

## Bankruptcy (Scotland) Bill

### Drafter's Notes

#### General

- 1 This Bill consolidates the Bankruptcy (Scotland) Act 1985 (c.66) (referred to in these notes as “the 1985 Act”) and subsequent legislation on, or linked to, the topic of bankruptcy.
- 2 Almost all the law proposed for consolidation is in fact already contained in the 1985 Act because any changes have, more or less consistently (though in stylistically diverse ways), been made by textual amendment. The principal amending statutes were—
  - the Bankruptcy (Scotland) Act 1993 (c.6),
  - the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) (referred to in these notes as “the 2007 Act”), and
  - the Bankruptcy and Debt Advice (Scotland) Act 2014 (asp 11) (referred to in these notes as “the 2014 Act”).
- 3 The existing Scottish law of Bankruptcy is therefore essentially the Bankruptcy (Scotland) Act 1985 as textually amended by other legislation. But if that is the case it might be asked why we need the consolidation at all. That question is addressed in paragraphs 6 to 12 of these notes.
- 4 In May 2013 the Scottish Law Commission laid before the Scottish Parliament a Report on the *Consolidation of Bankruptcy Legislation in Scotland* (Scot Law Com No. 232). In that Report (referred to in these notes as “the Report”) they made 38 recommendations, almost all of which were given effect to in the 2014 Act<sup>1</sup>; but the draft Bill appended to the Report (as Appendix 2, and referred to in these notes as “the 2013 Bill”) was not itself introduced.
- 5 It is intended that the current Bill will be a straight consolidation (that is to say, a Bill which restates the law but does not change it). References to the Report therefore are included for their relevance to the history of the present law of Bankruptcy and not with any suggestion that they require to be reconsidered.
- 6 The subsequent legislation referred to in paragraph 1 of these notes includes the substantive provisions of the Protected Trust Deeds (Scotland) Regulations 2013 (S.S.I. 2013/318) (referred to in these notes as “the PTD Regulations”). Such inclusion was recommendation 38 of the Report. As the Commission said in putting the recommendation forward “the law concerning Protected Trust Deeds....is a complex body of law entirely appropriate to primary legislation and....much too important to be relegated to subordinate legislation”.

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<sup>1</sup> **SLC recommendation 1** (for the expression “right or interest” in the 1985 Act to be shortened simply to “right”) was implemented by the 2014 Act in relation only to ss.32(6), 34(4) and 36(5) of the 1985 Act. Because of concerns expressed by practitioners and others as to possible uncertainties in certain contexts it was not however implemented in relation to ss.39A and 40 of the 1985 Act. **SLC recommendations 34 and 35** fell with the repeal, by section 18(3) of the 2014 Act, of section 56 and schedule 4 of the 1985 Act (provisions which related to the discharge of a debtor by virtue of an offer of composition made by or on behalf of the debtor and placed before creditors). **SLC recommendation 38** is relevant to the scope of this consolidation, as explained in paragraphs 6 and 7 of these notes.

- 7 The schedule of those regulations (30 pages of forms to be used in connection with protected trust deeds) is on the other hand very much the stuff of subordinate legislation and is therefore not restated in the Bill. Protected trust deeds forms will continue to be prescribed by regulations subject to the affirmative procedure.
- 8 It is not thought necessary or apt, in the present consolidation, to upgrade to primary legislation any other provisions of subordinate legislation<sup>2</sup>.
- 9 As the Commission also said (at paragraph 1.1 of the Report): “[the 1985 Act] has been so heavily amended, on so many occasions, that it has lost coherence and rational structure. Many of its provisions (whether sections, subsections or paragraphs) are inordinately long, and numbering has become complex and unwieldy.” By way of example, section 5 of the 1985 Act currently has 29 subsections, the sequence of numbers being (1), (2), (2ZA), (2ZB), (2ZC), (2ZD), (2ZE), (2B), (2C), (2D), (2E), (2F), (3), (4), (4A), (4AA), (4AB), (4B), (4BA), (5), (6), (6A), (6B), (7), (7A), (8), (8A), (9) and (10). It is proposed, in the Bill, to partition all the material of those subsections between nine sections. A further example is section 29 of the 1985 Act which currently has 24 subsections. In this case the sequence of numbers is at least a bit simpler: (1), (1A), (2), (3), (3A), (3B), (3C), (4), (5), (6), (6A), (6B), (6C), (6D), (6E), (6F), (6G), (6H), (6I), (6J), (7), (8), (9) and (10). It is proposed, in the Bill, to split section 29 into six sections.
- 10 The sections of the 1985 Act go from 1 to 78 but currently there are 170 of them, the sequence of numbers in this case being 1, 1A, 1B, 1C, 1D, 2, 3, 3A, 4, 4A, 4B, 4C, 4D, 5, 5B, 5C, 5D, 6, 6A, 6B, 7, 8, 8A, 9, 10, 10A, 11, 11A, 11B, 12, 13, 13A, 13B, 14, 15, 16, 17, 17A, 17B, 17C, 17D, 17E, 17F, 17G, 18, 19, 20, 20A, 21A, 21B, 22, 23, 24, 25, 25A, 25B, 26, 26A, 27, 28, 28A, 28B, 29, 30, 31, 31ZA, 31A, 31AA, 31B, 31BA, 31C, 32, 32A, 32B, 32C, 32D, 32E, 32F, 32G, 32H, 33, 34, 35, 36, 36A, 36B, 36C, 36D, 36E, 36F, 37, 38, 39, 39A, 40, 41, 41A, 42, 43, 43A, 43B, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 53A, 54, 54A, 54B, 54C, 54D, 54E, 54F, 54G, 55, 55A, 55B, 56, 56A, 56B, 56C, 56D, 56E, 56F, 56J, 57, 58, 58A, 58B, 58C, 58D, 59, 59A, 59B, 59C, 60, 60A, 60B, 61, 62, 63, 63A, 63B, 63C, 64, 65, 66, 67, 68, 69, 69A, 70, 71A, 71B, 71C, 72, 72ZA, 72A, 73, 74, 75, 76, 77 and 78.
- 11 The Bill broadly follows, both in structure and in wording, the 2013 Bill but with the inclusion of—
- the considerable body of new provisions supplied by the 2014 Act (including provisions which already give effect to almost all the recommendations contained in the Report), and
- the substantive provisions referred to in paragraph 2 above.
- 12 In consequence of those inclusions and of breaking up (wherever it appears helpful to do so) provisions carried forward from the 1985 Act, the 151 sections of the 2013 Bill have become the 238 sections presently offered for the Committee’s consideration.
- 13 At a few places in the Bill (as for example at section 77(7)(a) which relates to the authorisation of a person by a creditor to represent the creditor at a meeting and at section 101(4) which relates to the meaning of the expression “the 1999 Act” in one Part only of the Bill) readers are referred to relevant provisions of the Bill. These references are intended only to assist and are not intended to have any legal effect. They are preceded in recent Acts (though they have no equivalent in the 1985 Act itself).

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<sup>2</sup> See paragraphs 36 to 43 of the Background Paper provided to the Delegated Powers and Law Reform Committee.

## Notes on particular provisions

### *Long Title:*

- 14 The inclusion of the words “to consolidate” in the Long Title make it clear that, in the event of any uncertainty as to the meaning of a provision of any Act resulting from this Bill, a court construing the provision may have recourse to the provision of the 1985 Act (or other enactment) from which it was derived, the presumption being that there was no intention to change the law.

### *Section 1: sequestration*

- 15 Section 1 of the Bill restates section 5(1) of the 1985 Act. The 1985 Act begins with questions of administration (sections 1 to 4) and proceeds from there to the matter of moratoria on diligence (sections 4A to 4D) before going on (beginning at section 5 which is actually, because of insertions, that Act’s fourteenth section) to deal with the sequestration process itself. In contrast, in section 1 of the Bill we are immediately into the sequestration process, putting aside such other matters until considerably later. Sections 1 to 1B of the 1985 Act are, for example, restated in sections 199 to 201 of the Bill.

### *Section 3: debt advice and information package*

- 16 Section 3 of the Bill restates and (by relying on the definition of “debt advice and information package” in section 228(1) of the Bill) condenses section 5(2D) and (2E) of the 1985 Act. This is just one contribution to breaking up and simplifying what is a very large section: (see paragraph 9 of these notes).

### *Section 6: sequestration of other estates*

- 17 Section 6(2)(b) of the Bill restates section 6(2)(b) of the 1985 Act. The latter provision was amended by paragraph 6(a) of schedule 3 of the 2014 Act so as to implement recommendation 4 of the Report (for it to be expressly stated that it was not competent to sequester the estate of a limited liability partnership).

### *Section 7: qualified creditor and qualified creditors*

- 18 Section 7(1) to (3) of the Bill restates the very long (at 146 words) section 5(4) of the 1985 Act. This is a further contribution of the kind mentioned in paragraph 16 of these notes.
- 19 Given the provisions of section 22 of the Interpretation and Legislative Reform (Scotland) Act 2010 (that is to say, that “words in the singular include the plural” and “words in the plural include the singular”) it might at first sight seem odd to have separate definitions of “qualified creditor” and “qualified creditors” but of course the important point being made at section 7(1) of the Bill is that, where there is more than one creditor, they do not each have to be owed at least £3,000 (or that sum as updated at some future time). It is enough that their debts amount in aggregate to at least that amount.

*Section 8: Debtor applications: general*

- 20 In section 8(1) of the Bill, which restates section 5(4B) of the 1985 Act, is the Bill's first mention of the Accountant in Bankruptcy. That officer is referred to throughout the Bill and therefore the well preceded abbreviation "AiB" is used. Both "AiB" and "Accountant in Bankruptcy" are defined, with other terms, in section 228(1) (interpretation) of the Bill.

*Section 16: meaning of "apparent insolvency"*

- 21 Section 16 of the Bill restates section 7 of the 1985 Act.
- 22 Subsections (1)(e) to (h) and (2) of section 16 restate subsections (1)(c) to (cc) and (1A) of section 7. Paragraphs (c) to (cc) were substituted (for an earlier paragraph (c) in section 7(1)) by paragraph 7(a) of schedule 3 of the 2014 Act and subsection (1A) was inserted in section 7 by paragraph 7(b) of that schedule, the substitution and insertion being to implement recommendations 5 (relating to the meaning of "apparent insolvency") and 30(a) (for the omission of a provision left in place inadvertently) of the Report.
- 23 Subsections (4) and (5) of section 16 restate subsection (3) of section 7, a subsection which was amended by paragraph 7(c) of schedule 3 of the 2014 Act so as to implement recommendation 6 of the Report (for the inclusion of a reference to apparent insolvency being constituted anew in relation both to partnerships and to unincorporated bodies).

*Section 22: when sequestration is awarded*

- 24 Section 22 of the Bill restates section 12(1), (1B), (2), (3) and (4) of the 1985 Act.
- 25 In subsection (5) of section 22, the rather old-fashioned word "forthwith" is retained because its precise meaning, in the context of what is an important provision, is contentious, with different sheriffs taking different views in the matter. Continuations of longer than 42 days are apparently not uncommon and the meaning of "forthwith" has been considered in a surprisingly large number of cases<sup>3</sup> and articles<sup>4</sup>. To resolve a current legal debate by introducing a new expression would, in this instance, be to change the law (by introducing certainty where there is none at present) and however desirable that might seem it is not appropriate in a straight consolidation.
- 26 For consistency "forthwith" is also retained in the less contentious subsections (1) and (2) of section 22.
- 27 Subsection (7)(b) of section 22 restates section 12(4)(b) of the 1985 Act. The latter provision was amended by paragraph 9(b) of schedule 3 of the 2014 Act so as to implement recommendation 7 of the Report (for an adjustment to clarify the meaning of the expression "the date of sequestration" in the 1985 Act).

<sup>3</sup> See for example: *Royal Bank of Scotland plc v. Forbes* 1987 SC 99; *Bank of Scotland v. Mackay* 1991 SLT 163; *Sales Lease Ltd. v. Minty* 1993 SLT (Sh. Ct.) 52; and *Customs and Excise Commissioners v. Zaoui* 2001 SLT (Sh.Ct.) 197.

<sup>4</sup> See for example: "'Forthwith' and avoiding sequestration" 1995 SLT 19; and "'Forthwith' and avoiding sequestration": some observations" 1995 SLT 151-155.

*Section 24: effect of sequestration on diligence generally*

- 28 Section 24 of the Bill restates subsections (1) to (5A) of section 37 of the 1985 Act. It does not however restate subsection (6) of that section. That is because (subject to savings not relevant to the Bill) subsection (6) is spent by virtue of section 58(1) of the Debt Arrangement and Attachment (Scotland) Act 2002, which provides that it is not competent to enforce payment of a debt by poinding or warrant sale.

*Section 26: registration of warrant or determination of debtor application*

- 29 Section 26 of the Bill restates section 14 of the 1985 Act.
- 30 Subsection (1) of section 14 was amended by paragraph 11 of schedule 3 of the 2014 Act so as to implement recommendation 8 of the Report (for clarification of a duty placed on the sheriff clerk in relation to the registration of a warrant citing the debtor to appear before the sheriff).
- 31 It is to be noted that paragraph (c) of section 26(1) of the Bill stands despite the omission provided for in regulation 19(3)(b) of the Debt Arrangement Scheme Regulations 2013 (S.S.I. 2013/225)<sup>5</sup>. In that regard see recommendation 30(b) of the Report (for the omission of one of two paragraphs which inadvertently duplicate each other).
- 32 Section 48 of the 2014 Act implemented recommendation 11 of the Report (for the correction of an anomaly) in substituting new subsections for subsection (4) of section 14.

*Section 27: further matters in relation to award of sequestration*

- 33 Part 5 of the Courts Reform (Scotland) Act 2014 replaces appeals to the Sheriff Principal with appeals to the Sheriff Appeal Court. Section 27(3) of the Bill, which restates section 15(2A) of the 1985 Act, is accordingly framed by reference to that court but otherwise retains the appeal structure of the 1985 Act.

*Section 30: recall of sequestration by sheriff*

- 34 Section 30 of the Bill restates section 17 of the 1985 Act.
- 35 Subsection (2) of section 17 was amended by paragraph 14(a) of schedule 3 of the 2014 Act so as to implement recommendation 12 of the Report (for clarification of an anomalous provision) and is restated as subsection (3) of section 30.
- 36 Subsection (3)(a) of section 17 was amended by paragraph 14(b) of that schedule so as to implement recommendation 13 of the Report (for account to be taken of the situation where no interim trustee has been appointed) and is restated as subsection (5)(a) of section 30.
- 37 And subsection (8)(b)(ii) of section 17 was amended by paragraph 14(c) of that schedule so as to implement recommendation 14 of the Report (for clarification of an anomalous provision) and is restated as subsection (9)(b)(ii) of section 30.

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<sup>5</sup> The extant section 14(1)(c) was inserted by paragraph 1 of schedule 2 of the Debt Arrangement Scheme Regulations 2011 (S.S.I. 2011/141).

*Section 38: effect of recall of sequestration*

- 38 Subsections (3) and (4) of section 17D of the 1985 Act duplicate subsections (4) and (5) of section 17 of that Act. Accordingly section 38 of the Bill suffices to restate both. And with section 38 set out as a free-standing section of general application, no equivalent is then needed for subsection (7) of section 17E of the 1985 Act. Note that a correction slip has confirmed that subsection (7) begins “Subsections (3) and (4) of section 17D apply....” and not (see section 27 of the 2014 Act as first printed) “Subsections (2) and (3) of section 17D apply....”.

*Section 39: interim preservation of estate*

- 39 Section 39(2)(h) of the Bill restates section 18(2)(h) of the 1985 Act. There is an ambiguity in the latter provision. Do the words “in so far as it is necessary for the interim trustee to do so to safeguard the debtor’s estate” qualify both the carrying on of the business of the debtor and the borrowing of money or do they qualify only the latter? To resolve that ambiguity would be to change the law and accordingly the ambiguity itself must be consolidated and the wording of section 18(2)(h) adhered to in section 39(2)(h).

*Section 42: duties on receipt of list of assets and liabilities*

- 40 Section 42(1) of the Bill restates section 20(1) of the 1985 Act. The latter provision was amended by paragraph 15 of schedule 3 of the 2014 Act so as to implement (in part) recommendation 15 of the Report (for a statement as to the debtor’s assets to be required only in certain circumstances).

*Section 48: proceedings before trustee vote*

- 41 Section 48(4)(d) of the Bill restates section 23(3)(c) of the 1985 Act. The latter provision was amended by paragraph 16 of schedule 3 of the 2014 Act so as to implement (in part) recommendation 15 of the Report.

*Section 58: termination of Accountant in Bankruptcy’s functions as interim trustee where not appointed trustee*

- 42 Section 58(4)(b) of the Bill restates section 13B(4)(b) of the 1985 Act. Section 13B(4)(b) was amended by paragraph 10(a) of schedule 3 of the 2014 Act so as to implement recommendation 9 of the Report (for the correction of an erroneous reference).
- 43 Section 58(5)(d) of the Bill restates section 13B(5)(c) of the 1985 Act. 13B(5)(c) was amended by paragraph 10(b) of that schedule so as to implement recommendation 10 of the Report (for the correction of an erroneous reference).

*Section 60: appointment of replacement trustee*

- 44 Section 60(3)(b) of the Bill restates section 25(3)(b) of the 1985 Act. The latter provision refers to “[an objection] by making a summary application to the sheriff”. However rule 1.4 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) S.I. 1999/929) says that, unless otherwise provided, any application or appeal to the sheriff is to be by way of summary application, so the words “making a summary” are otiose in section 25(3)(b) and are therefore omitted in section 60(3)(b).

*Section 61: procedure in application to Accountant in Bankruptcy under section 60*

- 45 Section 61(8) of the Bill restates section 25A(8) of the 1985 Act. The latter provision states that “The trustee, the objector and any other interested person may by summary application appeal to the sheriff against [certain decisions]”. For the reason given in paragraph 44 of these notes, the words “by summary application” are otiose in section 25A(8) and are therefore omitted in section 61(8).

*Section 63: termination of original trustee’s functions*

- 46 Section 63(2) of the Bill restates section 26(1) of the 1985 Act. The latter provision was amended by paragraph 17 of schedule 3 of the 2014 Act so as to implement recommendation 16 of the Report (for the correction of an anomaly).

*Section 65: discharge of original trustee*

- 47 Section 65(7) to (9) of the Bill restates section 27(4) of the 1985 Act. The latter provision was amended by section 40(2)(b) and paragraph 18 of schedule 3 of the 2014 Act in ways which take due account of recommendation 17 of the Report (for the rewording and clarification of provisions relating to the discharge of an original trustee).

*Section 75: further provision as regards election or appointment of new trustee*

- 48 Section 75 of the Bill restates (in part) section 29(8) of the 1985 Act. The latter provision was amended by paragraph 19 of schedule 3 of the 2014 Act so as to implement recommendation 18 of the Report (for a sheriff’s decision, on any appeal under section 28(7) of the 1985 Act as that Act applied for the purposes of section 29, to be final just as it was on any other appeal under section 28(7)).

*Section 86: further provision as regards vesting of estate*

- 49 Section 86(13) of the Bill restates paragraph (ii) of the proviso to section 32(6) of the 1985 Act. That paragraph was amended by schedule 4 of the 2014 Act so as to implement (in part) recommendation 1 of the Report (see footnote 1 of these notes).

*Section 98: gratuitous alienations*

- 50 Section 98(7) of the Bill restates the proviso to section 34(4) of the 1985 Act. That proviso was amended by schedule 4 of the 2014 Act so as to implement (in part) recommendation 1 of the Report (see footnote 1 of these notes).

*Section 99: unfair preferences*

- 51 Section 99(7) of the Bill restates the proviso to section 36(5) of the 1985 Act. That proviso was amended by schedule 4 of the 2014 Act so as to implement (in part) recommendation 1 of the Report (see footnote 1 of these notes).

*Section 103: orders under section 101: supplementary*

- 52 Section 103 of the Bill restates section 36C of the 1985 Act. Despite the transfer of functions effected by section 53 of the Scotland Act 1998, the Secretary of State retains (by virtue of head F3 of schedule 5 of that Act) the power to make provision by regulations about the calculation and verification of certain values and amounts relevant to the recovery of excessive pension contributions. That power is set out in subsection (4) of section 103. The procedure in the Houses of Parliament for such regulations is not however restated in the Bill but is intended to be restated instead in an order under section 104 of the Scotland Act 1998.

*Section 106: recovery orders: supplementary*

- 53 Section 106 of the Bill restates section 36F(1) to (7) of the 1985 Act. It does not restate section 36F(8) which, since it relates solely to procedure in the Houses of Parliament for regulations by the Secretary of State as regards recovery orders relating to excessive contributions in pension-sharing cases, is intended to be restated instead in an order under section 104 of the Scotland Act 1998.

*Section 112: debtor's family home*

- 54 Section 112 of the Bill restates section 39A of the 1985 Act. Section 39A was amended by paragraph 21 of schedule 3 of the 2014 Act so as to implement recommendation 20 of the Report (for more general wording as regards the completion of title in relation to a right or interest in a debtor's family home) and by schedule 4 of the 2014 Act so as to implement recommendation 21 of the Report (for simplification of a provision for the determination of a date from which a certain period of time was to run).

*Section 113: power of trustee in relation to debtor's family home*

- 55 The definition, in section 40(4)(ba) of the 1985 Act, of "local authority" is not reproduced on the basis that the expression is defined, for any Act of the Scottish Parliament, in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

*Section 120: provisions ancillary to sections 118 and 119*

- 56 Section 120 of the Bill restates section 46 of the 1985 Act in so far as that section relates to a debtor or "relevant person" (as defined in section 118(2) of the Bill) residing in Scotland. Since the section relates to the apprehension or (in other parts of the United Kingdom) the arrest of the debtor or person and to taking the debtor or person to a place of examination, it is thought appropriate to restate section 46 as it relates to a debtor or relevant person residing in a part of the United Kingdom other than Scotland in an order under section 104 of the Scotland Act 1998 rather than in the Bill itself.



*Section 134: appeal against determination as to outlays and remuneration payable to trustee*

- 57 Section 134 of the Bill restates subsections (6), (6A) and (6B) of section 53 of the 1985 Act.
- 58 Subsection (6) was amended by paragraph 27(a) of schedule 3 of the 2014 Act so as to implement recommendation 22 of the Report (for finality of certain decisions of the sheriff on appeal).
- 59 And subsection (6A) was amended by paragraph 27(b) of that schedule so as to implement recommendation 23 of the Report (for the avoidance of unnecessary duplication in certain proceedings).

*Section 136: procedure after end of accounting period where Accountant in Bankruptcy is trustee*

- 60 Section 136 of the Bill restates section 53A of the 1985 Act. The latter provision takes the form of applying section 53 of that Act, but with extensive modifications, to the special circumstance of the Accountant in Bankruptcy being trustee. For the convenience of any person reading section 136 of the Bill, that section is instead free-standing. (That is to say, it is to the same effect but the modifications have already been made).

*Section 145: effect of discharge under section 137, 138 or 140*

- 61 Section 145(3)(b) of the Bill restates section 55(2)(aa) of the 1985 Act. Section 55(2)(aa) was amended by paragraph 29(b)(i) of schedule 3 of the 2014 Act so as to implement recommendation 24 of the Report (which referred to the fact that liability might for some time continue to arise in relation to fines which have been imposed in district courts even though such courts are now replaced with justice of the peace courts by virtue of sections 59 and 64 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007).

*Section 161: bankruptcy restrictions orders and interim bankruptcy restrictions orders: effect of recall of sequestration*

- 62 For the reason given in paragraph 33 of these notes, in section 161(2) and (3) of the Bill appeal to the Sheriff Principal is replaced with appeal to the Sheriff Appeal Court.

*Section 181: administration of trust under protected trust deed*

- 63 Subsection (3)(b) of section 181 of the Bill provides for creditors objecting to a certain course of action where an expected final dividend to ordinary creditors is “at least 20% lower than [an expected dividend earlier set out in a statement of the trustee’s anticipated realisations from the trust deed]”. The words “at least” do not occur in the provision from which subsection (3) is derived (regulation 21(2A) of the PTD Regulations) but it would be extraordinary were the provision so narrow as only to be applicable where the expected final dividend was exactly 20% lower than the expected dividend earlier set out. That the words “at least” are indeed to be implied is in any event apparent from the wording provided for a statement set out in form 4 in the schedule of the regulations but (for the reason given in paragraph 7 of these notes) not restated in the Bill.

The wording for that statement (which is the third statement set out in form 4) is as follows:

“I state that the expected final dividend is now.....(insert amount of expected final dividend). This is less than 80% of the final dividend declared in my Form 3 statement dated.....(insert date Form 3 (Part 1) signed).”.

*Section 188: protected trust deed: appeal*

- 64 Section 188(1), (3) and (4) of the Bill restates paragraphs (1), (3) and (4) of regulation 27 of the Protected Trust Deeds (Scotland) Regulations 2013. Those paragraphs each state that “[there may be an] appeal to the sheriff by way of summary application”. For the reason given in paragraph 44 of these notes, the words “by way of summary application” are otiose in each of the paragraphs and are therefore omitted in 188(1), (3) and (4).

*Section 194: regulations modifying Part 14*

- 65 Sections 163 to 189 and 193 of the Bill are derived from the Protected Trust Deeds (Scotland) Regulations 2013 (S.S.I. 2013/318), made in exercise of the powers conferred by sections 69A and 72(1) of, and paragraph 5 of Schedule 5 of, the 1985 Act. Because those powers are, by virtue of section 7(1) of the Interpretation and Legislative Reform (Scotland) Act 2010, exercisable from time to time it is necessary (if we are not to effect a change in the law) to give the Scottish Ministers corresponding powers in relation to the sections of the Bill mentioned above.

*Section 205: Fees for Accountant in Bankruptcy*

- 66 Section 205 of the Bill restates section 69A of the 1985 Act but there are now two subsections rather than one. This is because the Accountant in Bankruptcy has functions both under the 1985 Act and under the Insolvency Act 1986. Despite the transfer of functions effected by section 53 of the Scotland Act 1998, the Secretary of State retains (by virtue of head C2 of schedule 5 of that Act) the power to prescribe by regulations the fees and outlays payable to the Accountant in Bankruptcy in respect of the exercise of functions under the latter Act (and certain other matters in relation to such fees and outlays). That power is set out in subsection (2) of section 205. The procedure in the Houses of Parliament for such regulations is not however restated in the Bill but is intended to be restated instead in an order under section 104 of the Scotland Act 1998.

*Section 208: trustee’s duty to provide certain notices and copies of documents to member State liquidator*

- 67 Section 208 of the Bill restates section 60B of the 1985 Act. The latter provision was amended by paragraph 33 of schedule 3 of the 2014 Act so as to implement recommendation 26 of the Report (for clarifying that the giving of notice, or the provision of a document, to a member State liquidator was to be in addition to, rather than in place of, the giving of notice, or the provision of a document, to the sheriff or the Accountant in Bankruptcy).

*Section 228: interpretation*

- 68 The following three paragraphs relate to definitions in section 228(1) of the Bill.
- 69 The definition of “commissioner” restates the definition of that expression in section 73(1) of the 1985 Act. That 1985 Act definition was amended by paragraph 35(a) of schedule 3 of the 2014 Act so as to implement recommendation 29 of the Report (for such a restatement).
- 70 The definition of “qualified to act as an insolvency practitioner” restates the definition of that expression (and the proviso to that definition) in section 73(1) of the 1985 Act. That 1985 Act definition was amended by paragraph 35(g) of schedule 3 of the 2014 Act so as to implement recommendation 28 of the Report (for such a restatement).
- 71 The definition of “the EC Regulation” will require to be recast after (most of) the provisions of Council Regulation (EC) No. 848 of 20 May 2015 on insolvency proceedings have entered into force. They will apply from 26 June 2017.

*Section 229(7): meaning of “associate”*

- 72 Section 229(7) of the Bill restates section 74(4) of the 1985 Act. The latter section was amended by schedule 4 of the 2014 Act so as to implement recommendation 31 of the Report (for the removal of an inapt and superfluous reference to illegitimacy).

*Schedule 2: determination of amount of creditor’s claim*

- 73 Paragraph 2(2) of schedule 2 of the Bill restates paragraph 2(2) of schedule 1 of the 1985 Act. Paragraph 2(2) was amended by paragraph 36 of schedule 3 of the 2014 Act so as to implement recommendation 33 of the Report (for clarification of an ambiguous reference to a body of text).

*Schedule 3: preferred debts*

- 74 Schedule 3 of the Bill restates schedule 3 of the 1985 Act. Despite the transfer of functions effected by section 53 of the Scotland Act 1998, the Secretary of State retains (by virtue of head C2 of schedule 5 of that Act) the power to prescribe by regulations certain amounts of remuneration of employees which are to be preferred debts in the distribution of the funds of a debtor’s estate by the trustee in a sequestration. That power is set out in paragraphs 2, 3 and 14 of schedule 3 of the Bill. The procedure in the Houses of Parliament for such regulations is not however restated in the Bill but is intended to be restated instead in an order under section 104 of the Scotland Act 1998.

*Schedule 7: re-enactment of sections 10 and 189 of the Bankruptcy (Scotland) Act 1913*

- 75 Schedule 7 of the Bill follows closely the wording, placing and structure of Part 2 of schedule 7 of the 1985 Act. Paragraph 1(3) and (4) of schedule 7 of the Bill restates paragraph 24(3) of schedule 7 of the Bankruptcy (Scotland) Act 1913. Paragraph 24(3) was amended by paragraph 37 of schedule 3 of the 2014 Act so as to implement recommendation 36 of the Report (for the removal of a distinction for which there did not seem to be any explanation).

*Schedule 8: modification of enactments*

- 76 Paragraph 23(2) of schedule 8 of the Bill, by providing prospectively for the insertion of an additional, free-standing, section 23A into the Bill makes the same provision in relation to the Bill as paragraph 13(3)(e) to (g) of schedule 5 of the 2007 Act makes (though by inserting subsections into an existing section) in relation to the 1985 Act.
- 77 The following two paragraphs of these notes relate to the new section (**section 127A: Amendment of Bankruptcy (Scotland) Act 2016**) under which, as provided for in paragraph 23(2) of schedule 8 of the Bill, the insertion mentioned in paragraph 76 would be made.
- 78 Section 127A(3)(a) provides for an amendment to section 25(1) of the Bill consequential upon that insertion.
- 79 Section 127A(3)(b) has the same effect in relation to section 25(3) of the Bill as schedule 6 of the 2007 Act has in relation to section 37(8) of the 1985 Act. Adding to the complexity of these matters, schedule 6 of the 2007 Act was itself amended, implementing recommendation 19 of the Report (for the correction of an erroneous cross-reference), by paragraph 40 of schedule 3 to the 2014 Act.
- 80 No date has yet been appointed under section 227(3) of the 2007 Act for the coming into force of the provisions of that Act mentioned in paragraph 76 of these notes or for schedule 6 of that Act to have effect in relation to section 14(2) or 37(1)(a) or (8) of the 1985 Act. Any date appointed for the coming into force of the new section 23A (or for section 127(3)(a) or (b) to come into force) will itself fall to be appointed under section 227(3) of the 2007 Act.

**References to times by which something is to happen**

- 81 The 1985 Act refers very frequently and in various ways to the times by which something must, or may, happen. An attempt is made in the Bill at achieving uniformity and simplicity in those references. But some references take the form “[Something must be done] within a period of 14 days after [something else happens]” and others, even within the same section, the form “[Something must be done] before the expiry of the period of 14 days beginning with the day on which [something else happens]” (see section 27(2)(a) and (3B) of the 1985 Act). While the words “within a period of 14 days” and “before the expiry of the period of 14 days” can both be shortened to “within 14 days” without changing the law, it is considered that the differences in the two forms must otherwise be retained since it is by no means clear whether the former is intended to include the day of the happening. It is not for the consolidation to resolve the ambiguity.

**Transfer of functions**

- 82 Most references in the 1985 Act to “the Secretary of State” fall to be construed, by virtue of section 53 of the Scotland Act 1998 (c.46) (which relates to the general transfer of functions), as references to “the Scottish Ministers”; but at certain places the references arise in the context of functions which are not exercisable within devolved competence and where, in consequence, references to the Secretary of State must be retained. That is the case at sections 103(4) and (8), 106(7) and (8) and 205(2), and at paragraphs 11 and 14 of schedule 3, of the Bill.

**Provisions of the 1985 Act requiring the making of an order under section 104 of the Scotland Act 1998**

- 83      The Bill contains some provisions which, but for paragraph 7 of schedule 4 of the Scotland Act 1998, would be outwith the legislative competence of the Scottish Parliament. (By virtue of that paragraph an Act of the Scottish Parliament may restate the law even where the subject matter is a reserved matter. The law as restated will of course continue to be regarded as law relating to a reserved matter.)
- 84      But some provisions of the legislation consolidated require, by virtue of section 78(5) and (6) of the 1985 Act, not merely to be restated in Scots law but to be law in other parts of the United Kingdom. Meeting that requirement necessitates the making of an order under section 104 of that Act of 1998. (Though such an order would in any event be needed to take account of consequential matters generally.)