall: I add that, last week, Colin Borland of the Federation of Small Businesses told the committee that, from its perspective,

“one of the ... advantages here is that we will be opening up a form of finance to unincorporated bodies, which is definitely a major prize”.—[*Official Report, Delegated Powers and Law Reform Committee, 25 October 2022; c 13.*]

Therefore, we definitely need to avoid stymieing the ability of microbusiness, businesses that have just started up and sole traders to raise finance.

Paul Sweeney: On that, inevitably we will come upon distressing situations in which a small business start-up might have overleveraged or might have a particularly aggressive lender that is seeking to cause destruction. That happened quite commonly after the credit crunch. A particularly egregious example was RBS, which destroyed many businesses. Had a more patient approach been taken, we could have had far more success and resilience in our economy.

It has been highlighted that a lender would not need a court order in order to seize items that had been pledged by a sole trader or a small business even if they had missed only one payment. In a cash-flow situation that was caused, for example, by a spike in energy bills such as we are seeing at the moment, a business might have to defer payment, but that could destroy the business overnight. Will the Government consider strengthening the position? Will there be a safeguard in the legal system, at least to allow for pleas to be made about the circumstances, before a lender is allowed to arrest property that could be critical to a business?

Tom Arthur: I am happy to reflect on that. I will also take away the questions of definitions and to which particular category of business the protection would apply. Of course, businesses of all sizes can get into financial distress. We see examples of larger businesses that have declined and failed, and of smaller businesses that have been very resilient, nimble and fleet of foot. However, I acknowledge the general point about the particular risk and exposure that are faced by small businesses when they are still just saplings on the forest floor.

The protections in the bill as they apply to individuals with regard to a statutory pledge could, for example, inhibit a small business that would, perhaps, prefer to pledge a category of asset rather than to pledge specific assets, so that it could maximise what it can raise in finance. In seeking to protect small early-stage microbusinesses and sole traders, a careful balance would be needed to ensure that we do not, as the FSB suggested, risk doing anything that would stymie access to finance.

Paul Sweeney: It is helpful to know that the Government is alive to the issue. We will obviously work through it, in due course.

I will touch on a particular issue that the committee has highlighted before, and which touches on the discussions that we have had about motor vehicles, as an area of particular focus. In its delegated powers report on the bill,

the committee recommended that in relation to section 53(8), on acquisition in good faith of motor vehicles, instruments should be subject to affirmative procedure. The Government suggested in its response to the committee's letter on that power that it is open to changing that at stage 2. Is that still the case?

Tom Arthur: Yes—I am happy to consider that.

Paul Sweeney: That is welcome.

I will also touch on a matter that was raised by the Govan Law Centre in relation to particular sections of the bill. In his evidence to the committee, Mr Dailly raised concerns about section 63, which entitles a creditor to serve a pledge enforcement notice on a debtor if payment has not been made; and about section 65, which enables an authorised person such as a sheriff officer to enter someone's home to remove moveable goods that are the subject of statutory pledges under section 66.

Mr Dailly's interpretation is that that would give a creditor the rights to sell someone's moveable goods at public auction and could lead to the emergence of what he characterised as a "virtual pawnbroking" scenario. That has been disputed by others—notably, the Scottish Law Commission, which was involved in drafting the bill.

What is the take of the minister and his colleagues on the Govan Law Centre's highlighting of those sections of the bill as representing a risk that there will be the unintended consequences that have been described? Do those sections of the bill need to be further investigated?

Tom Arthur: I am always keen to reflect on evidence that is given. As has been touched on, for security to be effective in relation to default, there has to be a means of acquisition of the asset. Clearly, the provisions are fairer and more consistent with provisions elsewhere within diligence. However, I want to give the issue careful reflection.

I am conscious of comment from Professor Steven that the committee received in correspondence—in particular, on the evidence that the committee received at the start of October. I will consider that carefully and look at the committee's report.

To clarify, I say that I understand that protections exist by dint of other legislation—for example, the 1974 act. Perhaps Hamish Goodall wants to come in.

Hamish Goodall: To make it absolutely clear, I add that, in relation to section 66, the secured creditor's right to sell will apply only to the asset that is the subject of the statutory pledge; it will not apply to any other property of the debtor. I think

that the allegation was made that we would have sheriff officers going into people's houses and basically lifting anything that they wanted to lift, as they might under a warrant sale. That will not be the case: section 66 relates only to the asset that is subject to the statutory pledge.

11:00

Paul Sweeney: That is helpful clarification. The scenario that was painted was of a Bighthouse type situation in which there would almost be adverts with prices on every item of household goods and people could cash in and liquidate assets without having to take them from the home. That suggestion was made in the context of there being distressed household finances across the country and its possibly being a tempting proposition. It is helpful that the Government has indicated that it is willing to look at the carve-out for consumers.

I am happy to rest there, convener. I appreciate your indulgence.

The Convener: That is no problem.

Jeremy Balfour has questions.

Jeremy Balfour: I will close with two technical questions.

The legislation was drafted before the Covid pandemic, and contains a requirement on use of electronic signatures. You might have heard the concern that people will have to have a particular type of software if they are to do that in the way that is suggested in the bill. Now, post-Covid, electronic signatures can be done much more easily than by using that software. That would particularly affect small businesses, which might not have that software. That is quite a technical issue, but we might need to look at how the provision is drafted.

Tom Arthur: Hamish—do you have an answer?

Hamish Goodall: I think we should ask our legal colleagues about that.

Vuyi Stutley: We can take that question away and get back to the committee in writing.

Jeremy Balfour: That is helpful. Thank you.

You might have seen that one respondent to the committee's call for views on the bill called for agricultural charges to be reformed rather than abolished. Have you reflected on that?

Hamish Goodall: That recommendation came from the Scottish Law Commission. It is not something that we have considered, but we can take another look at it.

Tom Arthur: I am happy to look at the evidence that you received. The bill that we introduced reflects the recommendations of the SLC.

Jeremy Balfour: On both those points, if we were to get a response before the stage 1 report comes out and before the Parliament debate takes place, that would be helpful and would allow us to reflect. If you could do that by correspondence, that would be helpful.

Tom Arthur: Absolutely: I would be happy to do that.

Jeremy Balfour: Thank you.

The Convener: Do members have any other questions for the minister or his team?

Minister—I thank you and your colleagues for appearing today. I have one request. We will produce our stage 1 report and the Scottish Government will reply to it. You have touched a couple of times on the existing legal protections. Following today's discussion, it would be useful if the reply to the stage 1 report could highlight where you feel the legal protections exist and where there might be gaps where protections do not exist.

Tom Arthur: I would be happy to do so. I also make the point that the legal protections apply to the bill as drafted. I would be happy to discuss potential amendments and ways in which the bill could be changed. I am happy to keep the committee informed of any decisions that the Government makes ahead of stage 2 and about how any changes would relate to the broader protections that are available.

The Convener: That would be helpful. Jeremy Balfour also asked about the possible section 104 order. If there is any update or correspondence about that from the UK Government, it would be helpful if you could inform the committee.

I thank the minister and his officials for their evidence. The committee might follow up by letter with additional questions.

11:04

Meeting suspended.

11:08

On resuming—

Instruments subject to Affirmative Procedure

The Convener: Under item 3, we are considering two instruments, on which no points have been raised.

Police Act 1997 (Offences in Schedules 8A and 8B) Amendment (Scotland) Regulations 2022 [Draft]

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment (No 2) Order 2022 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

11:09

The Convener: Under item 4, we are considering two instruments. An issue has been raised on the following instrument.

Scottish Child Payment (Saving Provisions) Regulations 2022 (SSI 2022/302)

The Convener: The instrument makes savings provisions in connection with the amendments that will be made by the Social Security (Miscellaneous Amendment and Transitional Provision) (Scotland) Regulations 2022 to the Scottish Child Payment Regulations 2020.

The savings provisions will ensure that the higher weekly rate of the Scottish child payment of £25 applies only to periods of entitlement that fall on or after 14 November 2022, and that an individual's entitlement to a double payment where a child dies does not apply where the child in question dies before 14 November 2022.

In correspondence with the Presiding Officer, the Scottish Government explained that, following an issue having been identified, it was necessary to breach the 28-day rule so that the savings provisions will come into force at the same time as the substantive provisions. That will ensure that the policy intent is delivered, and it will prevent there being a gap between the substantive changes to the law and the coming into force of savings provisions on a later date.

Under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, instruments that are subject to the negative procedure must be laid at least 28 days before they come into force, not counting recess periods of more than four days. The instrument breaches that requirement, as it was laid on 26 October 2022 and will come into force on 14 November 2022.

Does the committee wish to draw the instrument to the attention of Parliament on reporting ground (j), for failure to comply with laying requirements? At the same time, does the committee wish to note that the instrument makes necessary savings provisions in order to give full effect to the Social Security (Miscellaneous Amendment and Transitional Provision) (Scotland) Regulations 2022?

Members *indicated agreement.*

The Convener: Also under this item, no points have been raised on the following instrument.

**Town and Country Planning
(Miscellaneous Amendment) (Scotland)
Regulations 2022 (SSI 2022/286)**

11:11

Meeting continued in private until 12:23.

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@parliament.scot



The Scottish Parliament
Pàrlamaid na h-Alba