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# Credit where Credit is Due: The Effect of Devolution on Insolvency Law in Scotland

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## Introduction

1 The Scotland Act 1998 reserved some aspects of insolvency law to the United Kingdom Parliament and devolved others to the Scottish Parliament.<sup>1</sup> The period since the Scottish Parliament's establishment has been characterised by rising debt, particularly consumer debt, and a severe financial crisis and recession resulting in increased financial difficulties for both consumers and businesses.<sup>2</sup> The total number of personal insolvencies, including sequestrations, protected trust deeds ("PTDs") and, since their introduction in 2004, debt payment programmes ("DPPs"), has increased steadily;<sup>3</sup> the total number of corporate insolvencies, namely compulsory and creditors' voluntary liquidations, receiverships, administrations and company voluntary arrangements under Part 1 of the Insolvency Act 1986, has fluctuated but the general trend has also been upwards.<sup>4</sup>

2 It is not therefore surprising that the Scottish Parliament has already paid considerable attention to, *inter alia*, the devolved aspects of insolvency law and is

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<sup>1</sup> See further below.

<sup>2</sup> See, e.g., *A Better Deal for Consumers* (2009) (Cm 7669), at paragraph 1.1.

<sup>3</sup> See statistics published by the Accountant in Bankruptcy, available at: <http://www.aib.gov.uk> (last accessed 5 July 2013). The relative numbers of each procedure have fluctuated over time, some of these fluctuations being attributable to changes brought about by various pieces of legislation enacted by the Scottish Parliament as discussed further below.

<sup>4</sup> See statistics published by the Insolvency Service, available at: <http://www.insolvency.gov.uk/otherinformation/statistics/insolv.htm> (last accessed 5 July 2013). Again, the relative numbers of each procedure have fluctuated over time, some of these fluctuations being attributable to the changes brought about by the Enterprise Act 2002. It should be noted that the information recorded in respect of compulsory liquidations has changed from financial year 2009-10: the figures for compulsory liquidations are not therefore directly comparable with previous years.

about to legislate further. This article examines the effect of devolution on insolvency law in Scotland. It begins with a discussion of the reserved/devolved split in relation to insolvency law, provides an overview and assessment of the legislation already passed by the Scottish Parliament and that in prospect and concludes with an overall assessment.

### **Reserved and Devolved Aspects of Insolvency Law**

3 The Scotland Act 1998 specifically reserved to the United Kingdom Parliament most aspects of corporate insolvency law and some aspects of non-corporate insolvency (bankruptcy) law.<sup>5</sup> All non-reserved aspects are devolved. In broad terms, this means the process of winding up and the effect of winding up on diligence and prior transactions generally; certain additional aspects of the winding

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<sup>5</sup> Scotland Act 1998, Schedule 5, Part II, Section C2. Subject to specified exceptions, this encompasses the following: (1) in relation to business associations (a) the modes of, the grounds for and the general legal effect of winding up, and the persons who may initiate winding up, (b) liability to contribute to assets on winding up, (c) powers of courts in relation to proceedings for winding up, other than the power to sist proceedings, (d) arrangements with creditors, and (v) procedures giving protection from creditors; (2) preferred or preferential debts for the purposes of the Bankruptcy (Scotland) Act 1985, the Insolvency Act 1986, and any other enactment relating to the sequestration of the estate of any person or to the winding up of business associations, the preference of such debts against other such debts and the extent of their preference over other types of debt; (3) regulation of insolvency practitioners and (4) co-operation of insolvency courts. The specified exceptions are: (1) in relation to business associations (a) the process of winding up, including the person having responsibility for the conduct of a winding up or any part of it, and his conduct of it or of that part, (b) the effect of winding up on diligence, and (c) avoidance and adjustment of prior transactions on winding up; (2) in relation to business associations which are social landlords, the following additional exceptions, namely (a) the general legal effect of winding up, (b) procedures for the initiation of winding up, (c) powers of courts in relation to proceedings for winding up, and (d) procedures giving protection from creditors, but only in so far as they relate to a moratorium on the disposal of property held by a social landlord and the management and disposal of such property; and (3) floating charges and receivers, other than in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts. For this purpose, "business association" has the same meaning as in the Scotland Act 1998, Schedule 5, Part II, Head C, Section C1, but does not include any person whose estate may be sequestrated under the Bankruptcy (Scotland) Act 1985 or any public body established by or under an enactment; "social landlord" means a body which is (a) a society registered under the Industrial and Provident Societies Act 1965 which has its registered office for the purposes of that Act in Scotland and satisfies the relevant conditions or (b) a company registered under the Companies Act 1985 which has its registered office for the purposes of that Act in Scotland and satisfies the relevant conditions, the "relevant conditions" being that the body does not trade for profit and is established for the purpose of, or has among its objects and powers, the provision, construction, improvement or management of (a) houses to be kept available for letting (b) houses for occupation by members of the body, where the rules of the body restrict membership to persons entitled or prospectively entitled (as tenants or otherwise) to occupy a house provided or managed by the body or (c) hostels, "house" and "hostel" having the meanings given in section 338(1) of the Housing (Scotland) Act 1987; and "winding up", in relation to business associations, includes winding up of solvent, as well as insolvent, business associations. Scotland Act 1998, Schedule 5, Part II, Head C, Section C1 defines provides that "business association" means any person (other than an individual) established for the purpose of carrying on any kind of business, whether or not for profit; and "business" includes the provision of benefits to the members of an association.

up of registered social landlords; receivership (with the exception of preferential debts, regulation of insolvency practitioners and co-operation of courts); and bankruptcy law (also with the exception of preferred debts, regulation of insolvency practitioners and co-operation of courts). These areas reflect the areas of insolvency law which have traditionally been distinctively Scottish.

4 The reserved/devolved split has, however, given rise to difficulties, most notably with regard to the reform of corporate insolvency law. Since devolution, the United Kingdom Parliament has legislated extensively on corporate insolvency. Most of that legislation has related to reserved matters and applied equally to Scotland, but the Enterprise Act 2002 (“EA 2002”), for example, included reforms to receivership which, as noted, is largely devolved. The Scottish Parliament had the option of passing separate legislation implementing the relevant reforms in Scotland, consenting to the inclusion of provisions implementing the relevant reforms in Scotland in the EA 2002 or deciding that it did not want these reforms in Scotland and therefore refusing to do either of these things. Since the receivership reforms were part of an integrated package of corporate insolvency reforms, however, such a refusal could have caused a constitutional crisis - the United Kingdom Parliament would have had to decide whether to ignore the constitutional convention of not legislating on devolved matters without the Scottish Parliament’s consent in order to implement the reforms in their entirety. Fortunately, this did not happen: the Scottish Parliament was agreeable to the relevant reforms and passed an appropriate Sewel motion.<sup>6</sup> Similar issues may, however, arise in future. For example, the government recently proposed to introduce new statutory provisions regulating pre-pack sales in administration and liquidation.<sup>7</sup> Since administration is reserved, the relevant legislation relating to administration would have fallen to be made by the United Kingdom Parliament for both England and Wales and Scotland. Since this aspect of liquidation is devolved, however, in relation to liquidation, separate legislation made by the Scottish Parliament or its consent to the inclusion of the relevant provisions in the legislation made by the United Kingdom Parliament would have been required. The government subsequently

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<sup>6</sup> The use of Sewel motions raises another issue, however: the United Kingdom legislation to which consent is to be given does not always receive the same scrutiny by the Scottish Parliament that its own legislation would receive, which is a general weakness in that procedure. This is discussed further below.

<sup>7</sup> See Insolvency Service, *Consultation/Call for Evidence: Improving the Transparency of, and Confidence in, Pre-Packaged Sales in Administration* (March 2010); Insolvency Service, *Improving the Transparency of, and Confidence in, Pre-Packaged Sales in Administration: Summary of Consultation Responses* (March 2011); Ministerial Statement by Edward Davey (31 March 2011); Insolvency Service, *Letter to Consultees* (31 March 2011); and Ministerial Statement by Edward Davey (26 January 2012), available at: <http://www.bis.gov.uk/insolvency/Consultations/PrePack?cat=closedwithresponse> (last accessed 5 July 2013). The Insolvency Service had also published draft Insolvency (Amendment) Rules (No 2) 2011 for comment in June 2011.

decided not to proceed with these proposals, but a review of pre-packs is now in prospect<sup>8</sup> and further legislation remains a possibility.

5 Less amenable to resolution have been issues resulting from the programme of general updating and modernisation of insolvency legislation implemented by the United Kingdom Parliament since devolution. These were encapsulated in submissions made to the Commission on Scottish Devolution (“Calman Commission”) by the Institute of Chartered Accountants for Scotland (“ICAS”), which submitted that the law relating to corporate insolvency so far as devolved had not kept abreast of changes in England and Wales, thereby creating difficulties for insolvency practitioners.<sup>9</sup> This is possible because changes in reserved areas fall within the remit of the United Kingdom Insolvency Service (“IS”), with the relevant legislation made by the United Kingdom Parliament, whereas changes in devolved areas fall within the remit of the Accountant in Bankruptcy (“AIB”), with the relevant legislation made by the Scottish Parliament. While the Scottish Parliament has legislated extensively on the devolved aspects of bankruptcy, however, it has legislated little on the devolved aspects of corporate insolvency.<sup>10</sup> Thus corporate insolvency law so far as devolved has fallen behind the changes to both the corresponding provisions in England and Wales and the reserved areas in both jurisdictions where reform has been implemented by the United Kingdom Parliament.<sup>11</sup>

6 ICAS also submitted to the Calman Commission that the expertise necessary to ensure appropriate changes were made in devolved areas was lacking, and

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<sup>8</sup> See Insolvency Service, News Release (12 March 2013) at: <http://www.bis.gov.uk/insolvency/news/news-stories/2013/Mar/PrePackStatement> (last accessed 5 July 2013).

<sup>9</sup> Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: A First Report* (December 2008), at paragraph 5.48.

<sup>10</sup> See further below.

<sup>11</sup> The main pieces of modernising legislation comprise: the Legislative Reform (Insolvency) (Advertising Requirements) Order 2009 (SI 2009/864), which made changes to the advertising requirements in voluntary liquidations which apply in England and Wales only as the relevant provisions in Scotland are devolved; the Insolvency (Amendment) Rules 2009 (SI 2009/642), which made changes to the rules on publication or advertisement of notices in all insolvency procedures in England and Wales only; the Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2010 (SI 2010/18), which made a number of other changes to the provisions relating to voluntary liquidations which apply in England and Wales only as the relevant provisions in Scotland are devolved, as well as wider changes to all insolvency procedures which in Scotland apply to those corporate insolvency procedures which are reserved only; the Insolvency (Amendment) Rules 2010 (SI 2010/686), as amended by Insolvency (Amendment) (No 2) Rules 2010 (SI 2010/734), which create a completely new set of insolvency rules for England and Wales covering all corporate insolvency procedures; the Insolvency (Scotland) Amendment Rules (SI 2010/688), which made relevant corresponding changes to the insolvency rules in Scotland for those corporate insolvency procedures which are reserved only. While most of these pieces of legislation post-date the submissions to the Calman Commission, they were in prospect at the time.

proposed that the whole of corporate insolvency law should be (re)reserved.<sup>12</sup> The Calman Commission sought further evidence<sup>13</sup> and, having received it, concluded that devolution had “produced an unsatisfactory state of affairs relating to corporate insolvency”: there was an absence of clarity as to where responsibility lay for drawing up the relevant insolvency rules; there were unnecessary and confusing divergences between the rules applying in England and Scotland; and there had been unnecessary and damaging delays in introducing new rules in Scotland.<sup>14</sup> It considered, however, that matters could be resolved without altering the reserved/devolved boundary if the IS, with appropriate input from the relevant Scottish government department(s), was made responsible for laying down the relevant rules in both jurisdictions, and that this could be achieved by United Kingdom legislation to which the Scottish Parliament could consent, and it recommended accordingly.<sup>15</sup>

7 The United Kingdom government accepted the need for change,<sup>16</sup> but there were concerns. For example, the then Chairman of the Scottish Law Commission (“SLC”), Lord Drummond Young, commented that if it meant that all legislation bearing on (corporate) insolvency was to be reserved to Westminster under the control of the Department of Business Innovation and Skills (“DBIS”), of which the IS forms part, the result would be that the sensible reform of Scottish commercial law would become impossible.<sup>17</sup> His comment reflected his wider concerns over the perceived attitude of DBIS to reform of Scots law in reserved areas, but this may have been misplaced in this particular case: in practice, the IS has not been dilatory in matters of corporate insolvency reform in Scotland in reserved areas, at least where equivalent changes are also being made in England and Wales.

8 The bill which ultimately became the Scotland Act 2012 was introduced in the House of Commons on 30 November 2010 and contained provisions (re)reserving the devolved aspects of winding up and, so far as appropriate, updating and modernising them in line with the changes already made in winding up in England and Wales and in reserved areas in both jurisdictions.<sup>18</sup> Unsurprisingly, these were opposed in principle by the then minority SNP administration, which considered

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<sup>12</sup> Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: A First Report* (December 2008), at paragraph 5.48.

<sup>13</sup> *Ibid.*, at paragraphs 5.48, 5.49 and 5.52.

<sup>14</sup> Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: Final Report* (June 2009), at paragraph 5.275.

<sup>15</sup> *Ibid.*, at paragraph 5.277 and recommendation 5.23.

<sup>16</sup> See Scotland Office, *Scotland's Future in the United Kingdom: Building on Ten Years of Scottish Devolution* (Cm 7783), at paragraphs 5.33-5.35; HM Government, *Strengthening Scotland's Future* (Cm 7973), at 57-58.

<sup>17</sup> See Chairman's Foreword to Scottish Law Commission, *Annual Report 2009* (Scot Law Com No 221, 2009).

<sup>18</sup> Scotland Bill, clause 12 and Schedule 2.

that the issues could be addressed by improved inter-governmental working.<sup>19</sup> The Scotland Bill Committee established by the Scottish Parliament in December 2010 to consider the bill was, however, content with them, subject to some concerns regarding the impact on registered social landlords.<sup>20</sup> It therefore recommended the Scottish Parliament give legislative consent to the provisions, subject to amendments allowing devolved legislation on the winding-up of registered social landlords,<sup>21</sup> and the Scottish Parliament subsequently passed a motion agreeing the bill be considered by the United Kingdom Parliament, but inviting it and the United Kingdom government to consider the changes proposed in the Scotland Bill Committee's report with a view to future debate in the Scottish Parliament on a further legislative consent motion.<sup>22</sup>

9 Following the Scottish Parliament elections in May 2011, however, the SNP minority administration became a majority administration. As a result, more extensive changes to the devolution settlement, and thus the Scotland Bill, were sought and a new Scotland Bill Committee was established in June 2011. It took the view that it was not necessary to (re-)reserve the devolved aspects of corporate insolvency to the United Kingdom Government and Parliament in order to address the issues and improved inter-governmental working was preferable,<sup>23</sup> and it recommended that, as a matter of principle, no powers should be re-reserved and legislative consent should not be given to the provisions.<sup>24</sup> Discussions between the Scottish administration and the United Kingdom government followed, as a result of which it was agreed, *inter alia*, that the provisions should be removed from the Scotland Bill.<sup>25</sup> They were duly removed at report stage in the House of Lords<sup>26</sup> and the Scottish Parliament subsequently passed a motion agreeing the bill as amended be considered by the United Kingdom Parliament.<sup>27</sup> The Scotland Bill as amended received Royal Assent on 1 May 2012. The original reserved/devolved split on corporate insolvency was therefore maintained.

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<sup>19</sup> See Scotland Bill Committee, *Report on the Scotland Bill and Relative Legislative Consent Memoranda*, at paragraph 723.

<sup>20</sup> *Ibid.*, at paragraph 147.

<sup>21</sup> *Ibid.*, at paragraph 148. This recommendation was presented as a recommendation of the whole committee notwithstanding a minority dissent: see Scotland Bill Committee, above note 19, Annex A.

<sup>22</sup> Scottish Parliament, *Official Report*, column 34358 (10 March 2011).

<sup>23</sup> Scotland Bill Committee, *Report on the Scotland Bill, Volume 1*, at paragraph 74. Three members of the committee dissented from this view (footnote 74).

<sup>24</sup> *Ibid.*, recommendation 20. Three members of the committee dissented from this recommendation (footnote 12).

<sup>25</sup> See the *Legislative Consent Memorandum* (21 March 2012), available at: [www.scottish.parliament.uk/S4\\_ScotlandBillCommittee/General%20Documents/LCM\\_-\\_Scotland\\_Bill\\_-\\_Final.pdf](http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/General%20Documents/LCM_-_Scotland_Bill_-_Final.pdf) (last accessed 5 July 2013) and Scotland Bill Committee, *Report on the Scottish Government's Legislative Consent Memorandum*, SP Paper 106, at paragraphs 1-5 and 11.

<sup>26</sup> See Hansard (HL), 28 March 2012, volume 736, column 1440.

<sup>27</sup> Scottish Parliament, *Official Report*, column 8137 (18 April 2012).

10 The AIB has now established a working party to work on the updating and modernisation of the devolved aspects of corporate insolvency law and legislation including new corporate insolvency rules is planned for the autumn. The maintenance of the reserved/devolved split on corporate insolvency, however, means that this project remains far from unproblematic. For example, changes to the Insolvency Act 1986 to allow provisions in devolved areas which currently apply in England and Wales but not in Scotland to apply in Scotland will be required and will have to be made by the United Kingdom Parliament, while the new rules will continue to have both reserved and devolved elements which means that they cannot be enacted in their entirety by the Scottish Parliament.

11 Inevitably, lines must be drawn somewhere. It is critical, however, that the coherence and effectiveness of the law is maintained irrespective of the legislator. The issue therefore becomes how the interface between what is reserved and what is devolved can best be managed to achieve this, particularly where a single area of law such as insolvency law is partly reserved and partly devolved. This remains a crucial issue for the development of insolvency law, in particular corporate insolvency law, in Scotland.

## **The Scottish Parliament's Legislation on Insolvency**

### *Introduction and Overview*

12 As noted, the Scottish Parliament has so far legislated extensively on the devolved aspects of bankruptcy, but little on the devolved aspects of corporate insolvency. The main focus of this section will therefore be its legislation on bankruptcy, in particular the Debt Arrangement and Attachment (Scotland) Act 2002 ("DAA(S)A 2002"), the Bankruptcy and Diligence etc. (Scotland) Act 2007 ("BD(S)A 2007"), the Home Owner and Debtor Protection (Scotland) Act 2010 ("HODP(S)A 2010") and the most important related secondary legislation. Consideration will also be given to the further legislation now in prospect.

13 This legislation must be seen in its context as part of a wider body of legislation passed by the Scottish Parliament relating to debt and enforcement generally which has brought about extensive and, for the most part, systematic reform of the wider law of diligence and aspects of debtor protection as well as reform of bankruptcy law as such. The first relevant piece of legislation was the Abolition of Poindings and Warrant Sales Act 2001 ("APWSA 2001"), which was introduced to the Scottish Parliament less than three months after its establishment and ultimately brought about the abolition of what was seen as the outmoded diligence of poinding and warrant sale.<sup>28</sup> The DAA(S)A 2002 replaced that diligence with a modernised diligence in the form of attachment, and also introduced the DAS. In the interim,

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<sup>28</sup> The diligence used to attach moveable property of the debtor in the debtor's own possession.

the Mortgage Rights (Scotland) Act 2001 (“MR(S)A 2001”) had made provision for the suspension of enforcement of a standard security on application to the court and related provision for the protection of the debtor. The next and, for this purpose, most significant piece of legislation was the BD(S)A 2007, which made far-reaching changes to the law of diligence and floating charges as well as the law of bankruptcy. Finally, the HODP(S)A 2010 extended the protections given to debtors by the MR(S)A 2001 as well as making further changes to bankruptcy law. There has also been a considerable volume of related secondary legislation.

### *The Legislation on Bankruptcy*

#### (a) The Debt Arrangement and Attachment (Scotland) Act 2002

14 As noted, the DAA(S)A 2002 replaced the diligence of poinding and warrant sale with a modernised diligence in the form of attachment. The new provisions on attachment included an expanded list of items exempt from the diligence which reflected changes that had already been made to the list of items exempt from the old diligence of poinding by secondary legislation as an interim measure.<sup>29</sup> These exemptions also apply in sequestration.<sup>30</sup>

15 The DAA(S)A also introduced the DAS. Although not a new concept, previous proposals had remained unimplemented.<sup>31</sup> However, following the original lodging of the proposal for the Abolition of Poindings and Warrant Sales Bill (“APWS Bill”),<sup>32</sup> a reference was made to the SLC, which duly published a discussion paper followed by a report.<sup>33</sup> This recommended that consideration should be given to introducing debt arrangement schemes,<sup>34</sup> the form of which should be determined in consultation with debtor and creditor interests.<sup>35</sup> The report of a Cross-Party Parliamentary Working Group established by the SE, *Striking the balance - a new approach to debt management*, also recommended the introduction of a statutory debt arrangement scheme.<sup>36</sup> Following consultation on the latter report, the SE

<sup>29</sup> See Debtors (Scotland) Act 1987 (Amendment) Regulations 2000 (SSI 2000/189).

<sup>30</sup> See Bankruptcy (Scotland) Act 1985, section 33.

<sup>31</sup> A debt arrangements scheme was originally proposed by the Scottish Law Commission in its *Fourth Memorandum on Diligence: Debt Arrangement Schemes*, Scot Law Com Consultative Memorandum No 50 (1980) and recommended in its *Report on Diligence and Debtor Protection* (Scot Law Com 95, 1985).

<sup>32</sup> The original proposal was too narrow in scope to allow the introduction of the bill and the bill was introduced only after a second proposal was subsequently lodged: see Scottish Law Commission, *Report on Poinding and Warrant Sale* (Scot Law Com 177, 2000), at paragraph 1.2; *Stage 1 Report on the Abolition of Poindings and Warrant Sales Bill*, at paragraphs 1-2.

<sup>33</sup> Scottish Law Commission, *Poinding and Sale: Effective Enforcement and Debtor Protection* (Discussion Paper No 110, 1999); *Report on Poinding and Warrant Sale* (Scot Law Com 177, 2000).

<sup>34</sup> *Ibid.*, at paragraph 5.61.

<sup>35</sup> *Idem.*

<sup>36</sup> See the Working Group Report, *A Replacement for Poinding and Warrant Sale, Striking the Balance: A New Approach to Debt Management* (July 2001), at paragraph 100.



announced it would implement the working group's approach and detailed proposals for a statutory debt arrangement scheme would be issued for consultation. These were subsequently set out as part of the SE's consultation paper on Enforcement of Civil Obligations in Scotland.<sup>37</sup>

16 Before that consultation was completed, however, the Debt Arrangement and Attachment (Scotland) Bill ("DAA(S) Bill") was introduced including provisions establishing the DAS. The reason given was the importance the SE attached to the DAS, which it wished to introduce as soon as possible.<sup>38</sup> The DAA(S) Bill therefore set out the framework and empowered the Scottish Ministers to make provision for the details by way of regulations to be prepared taking into account the consultation responses,<sup>39</sup> although this effectively rendered the consultation superfluous in relation to the framework and raised questions as to whether all the matters left to secondary legislation were properly so left.<sup>40</sup> The DAA(S)A 2002 provided for the DAS provisions to be brought into force on a date to be appointed, thus allowing time for the supporting regulations to be put in place. Following limited consultation on a draft, revised draft Debt Arrangement Scheme (Scotland) Regulations were laid before and approved by the Scottish Parliament, becoming the Debt Arrangement Scheme (Scotland) Regulations 2004.<sup>41</sup> The DAS came into force on 30 November 2004.<sup>42</sup> It has been subject to review and amendment on a number of occasions, most recently in July 2013.<sup>43</sup>

(b) The Bankruptcy and Diligence etc. (Scotland) Act 2007 and related secondary legislation

17 As noted, the BD(S)A 2007 made far-reaching changes to the law of bankruptcy. Consultation on these changes began in 2003 with a consultation paper *Personal Bankruptcy Reform in Scotland: A Modern Approach*,<sup>44</sup> which sought views on proposed reforms to bankruptcy in Scotland. It identified two "drivers for change":

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<sup>37</sup> See Scottish Executive, *Enforcement of Civil Obligations in Scotland*, Part 4(D).

<sup>38</sup> SP Bill 52-PM, at paragraph 17.

<sup>39</sup> *Ibid.*

<sup>40</sup> See further below.

<sup>41</sup> SSI 2004/468. These were almost immediately amended by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2004 (SSI 2004/470).

<sup>42</sup> See the Debt Arrangement and Attachment (Scotland) Act 2002 (Commencement No. 2 and Revocation) Order 2004 (SSI 2004/416), which revoked the earlier Debt Arrangement and Attachment (Scotland) Act 2002 (Commencement) Order 2004 (SSI 2004/401), which contained an error.

<sup>43</sup> See further below.

<sup>44</sup> Scottish Executive, *Personal Bankruptcy Reform in Scotland: A Modern Approach* (November 2003), available at: <http://www.scotland.gov.uk/Resource/Doc/1097/0030743.pdf> (last accessed 5 July 2013).

- (i) the importance of having an integrated debt management framework within which the available debt management tools worked together to form a comprehensive package of solutions for debtors;<sup>45</sup> and
- (ii) “developments”, identified as the introduction of DAS and the need to consider its fit with sequestration;<sup>46</sup> the need to consider whether action was still required on certain issues raised in previous consultations;<sup>47</sup> and the changes to bankruptcy in England and Wales introduced by the EA 2002,<sup>48</sup> which included enabling debtors to obtain an automatic discharge after a maximum period of one year and the introduction of a bankruptcy restrictions regime.<sup>49</sup>

18 A further consultation paper and draft bill, *Modernising bankruptcy and diligence in Scotland: Draft Bill and Consultation*,<sup>50</sup> followed in 2004. A Working Group on Debt Relief was also established to consider further issues surrounding debtor access to sequestration and debtors with little or no assets or income. Its report was published in 2005 but not subject to formal consultation.<sup>51</sup>

19 On its introduction, the bankruptcy provisions of the Bankruptcy and Diligence etc. (Scotland) Bill (“BD(S) Bill”) comprised provisions similar to those introduced in England and Wales by the EA 2002 (“EA 2002-style reforms”), limited provision on debtor access to sequestration, provisions for reversion of certain assets to the debtor in defined circumstances, provisions for streamlining sequestration procedure and provisions providing a platform for PTD reform.<sup>52</sup> The majority of the PTD reforms were to be contained in separate regulations, a draft of which was the subject of a separate consultation published early in 2006.<sup>53</sup> The SE also carried out a review of the DAS which was neither published nor subject to formal consultation. During the legislative process, a number of new provisions were added to the bankruptcy part of the bill, including provisions to reform the

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<sup>45</sup> *Ibid.*, at paragraph 3.1.

<sup>46</sup> *Ibid.*, at paragraph 3.3.

<sup>47</sup> *Ibid.*, at paragraph 3.4.

<sup>48</sup> *Ibid.*, at paragraph 3.5.

<sup>49</sup> For the history of the changes to bankruptcy law in England and Wales, see Insolvency Service, *Bankruptcy - A Fresh Start* (2000); *Productivity and Enterprise: Insolvency - A Second Chance* (2001) (Cm 5234); *Summary of Responses to the White Paper “Productivity and Enterprise - Insolvency: A Second Chance”* (2001); *An Update on the Bankruptcy Proposals* (26 March 2002); *Individual Insolvency* (8 November 2002).

<sup>50</sup> Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (July 2004), available at: <http://www.scotland.gov.uk/Resource/Doc/203606/0054275.pdf> (last accessed 5 July 2013).

<sup>51</sup> *Report of the Working Group on Debt Relief* (2005), available at: <http://www.scotland.gov.uk/Resource/Doc/1097/0016112.pdf> (last accessed 5 July 2013).

<sup>52</sup> See further below.

<sup>53</sup> See Scottish Executive, *Protected Trust Deeds: Consultation on Draft Regulations* (January 2006), available at: <http://www.scotland.gov.uk/Resource/Doc/89955/0021680.pdf>; Scottish Executive, *Protected Trust Deeds: Partial Regulatory Impact Assessment* (January 2006), available at: <http://www.scotland.gov.uk/Resource/Doc/92494/0022197.pdf>; Scottish Executive, *Protected Trust Deeds – Consultation on Draft Regulations and Partial Regulatory Impact Assessment: Analysis of Responses* (June 2006), available at: <http://www.scotland.gov.uk/Resource/Doc/1097/0031324.pdf> (all sites last accessed 5 July 2013).

DAS and provisions for access to sequestration by low income, low asset debtors (“LILAs”). The detailed provisions relating to LILAs were also to be contained in regulations and a consultation was duly published.<sup>54</sup>

20 Some of the provisions relating to the DAS, including the power to make regulations introducing an element of debt relief, came into force on 8 March 2007;<sup>55</sup> a minor amendment to claims in sequestration came into force on 31 March 2007;<sup>56</sup> some of the provisions relating to PTDs came into force on 19 February 2008;<sup>57</sup> and the remainder of the provisions, with some exceptions, came into force on 1 April 2008.<sup>58</sup>

21 The Protected Trust Deed (Scotland) Regulations 2008<sup>59</sup> and the Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008<sup>60</sup> also came into force on 1 April 2008, together with new Bankruptcy (Scotland) Regulations 2008<sup>61</sup> and appropriate changes to the relevant court rules.<sup>62</sup> The Debt Arrangement Scheme (Scotland) Amendment Regulations 2007,<sup>63</sup> which made provision for the introduction of the element of debt relief into the DAS, and the Debt Arrangement Scheme (Scotland) Amendment (No. 2) Regulations 2007,<sup>64</sup> which made other important changes to the DAS, both came into force on 30 June 2007.

(c) The Home Owner and Debtor Protection (Scotland) Act 2010

22 The HODP(S)A 2010 had its genesis in fears of a rise in repossessions resulting from the credit crunch and recession. Following the final report of the Debt Action Forum (“DAF”) and its repossessions sub-group established to consider these

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<sup>54</sup> See Accountant in Bankruptcy, *Low Income, Low Assets – A New Route into Bankruptcy: Consultation on Proposed Regulations* (April 2007), available at: <http://www.scotland.gov.uk/Resource/Doc/174131/0048565.pdf>; Accountant in Bankruptcy, *Low Income, Low Assets – A New Route into Bankruptcy: Report on Public Consultation* (February 2008), available at: <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000580.pdf> (all sites last accessed 5 July 2013).

<sup>55</sup> See the Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 1) Order 2007 (SSI 2007/82), Article 3.

<sup>56</sup> *Ibid.*, Article 4(a), (d).

<sup>57</sup> See the Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 2 and Saving) Order 2008 (SSI 2008/45), Article 2.

<sup>58</sup> See the Bankruptcy and Diligence etc. (Scotland) Act 2007 (Commencement No. 3, Savings and Transitionals) Order 2008 (SSI 2008/115), Article 3.

<sup>59</sup> SSI 2008/143.

<sup>60</sup> SSI 2008/81.

<sup>61</sup> SSI 2008/82. These have already been amended: see the Bankruptcy (Scotland) Amendment Regulations 2008 (SSI 2008/334).

<sup>62</sup> See the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 (SSI 2008/119) and the Act of Sederunt (Rules of the Court of Session Amendment No. 3) (Bankruptcy and Diligence etc. (Scotland) Act 2007) 2008 (SSI 2008/122).

<sup>63</sup> SSI 2007/262.

<sup>64</sup> SSI 2007/187.

issues,<sup>65</sup> the SE announced its intention to introduce legislation containing what it considered to be urgent and uncontroversial measures, including a number of reforms to sequestration and PTDs, to be followed by consultation on further changes to PTDs and the treatment of the family home in bankruptcy and further legislation.<sup>66</sup> The SE legislative programme for 2009-2010<sup>67</sup> duly included proposals for a Debtor Protection Bill in autumn 2009 and a Debt and Family Homes Bill to follow further consultation.<sup>68</sup>

23 The proposed Debtor Protection Bill duly became the Home Owner and Debtor Protection (Scotland) Bill (“HODP(S) Bill”). The reforms to sequestration and PTDs were contained in Part 2 and included provision for a new certificated route into sequestration; provision allowing the exclusion of certain property, specifically the family home, from a PTD; extension of the existing protections for the family home in sequestration to PTDs; and abolition of certain requirements for advertisement in the Edinburgh Gazette. In addition, provision was to be made in secondary legislation to increase the financial limit for a vehicle exempt from attachment (and consequently sequestration), and draft statutory instruments were produced for comment.<sup>69</sup> On the basis that the measures were urgent, and had received broad, if not in all cases unanimous, support in the DAF,<sup>70</sup> the bill did not go through the usual pre-introduction consultation, but was progressed to a truncated timetable<sup>71</sup> and passed on 11 February 2010. Some of the provisions of

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<sup>65</sup> Debt Action Forum, *Final Report* (June 2009), available at: <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000813.pdf> (last accessed 5 July 2013).

<sup>66</sup> See Debt Action Forum, *Report – The Scottish Government Response*, available at: <http://www.aib.gov.uk/About/DAF/DAFofficialresponse>; Scottish Executive News Release, “Law Change to Help Families” (17 June 2009), issued in response to the specific recommendations of the Repossessions Sub-group, available at: <http://www.scotland.gov.uk/News/Releases/2009/06/17172506>; Scottish Executive News Release, “Dealing with Debt” (23 June 2009), available at: <http://www.scotland.gov.uk/News/Releases/2009/06/23115155> (all sites last accessed 5 July 2013).

<sup>67</sup> See Scottish Executive, *Towards A More Successful Scotland: The Government’s Programme For Scotland 2009-2010* (September 2009), available at: <http://www.scotland.gov.uk/Publications/2009/09/02152902/0>, at 34-35. See also the First Minister’s speech to the Scottish Parliament setting out the legislative programme for 2009-2010 (3 September 2009), available at: <http://www.scotland.gov.uk/News/Speeches/Speeches/First-Minister/programme-for-scotland> (all sites last accessed 5 July 2013).

<sup>68</sup> Summaries of the proposed bills as they stood at that time can be found at: <http://www.scotland.gov.uk/About/programme-for-government/2009-10/summary-of-bills> (last accessed 5 July 2013).

<sup>69</sup> See Draft Bankruptcy (Certificate for Sequestration) (Scotland) Regulations, Bankruptcy (Scotland) Amendment Regulations and Protected Trust Deeds (Scotland) Amendment Regulations, available at: <http://www.scottish.parliament.uk/s3/committees/lgc/inquiries/HomeOwnerDebtorProtection/index.htm> (last accessed 5 July 2013).

<sup>70</sup> See *Home Owner and Debtor Protection (Scotland) Bill Policy Memorandum*, SP Bill 32-PM, at paragraphs 68-70.

<sup>71</sup> See *Local Government and Communities Committee, Stage 1 Report on the Home Owner and Debtor Protection (Scotland) Bill*, at paragraph 2.

Part 2 came into force on 7 September 2010, while the remainder come in to force on 15 November 2010 once the supporting secondary legislation was in place.<sup>72</sup>

(d) New debt arrangement scheme legislation

24 A review of the DAS in 2008<sup>73</sup> led to further proposed changes,<sup>74</sup> but there was no formal consultation, and the resultant Debt Arrangement Scheme (Scotland) Amendment Regulations 2009<sup>75</sup> were revoked before coming into force following reservations about the changes.<sup>76</sup> A formal consultation was then undertaken,<sup>77</sup> followed by a report.<sup>78</sup> This was followed by workshops with stakeholders and ultimately resulted in the Debt Arrangement Scheme (Scotland) Regulations 2011<sup>79</sup> and Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011<sup>80</sup> which replaced the previous regulations with an updated scheme from 1 July 2011. Further changes have now been made by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013<sup>81</sup> as part of the ongoing reform discussed below. These changes came into force on 2 July 2013.

(e) Ongoing reform

25 The proposed consultation on the treatment of the family home in bankruptcy was subsequently deferred,<sup>82</sup> and thus no Debt and Family Homes Bill has been introduced. There has, however, been consultation on other reforms to bankruptcy law as a result of which further reform is now ongoing.

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<sup>72</sup> Home Owner and Debtor Protection (Scotland) Act 2010 (Commencement) Order 2010 (SSI 2010/314).

<sup>73</sup> Accountant in Bankruptcy, *Debt Arrangement Scheme Review 2008* (31 March 2008), available at: <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000669.pdf> (last accessed 5 July 2013).

<sup>74</sup> See Accountant in Bankruptcy News Release, "Key Changes to Debt Arrangement Scheme" (13 March 2009), available at: <http://www.aib.gov.uk/News/releases/2009/03/13114653> (last accessed 5 July 2013).

<sup>75</sup> SSI 2009/234.

<sup>76</sup> See the Debt Arrangement Scheme (Scotland) Revocation Regulations 2009 (SSI 2009/258).

<sup>77</sup> Scottish Executive, *The Debt Arrangement Scheme – Improving Access: A Consultation Document* (September 2009), available at: <http://www.scotland.gov.uk/Publications/2009/09/22141137/0> (last accessed 5 July 2013).

<sup>78</sup> Accountant in Bankruptcy, *The Debt Arrangement Scheme Improving Access: Report on Public Consultation*, available at: <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000980.pdf> (last accessed 5 July 2013).

<sup>79</sup> SSI 2011/141.

<sup>80</sup> SSI 2011/238.

<sup>81</sup> SSI 2013/225.

<sup>82</sup> See further below.

26 A review of the LILA provisions took place after four months and again after one year<sup>83</sup> but did not lead to changes at that time. Following a review of PTDs in 2009,<sup>84</sup> a Protected Trust Deed Working Group was established which issued its final report in June 2010<sup>85</sup> and the SE subsequently issued a consultation Protected trust deeds – improving the process in October 2011.<sup>86</sup> It then issued a further consultation, Consultation on Bankruptcy Law Reform in February 2012,<sup>87</sup> which proceeded on the basis that the earlier reforms to bankruptcy legislation had been focused on specific issues such as low income, low asset debtors and the consultation offered the opportunity to consider the principles and concept of bankruptcy and other debt management solutions “for the first time in a generation”.<sup>88</sup> The proposals aimed to develop a new model of debt advice, debt management and debt relief fit for the 21<sup>st</sup> century, a “financial health service” providing “rehabilitation to individuals and organisations...while acknowledging their financial responsibilities”. The proposals consulted on were wide-ranging, but did not include the family home, which is still intended to be the subject of separate consultation at a later stage.<sup>89</sup>

27 Following the consultation, some proposals were dropped and others set aside for further development in future, but the majority were confirmed as going ahead.<sup>90</sup> These include the introduction of mandatory debt advice in all procedures; the introduction of a pre-application moratorium in all procedures; changes to the level of qualifying debt in sequestration; revised provision for no income debtors;

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<sup>83</sup> See Accountant in Bankruptcy, *The Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008: Four Month Review* (October 2008), available at: <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000658.pdf> and Accountant in Bankruptcy, *The Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008: One Year Review* (October 2009), available at: <http://www.aib.gov.uk/sites/default/files/publications/LILA%20Review%202009%20R30589.doc> (all sites last accessed 5 July 2013).

<sup>84</sup> See Accountant in Bankruptcy, *Protected Trust Deed Review 2009* (June 2009), available at: <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000821.pdf> (last accessed 5 July 2013).

<sup>85</sup> Protected Trust Deeds Working Group, *Final Report* (June 2010), available at: <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0001023.doc> (last accessed 5 July 2013).

<sup>86</sup> Scottish Executive, *Protected Trust Deeds – Improving the Process* (October 2011), available at: <http://www.scotland.gov.uk/Publications/2011/10/14103349/0> (last accessed 5 July 2013).

<sup>87</sup> Scottish Executive, *Consultation on Bankruptcy Law Reform* (February 2012), available at: <http://www.scotland.gov.uk/Resource/0038/00388465.pdf> (last accessed 5 July 2013).

<sup>88</sup> *Ibid.*, Ministerial Foreword.

<sup>89</sup> *Idem.*

<sup>90</sup> See Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (2012), available at: <http://www.scotland.gov.uk/Publications/2012/08/2539>; *The Scottish Government’s Response to the Consultation on Bankruptcy Law Reform* (2012), available at: <http://www.aib.gov.uk/publications/scottish-government%E2%80%99s-response-consultation-bankruptcy-law-reform>; Accountant in Bankruptcy, *Bankruptcy Law Reform – Update* (February 2013), available at: <http://www.aib.gov.uk/news/releases/2013/02/bankruptcy-law-reform-update> (all sites last accessed 5 July 2013).

provision for executor applications for sequestration to be made to AIB; the introduction of a common financial tool for calculating debtor contributions in all procedures; the introduction of payment holidays in all procedures; changes to discharge in sequestration; the introduction of financial education; the introduction of a business DAS; and further changes to DAS and PTDs.<sup>91</sup> Consequently, as noted above, the Debt Arrangement Scheme (Scotland) Amendment Regulations 2013<sup>92</sup> have already been passed and came into force on 2 July 2013 and a Bankruptcy and Debt Advice (Scotland) Bill (“BDA(S) Bill”) was introduced in the Scottish Parliament on 11 June 2013. Further secondary legislation relating to PTDs and business DAS is expected to be introduced in the autumn of 2013. This is to be followed by a consolidation bill.

#### *The Legislation on Corporate Insolvency*

28 As noted, the Scottish Parliament has so far legislated little on the devolved aspects of corporate insolvency, and such legislation as there has been has been secondary legislation which is essentially narrow in scope compared to the scope of the bankruptcy legislation.

29 The Non-Domestic Rating (Unoccupied Property) (Scotland) Amendment Regulations 2008<sup>93</sup> extended empty property relief to companies in administration and to limited liability partnerships in administration and liquidation.<sup>94</sup>

30 The Insolvency (Scotland) Rules 1986 Amendment Rules 2008<sup>95</sup> made some changes to the Scottish insolvency rules including amendments to the provisions on claims in liquidation, the introduction of a new rule relating to the provision of information by a liquidator or receiver about time spent on a case and an amendment requiring the final report in a creditors’ voluntary liquidation to be sent to the Accountant in Bankruptcy rather than the Registrar of Companies.

31 The Limited Liability Partnerships (Scotland) Amendment Regulations 2009<sup>96</sup> made a number of amendments to the Limited Liability Partnerships (Scotland) Regulations 2001<sup>97</sup> consequential on changes made to the Insolvency Act 1986 by, *inter alia*, the Insolvency Act 2000 and the EA 2002.

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<sup>91</sup> *Idem*.

<sup>92</sup> SSI 2013/225.

<sup>93</sup> SSI 2008/83.

<sup>94</sup> It should be noted, however, that the Scottish Parliament’s ability to make these changes derived from its devolved powers in relation to rates rather than its devolved powers in relation to corporate insolvency, administration, of course, being reserved.

<sup>95</sup> SSI 2008/393.

<sup>96</sup> SSI 2009/310.

<sup>97</sup> SI 2001/128.

32 The Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011<sup>98</sup> amended the provisions relating to the appointment of receivers. The genesis of these changes was a jurisdiction issue which had been identified following the introduction of the EC Regulation on Insolvency Proceedings,<sup>99</sup> and the changes were made following consultation.<sup>100</sup> It is thought, however, that some of the amendments are unnecessary and have unintended (and undesirable) consequences, with the result that corrective legislation may be required. As noted, further, more substantial, legislation on corporate insolvency is now in prospect.<sup>101</sup>

### Assessment

33 This section offers an assessment of the Scottish Parliament's insolvency legislation to date and how the particular way in which the Scottish Parliament functions has shaped it, focusing on the bankruptcy legislation as the major part of that legislation. This assessment is necessarily general given the volume of legislation involved, but it identifies a number of inter-connected issues underpinned by what can be seen as a unifying theme running through not only the bankruptcy legislation already enacted, but the wider legislation on diligence and debtor protection as a whole and, indeed, the legislation the Scottish Parliament is about to consider, namely the creation of a modern system which is fit for purpose and strikes an appropriate balance. It also considers what lessons might be learnt and applied to the Scottish Parliament's consideration of that prospective legislation.

34 The starting point is that, as in England and Wales, bankruptcy reform in Scotland was seen as important in building a modern and prosperous Scotland.<sup>102</sup> In both cases, the reforms were intended to foster entrepreneurship, but applied equally to consumer debtors (the vast majority). There is research suggesting more liberal bankruptcy regimes do have a positive effect on entrepreneurship,<sup>103</sup> but although referred to this in evidence, the Enterprise and Culture Committee ("ECC") in its Stage 1 Report on the BD(S) Bill considered the impact of the reforms on entrepreneurial activity/business restarts would be negligible, and

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<sup>98</sup> SSI 2011/140.

<sup>99</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings OJ L160/1 (30 June 2000).

<sup>100</sup> Scottish Executive, *Insolvency Act 1986 Floating Charges, Foreign Investment and European Regulations: The Power to Appoint a Receiver* (July 2010), available at: <http://www.scotland.gov.uk/Resource/Doc/254431/0101393.pdf> (last accessed 5 July 2013).

<sup>101</sup> See above.

<sup>102</sup> Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraph 1.6.

<sup>103</sup> See J. Armour and D. Cumming, *Bankruptcy Law and Entrepreneurship* (2005), available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/personaldocs/ArmourCummingEntrepreneurship.pdf> (last accessed 5 July 2013) and J. Armour, "Bankruptcy Law and Entrepreneurship" (2008) 10(2) *AE LR* 303-350.



maintenance of a “level playing field” with England and Wales was a more likely reason for their introduction.<sup>104</sup> Interestingly, the evidence from England and Wales has been that, despite reform, there is still stigma attached to bankruptcy,<sup>105</sup> and there also appears to be continuing stigma in Scotland.<sup>106</sup> Entrepreneurship is also an element of the current reforms: they are seen as supporting the current economic strategy of making Scotland a more successful country through increasing sustainable growth, one priority of which is creating a supportive business environment,<sup>107</sup> and proposals such as the new business DAS are clearly aimed at fostering entrepreneurship.<sup>108</sup>

35 Maintaining a level playing field was acknowledged to be one reason for including EA 2002-style reforms in the BD(S)A 2007,<sup>109</sup> although it was said in the Stage 1 debate that the desire to align the two jurisdictions did not seem to be a terribly strong rationale for following these reforms.<sup>110</sup> The Scottish bankruptcy reforms were, however, wider than those in England and Wales, and even where following them, did not copy them exactly. For example, they do not allow automatic discharge in less than a year, a provision which has now been repealed in England and Wales,<sup>111</sup> and LILAs were dealt with differently, through increased

<sup>104</sup> Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraphs 37-38.

<sup>105</sup> See Insolvency Service, *Attitudes to Bankruptcy*, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/attitudes/report-attitudetobankruptcy1.pdf>; Insolvency Service, *Attitudes to Bankruptcy Revisited*, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/ABrevisited/ABrevisited.pdf>; Insolvency Service, *Enterprise Act 2002: Attitudes to Bankruptcy Revisited 2009 Update*, available at: <http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/AB2009/Enterprise%20Act%202002%20-%20Attitudes%20to%20bankruptcy%202009%20update.doc> (all sites last accessed 5 July 2013).

<sup>106</sup> See AIB News Release (16 February 2009), available at: <http://www.aib.gov.uk/News/releases/2009/02/16120010> (last accessed 5 July 2013).

<sup>107</sup> Scottish Government, *Consultation on Bankruptcy Law Reform*, Part 3.

<sup>108</sup> *Ibid.*, at paragraph 11.4.

<sup>109</sup> See Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraphs 29 and 38.

<sup>110</sup> Scottish Parliament, *Official Report*, column 25930 (24 May 2006). This was contrasted with floating charge reform, for which there was seen to be a much stronger case.

<sup>111</sup> Enterprise and Regulatory Reform Act 2013, section 73 and Schedule 21, Part 3, paragraph 5. These provisions are expected to be brought into force on 1 October 2013: see Department for Business Innovation and Skills, *Enterprise and Regulatory Reform Act 2013: a guide* and indicative timetables for commencement of those provisions not already in force available at: <https://www.gov.uk/government/publications/enterprise-and-regulatory-reform-act-2013-a-guide>. For the preceding consultation, see Insolvency Service, *Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* (November 2009), at 32-33, available at: [http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/Debtor%20Petition%20Reform%20Final%20Nov%202009.pdf](http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Debtor%20Petition%20Reform%20Final%20Nov%202009.pdf); Insolvency Service, *Response to Consultation on Reforming Debtor Petition Bankruptcy and Early Discharge* (October 2010) and Ministerial Statement, available at: [http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/DPreferResponses/DPreferIndex.htm](http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/DPreferResponses/DPreferIndex.htm) (all sites last accessed 5 July 2013).

access to sequestration, whereas in England and Wales, a separate debt relief order procedure was introduced.<sup>112</sup> One reason for introducing the HODP(S)A 2010 provision allowing exemption of a debtor's main residence from a PTD was that it would give a debtor entering a PTD in Scotland the same opportunity to exclude his home from the procedure as a debtor entering an individual voluntary arrangement ("IVA") in England and Wales.<sup>113</sup> Arguably, however, this failed to recognise that, although functionally similar, PTDs and IVAs are legally quite different.

36 The maintenance of a level playing field has not, however, been wholly one-sided. England and Wales has followed some Scottish innovations such as the removal of debtor petitions for bankruptcy from the courts,<sup>114</sup> which was done in Scotland by the BD(S)A 2007. Interestingly, both jurisdictions have rejected the removal of (non-contentious) creditor applications for bankruptcy from the courts following overlapping consultations,<sup>115</sup> although the current reforms in Scotland do include the removal of executor petitions for bankruptcy from the courts.<sup>116</sup>

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<sup>112</sup> See Part 5 of the Tribunals, Courts and Enforcement Act 2007.

<sup>113</sup> See Home Owner and Debtor Protection (Scotland) Bill Policy Memorandum SP Bill 32-PM, at paragraph 44; see also Scottish Parliament, *Official Report*, columns 22399-22400 (17 November 2009) (Stage 1 debate).

<sup>114</sup> Enterprise and Regulatory Reform Act 2013, section 71 and Schedules 18 and 19. These provisions are expected to be brought into force in 2015-16: see Department for Business Innovation and Skills, *Enterprise and Regulatory Reform Act 2013: a guide* and indicative timetables for commencement of those provisions not already in force, available at: <https://www.gov.uk/government/publications/enterprise-and-regulatory-reform-act-2013-a-guide>. For the preceding consultation, see Insolvency Service, *Reforming Debtor Petition Bankruptcy and Early Discharge from Bankruptcy* (November 2009), at 32-33, available at: [http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/Debtor%20Petition%20Reform%20Final%20Nov%202009.pdf](http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Debtor%20Petition%20Reform%20Final%20Nov%202009.pdf); Insolvency Service, *Response to Consultation on Reforming Debtor Petition Bankruptcy and Early Discharge* (October 2010) and Ministerial Statement, available at: [http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/DPRefResponses/DPreIndex.htm](http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/DPRefResponses/DPreIndex.htm); Insolvency Service, *Consultation on Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up* (November 2011); Insolvency Service, *Consultation on Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up Summary of Responses* (September 2012) and Ministerial Response (9 October 2012), all available at: <http://www.bis.gov.uk/insolvency/Consultations/petition%20reform?cat=closedwithresponse> (all sites last accessed 5 July 2013).

<sup>115</sup> For England and Wales, see Insolvency Service, *Consultation on Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up* (November 2011), Insolvency Service, *Consultation on Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up Summary of Responses* (September 2012) and Ministerial Response (9 October 2012), all available at: <http://www.bis.gov.uk/insolvency/Consultations/petition%20reform?cat=closedwithresponse> (last accessed 5 July 2013). For Scotland, see Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Part 12; Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of Responses* (August 2012); Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (October 2012); Accountant in Bankruptcy, *Bankruptcy Law Reform Update* (February 2013).

<sup>116</sup> Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Part 12; Accountant in Bankruptcy, *Consultation on Bankruptcy Law Reform: The Report of the Summary of*

37 The importance of a comprehensive and coherent approach to bankruptcy reform was recognised in the consultations prior to the introduction of the BD(S) Bill. In its Stage 1 Report on the bill, however, the ECC said it wanted to see a more joined-up approach by the SE in terms of the different options ranging from debt write-off to sequestration.<sup>117</sup> This was said in the context of access to sequestration, where the ECC suggested the SE should consider a certification route into sequestration.<sup>118</sup> The SE considered, however, that the bill would deliver a new and better-integrated system of debt management and debt relief.<sup>119</sup> The coherence of bankruptcy reform was, however, jeopardised by Part 2 of the HODP(S)A 2010: although it was presented as an emergency measure:

“...to protect home owners and debtors during a period of recession and, in particular to reduce risk of homelessness as result of insolvency”,<sup>120</sup>

the SE was accused of introducing it simply to be seen to be doing something in the light of the financial crisis.<sup>121</sup> It is certainly arguable that the Part 2 measures were less urgent. Furthermore, it was clearly envisaged that the measures being introduced “would continue to be appropriate in the event of an early recovery”,<sup>122</sup> and were therefore intended to be longer-term measures. In addition, as was acknowledged in the Stage 1 debate, Part 2 was never intended to be “the be-all and end-all” of further bankruptcy legislation.<sup>123</sup>

38 Taking all these things together, it is arguable that the Part 2 measures should never have been included in the HODP(S) Bill and should have been pursued later as part of the more comprehensive reform which is now being undertaken. This might also have avoided issues it created around the various provisions relating to the debtor’s home in bankruptcy: for example, the existence of two separate provisions using two different definitions of the debtor’s home in the context of PTDs, one relating to the debtor’s main residence and one relating to the debtor’s family home as defined by section 40 of the Bankruptcy (Scotland) Act 1985 (“B(S)A 1985”). The current reforms, with their vision of a new model of debt advice, debt management and debt relief in the form of a “financial health service”,

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*Responses* (August 2012); Scottish Government, *Response to the Consultation on Bankruptcy Law Reform* (October 2012); Bankruptcy and Debt Advice (Scotland) Bill.

<sup>117</sup> Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraph 96.

<sup>118</sup> *Ibid.*, at paragraph 95. This suggestion was not taken up at the time in the light of the LILA reforms, but as noted above, was subsequently implemented by the HODP(S)A 2010.

<sup>119</sup> See Scottish Parliament, *Official Report*, column 29984 (30 November 2006) (Stage 1 debate).

<sup>120</sup> *Home Owner and Debtor Protection (Scotland) Bill Policy Memorandum*, SP Bill 32 – PM, at paragraph 2.

<sup>121</sup> Scottish Parliament, *Official Report*, column 23738 (11 February 2010).

<sup>122</sup> *Idem.*

<sup>123</sup> Scottish Parliament, *Official Report*, columns 22373-4 (17 December 2009). See also Scottish Parliament, *Official Report*, column 22379 (17 December 2009).

also seek to deliver comprehensive and coherent reform, although it is arguable that this cannot really be achieved absent consideration of the family home, since any changes to way in which the family home is dealt with might be regarded as fundamental to bankruptcy reform.<sup>124</sup>

39 It is clear that one of the main aims in legislating has been to strike the right balance between the interests of debtors, creditors and third parties, and in general terms, this was seen as requiring a shift in the balance in the debtor's favour. The ECC in its Stage 1 Report on the BD(S) Bill noted that the SE considered the (then) laws, made 20 years previously, were in need of reform because they were no longer fit for purpose and did not strike the right balance between the interests of debtors, creditors and public.<sup>125</sup> The issue of balance also arose in the debates on the HODP(S) Bill, where it was said the rights of creditors must be balanced with humane debt solutions proportionate to the impact of debt on families and the wider community.<sup>126</sup> The difficulty, of course, is that views on where the correct balance lies differ. This is encapsulated in the SE's acknowledgement in the Stage 3 debate on the BD(S) Bill that:

*"...[s]ome people will think that we should do more and some people will think that we should do less."<sup>127</sup>*

40 This is aptly illustrated by two contrasting views of the Scottish Parliament's wider work on debt as a whole. The first was offered in the Stage 3 debate on the BD(S) Bill:<sup>128</sup>

*"The Parliament has a strong record on reforming the way in which debt is dealt with. From the Abolition of Poindings and Warrant Sales Act 2001 to the Debt Arrangement and Attachment (Scotland) Act 2002, we have recognised the reality that people who are in financial difficulties face and the fact that they need support and advice to help them to repay, rather than threats."*

41 The second was offered in the Stage 3 debate on the HODP(S) Bill:<sup>129</sup>

*"The Scottish Parliament in the field of debt has been a one-way street of reforms that make it easier for people to avoid paying their bills. Before we go any further beyond this bill, we should pause to think about the stage we have reached."*

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<sup>124</sup> The wide-ranging impact of any change to how the family home is dealt with in bankruptcy or diligence was acknowledged in the consultation: see Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Executive Summary.

<sup>125</sup> Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraph 30.

<sup>126</sup> Scottish Parliament, *Official Report*, column 23752 (11 February 2010).

<sup>127</sup> Scottish Parliament, *Official Report*, column 29972 (30 November 2006).

<sup>128</sup> *Idem*.

<sup>129</sup> Scottish Parliament, *Official Report*, column 23738 (11 February 2010).

42 There is no doubt that Part 2 of the HODP(S)A 2010 effected a further shift in the balance towards the debtor. The current reforms also specifically refer to the need for balance,<sup>130</sup> but can be seen as shifting the balance back towards the creditors in some respects, for example through those changes designed to improve returns to creditors. In terms of fitness for purpose generally, the ECC in its Stage 1 Report on the BD(S) Bill considered that it was a “once-in-a-generation” opportunity to reform bankruptcy and diligence law in Scotland and a chance to provide a legislative framework fit-for-purpose for decades to come.<sup>131</sup> Perhaps inevitably, this did not prove not to be the case, as the HODP(S)A 2010 and the current reforms prove, and while the current reforms also aim to develop a new model of debt advice, debt management and debt relief “fit for the 21<sup>st</sup> century”, it may be questioned whether this kind of “future-proofing” can ever really be achieved.

43 The tenor of the legislation to be considered and ultimately passed by the Scottish Parliament can, of course, be affected by a change of administration.<sup>132</sup> For example, more radical changes to the treatment of the family home in bankruptcy and diligence may now be more likely since the previous minority administration which espouses them is now a majority administration.<sup>133</sup> Irrespective of “regime change”, however, it is clear that in legislating on bankruptcy in particular, and diligence and debtor protection more widely, the Scottish Parliament’s policy has been shaped largely by what might be characterised as “social” issues, particularly the impact of debt and enforcement on individuals. In contrast, economic issues, particularly the potential (adverse) effects of (more debtor-oriented) reform, appear to have received less credence or weight.

44 One particular aspect of this can be seen in the desire to prevent homelessness which was reflected, for example, in those provisions in Part 2 of the HODP(S)A 2010 allowing exclusion of the debtor’s main residence from a PTD and extending the protection for the family home in sequestration to PTDs. The ECC in its Stage 1 Report on the BD(S) Bill said that there were occasions where the sale of the home was merited in bankruptcy and occasions where it was not; that it would make no sense for bankruptcy to cause homelessness; and that the SE should ensure its

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<sup>130</sup> See, in particular, Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Part 5.

<sup>131</sup> Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraph 236. This sentiment was echoed in both the Stage 1 debate (see Scottish Parliament, *Official Report*, column 25928 (24 May 2006)) and the Stage 3 debate (see Scottish Parliament, *Official Report*, column 29965 (30 November 2006)).

<sup>132</sup> It must be remembered, however, that not all bills originate with the administration, and indeed the APWSA 2001 and the MR(S)A 2001 were both member’s bills, although the latter, unlike the former, had Scottish Executive support.

<sup>133</sup> See, for example, Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Executive Summary.

policies on these issues were consistent.<sup>134</sup> The current administration has maintained its position on homelessness,<sup>135</sup> but policy in this area requires to be very carefully considered, since preventing homelessness by exempting the debtor's home from bankruptcy or diligence either wholly or partly not only opens the door to potential abuse but effectively shifts the cost of housing debtors from the state to creditors with potentially wider implications for access to credit generally. The need to consider the issues carefully has been acknowledged as the reason for deferral of consideration of the treatment of the family home.<sup>136</sup>

45 There can also be disagreements between the Parliament and the administration, as epitomised by the Parliament taking a different view from the (then) minority administration on the corporate insolvency (re)reservation provisions of the Scotland Bill. More generally, committees examining legislation often raise issues or make recommendations for change, although these are often responded to positively. For example, a number of amendments were made to the BD(S) Bill at Stage 2 in response to issues raised in the Stage 1 Report.<sup>137</sup> In the Stage 1 debate on the HODP(S) Bill, it was said that the Local Government and Communities Committee ("LGCC") might have rejected Part 2 of the bill altogether and ministers had "a big job" to do to ensure it could be safely passed.<sup>138</sup> The SE issued a formal response to the Stage 1 Report, indicating in several cases that amendments would be lodged at Stage 2, including amendments to the provisions relating to delegated powers which had caused particular concern,<sup>139</sup> and the willingness of ministers to respond to the LGCC's concerns was noted in the Stage 3 debate.<sup>140</sup> Such issues may, of course, be less likely to arise in relation to the current reforms given that they are being put forward by a majority administration.

46 The use of secondary legislation, and in particular the correct balance between primary and secondary legislation and the type of procedure used to ensure the Parliament has an appropriate role in scrutinising secondary legislation, is an issue which has regularly concerned the Parliament, and the Subordinate Legislation Committee ("the SLCCte") has had an important role to play in this respect. The Social Justice Committee ("SJC") noted in its Stage 1 Report on the DAA(S)A 2002 that much of the detail of the DAS would be left to secondary legislation and

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<sup>134</sup> See Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraphs 61-62.

<sup>135</sup> See Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Executive Summary.

<sup>136</sup> *Idem*.

<sup>137</sup> See SPICE Briefing, *Bankruptcy and Diligence etc. (Scotland) Bill: Parliamentary Consideration Prior To Stage 3*, 06/100 (21 November 2006), for a full account of the amendments at Stage 2.

<sup>138</sup> Scottish Parliament, *Official Report*, column 22383 (17 December 2009).

<sup>139</sup> See *Home Owner and Debtor Protection (Scotland) Bill, Local Government and Communities Committee Stage 1 Report, Scottish Government Response* (January 2010). The issue of delegated powers is discussed further below.

<sup>140</sup> Scottish Parliament, *Official Report*, column 22736 (11 February 2010).

there was real concern about the lack of detail on face of bill.<sup>141</sup> It therefore said it expected the SE to consult on the secondary legislation,<sup>142</sup> even though this would delay implementation.<sup>143</sup> The SE's position in the Stage 1 debate was that it would have put the detail in the primary legislation if time had permitted, but it would consult.<sup>144</sup> There was also an amendment at Stage 3 to ensure that the first set of DAS regulations was subject to affirmative procedure.<sup>145</sup>

47 In its Stage 1 Report on the BD(S) Bill, the ECC noted in relation to the provisions on PTDs that it was being asked to agree the general principles of the bill without knowing the detail of the proposed statutory instruments which would give effect to the relevant provisions, a practice it described as "less than desirable", and that a balance needed to be struck between provisions written into primary legislation and those left to secondary legislation.<sup>146</sup> There was an amendment at Stage 3 to ensure that the first set of PTD regulations was subject to affirmative procedure. There was also an amendment at Stage 3 to ensure that any regulations changing the debt thresholds for sequestration were subject to affirmative procedure.<sup>147</sup>

48 The issue of amendments raises another important issue, that of drafting. Issues have arisen about the quality of drafting of some bills. For example, in its Stage 1 Report on the BD(S) Bill, the ECC noted it had received a substantial number of suggestions for mainly technical amendments which were non-controversial, which it recommended be taken forward at Stage 2.<sup>148</sup> It also commented on the role of consultation in ensuring there was less likelihood of amendments at Stages 2 and 3 and more consensus on the detail of a bill.<sup>149</sup> Notwithstanding the size and scope of the BD(S) Bill, the number of amendments at Stage 2 alone was considerable, and many were technical amendments which arguably should have been unnecessary.<sup>150</sup> The bankruptcy provisions of the BD(S) Bill also raised a different drafting issue. These provisions consisted primarily of amendments to the B(S)A 1985. The extent of the amendments begged the question of whether a consolidating measure would have been more appropriate. This was not accepted at the time, but the SLC was subsequently asked to undertake work to consolidate the bankruptcy legislation.<sup>151</sup>

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<sup>141</sup> Scottish Parliament, *Official Report, Social Justice Committee, Stage 1 Report on the Debt Arrangement and Attachment (Scotland) Bill*, at paragraph 21.

<sup>142</sup> *Ibid.*, at paragraphs 24, 27.

<sup>143</sup> *Ibid.*, at paragraph 25.

<sup>144</sup> Scottish Parliament, *Official Report*, column 13886 (19 September 2002).

<sup>145</sup> Scottish Parliament, *Official Report*, columns 15180-3 and 15281 (13 November 2002).

<sup>146</sup> Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraph 21.

<sup>147</sup> Scottish Parliament, *Official Report*, columns 29834, 29837 (30 November 2006).

<sup>148</sup> Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraphs 104-105.

<sup>149</sup> *Ibid.*, at paragraph 20. Consultation is dealt with further below.

<sup>150</sup> See SPICe Briefing, above note 137, for a full account of the amendments at Stage 2.

<sup>151</sup> See Scottish Law Commission, *Annual Report 2008* (Scot Law Com No 214, 2008).

Initially expected to be completed by the end of 2009, this work was delayed in order to take account of the (then) HODP(S) Bill.<sup>152</sup>

49 A consultation including a draft bill was eventually issued in 2011<sup>153</sup> and has now been followed by a report including a draft Bankruptcy (Scotland) Bill 2013, a draft section 104 order and draft tables of derivations and destinations.<sup>154</sup> This has, however, effectively been superseded by the introduction of the BDA(S) Bill, which makes further amendments to the B(S)A 1985, although as noted above it is still intended to proceed with a consolidation after these have been enacted. Furthermore, the HODP(S) Bill was criticised in the debates as being “badly constructed” and linking together “two disparate sets of issues” thereby creating “controversy, confusion and disagreement”,<sup>155</sup> and it was said that the SE should not come to a committee with legislation so unclear as a result of a last-minute rush to address issues that might have been better dealt with in future legislation.<sup>156</sup> And while it was also said that it is:

“...the Government’s responsibility to produce draft legislation and it is the Parliament’s job to improve and amend it as appropriate”,<sup>157</sup>

this cannot mean that legislation should not be as well-drafted as possible at the outset. It is to be hoped that similar issues do not arise with the current reforms.

50 Turning to consultation, this can be seen as important at two levels: a policy level and a technical level. This is undoubtedly why consultation is built into the parliamentary procedures themselves, even where there has been previous consultation, and it was noted in the Stage 1 Report on the BD(S) Bill that part of the committee’s role at Stage 1 is to consider whether the SE has consulted appropriately at the pre-legislative stage.<sup>158</sup> In that case, the ECC was generally satisfied with the consultation, but urged the SE to make more use of working groups and other participative forms of engagement that try to resolve problems and road test ideas before legislation is published.<sup>159</sup> As already referred to, the ECC in its Stage 1 Report on the BD(S) Bill was unhappy that some consultation was still ongoing, for example in relation to PTDs, and in the Stage 1 debate, it was said that the continuing uncertainty about the SE’s proposals on PTDs and the

<sup>152</sup> See Scottish Law Commission, *Annual Report 2009* (Scot Law Com No 221, 2009), at 26.

<sup>153</sup> Scottish Law Commission, *Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland* (August 2011).

<sup>154</sup> Scottish Law Commission, *Report on the Consolidation of the Bankruptcy Legislation in Scotland* (Scot Law Com No 232).

<sup>155</sup> Scottish Parliament, *Official Report*, column 22382 (17 December 2009).

<sup>156</sup> Scottish Parliament, *Official Report*, column 23746 (11 February 2010). The issue of whether the provisions in Part 2 should have been left to future legislation is discussed above.

<sup>157</sup> Scottish Parliament, *Official Report*, column 22385 (17 December 2009).

<sup>158</sup> Scottish Parliament, *Official Report, Enterprise and Culture Committee, Stage 1 Report on the Bankruptcy and Diligence etc. (Scotland) Bill*, at paragraph 16.

<sup>159</sup> *Ibid.*, at paragraph 20.



failure to have full proposals available was “deeply regrettable”, the bill being presented as package, but with some of its contents missing.<sup>160</sup> Consultation, or rather the lack of it, became a major issue in relation to the HODP(S) Bill. As noted, a truncated timetable was adopted on the basis that the measures in the bill were urgent and had received broad, if not in all cases unanimous, support in the DAF, and the usual pre-introduction consultation was not undertaken. However, the LGCC in its Stage 1 Report noted that the proposals in Part 2 had not been specifically recommended by DAF and it was not clear if or to what extent they had been discussed in subsequent meetings with stakeholders,<sup>161</sup> although it accepted it was a question of balance between the need for consultation and the need to take action quickly.<sup>162</sup> It ultimately concluded that the consultation on Part 2 had been “unsatisfactory”.<sup>163</sup> The Finance Committee (“FC”) went further in calling the failure to undertake the normal consultation process in respect of Part 2 “unacceptable”.<sup>164</sup>

51 It was observed in the Stage 3 debate that the Parliament is a unicameral Parliament, so it is vital to observe all current protocols when passing legislation and not excusable to ignore consultation and proper evidence taking.<sup>165</sup> Lack of consultation was also the downfall of the Debt Arrangement Scheme (Scotland) Amendment Regulations 2009<sup>166</sup> which, as noted above, were revoked before coming into force following reservations about the changes they contained which had not been formally consulted on.<sup>167</sup> There has been extensive pre-legislative consultation on the current reforms, including meetings with stakeholders, but consultation on the principles is different from consultation on the detail, and there is to be no formal consultation on the BDA(S) Bill itself. It remains to be seen whether this leads to difficulties since there are some aspects of the bill which have not been previously consulted on in detail or at all.

52 The truncated timetable for the HODP(S)A 2010 and the resultant criticism of lack of proper consultation on Part 2 highlights another important issue, parliamentary time. One of the main arguments for the Scottish Parliament is the opportunity to legislate on matters for which time would not be found at Westminster. The length of time it takes to get legislation on the statute book, however, is also important, and it can be argued that the procedure can take too

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<sup>160</sup> Scottish Parliament, *Official Report*, columns 22911-25912 (24 May 2006). See also Scottish Parliament, *Official Report*, column 29833 (30 November 2006).

<sup>161</sup> Scottish Parliament, *Official Report, Local Government and Communities Committee, Stage 1 Report on the Home Owner and Debtor Protection (Scotland) Bill*, at paragraph 9.

<sup>162</sup> *Ibid.*, at paragraph 36.

<sup>163</sup> *Ibid.*, at paragraph 43.

<sup>164</sup> *Ibid.*, at paragraph 55.

<sup>165</sup> Scottish Parliament, *Official Report*, column 23748 (11 February 2010).

<sup>166</sup> SSI 2009/234.

<sup>167</sup> See the Debt Arrangement Scheme (Scotland) Revocation Regulations 2009 (SSI 2009/258).

long. As was recognised in the debates surrounding the HODP(S)A 2010, however, there is a balance to be struck.

53 In considering the way in which legislation is shaped by the Parliament, it is clear the committee structure is pivotal and it has been favourably contrasted with the procedure at Westminster, for example, in the debates on the BD(S) Bill.<sup>168</sup> One of the main strengths of the committee system lies in the ability to take evidence and consider views from all stakeholders. It is important that a wide range of stakeholders can give evidence directly to the committees scrutinising a bill even if there has been pre-legislative consultation,<sup>169</sup> but particularly where there has not, as in the case of Part 2 of the HODP(S)A 2010. It is, therefore, perhaps somewhat ironic that it was acknowledged in the Stage 3 debate on that bill that not just members but key stakeholders had been influential throughout the passage of the bill, and although stakeholders did not always get their own way, the process of consultation was valuable in securing a better balance between protection for lenders and debtors and ensuring workable legislation.<sup>170</sup>

54 Issues have arisen, however, about the selection of the committees chosen to scrutinise a bill. In the debates on the BD(S) Bill, initial surprise was expressed at the designation of the ECC as the lead committee given that the overwhelming number of bankrupts were not entrepreneurs but consumer debtors,<sup>171</sup> and it was said that questions remained over the decision to allocate the bill to that committee.<sup>172</sup> It must also be recognised that committees may lack expertise, particularly in highly technical areas such as bankruptcy, although this may be compensated for to some extent by the appointment of advisers, as happened in the case of the BD(S) Bill and is proposed for the BDA(S) Bill. The committee structure was, however, generally approved of by the Calman Commission, who recommended that it should be maintained, although the turnover of membership during the parliamentary session should be minimised in order to allow committee members to build expertise, and a committee should have the facility to establish sub-committees to address temporary problems of legislative overload without prior approval of Parliament as a whole.<sup>173</sup>

55 The Calman Commission also considered, however, that the Scottish Parliament could be more effective in its scrutiny of bills towards the end of the legislative process.<sup>174</sup> In particular, it recommended the current three-stage bill process should be changed to a four-stage process, with Stage 3 becoming limited to a second main

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<sup>168</sup> Scottish Parliament, *Official Report*, column 25902 (24 May 2006).

<sup>169</sup> Consultation is discussed in detail above.

<sup>170</sup> Scottish Parliament, *Official Report*, columns 23733-23734 (11 February 2010).

<sup>171</sup> Scottish Parliament, *Official Report*, column 25919 (24 May 2006).

<sup>172</sup> Scottish Parliament, *Official Report*, column 22975 (30 November 2006).

<sup>173</sup> Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: Final Report* (June 2009), recommendation 6.1.

<sup>174</sup> *Ibid.*, Executive Summary, at paragraph 53.

amending stage, taken in the chamber, while the final debate on whether to pass the bill would become Stage 4.<sup>175</sup> It also recommended that the Parliament should amend its rules so that any MSP would have the right to propose at the conclusion of the Stage 3 amendment proceedings that parts of a bill be referred back to committee for further Stage 2 procedure,<sup>176</sup> and that the presiding officer should be able to identify in advance of Stage 3 amendments which in his view raised substantial issues not considered at earlier stages and, where any such amendments are agreed to, the relevant provisions of the bill should be referred back to committee for further Stage 2 consideration unless the Parliament decides otherwise on a motion by the member in charge of the bill.<sup>177</sup> Such a procedure would clearly have affected some of the legislation discussed in this chapter in view of the nature of amendments made at Stage 3, in particular in the case of the BD(S)A 2007.

## Conclusion

56 The period since the establishment of the Scottish Parliament has been characterised by rising debt, particularly consumer debt, and has encompassed a financial crisis and severe recession resulting in increased financial difficulties for consumers and businesses alike. Against that background, it is not surprising that the Scottish Parliament has legislated extensively on, *inter alia*, insolvency law, particularly bankruptcy law.

57 The reserved/devolved split in relation to insolvency law has, however, given rise to difficulties, particularly in the context of corporate insolvency law reform. These difficulties are partly a function of the nature of the split itself and partly a function of the Scottish Parliament's focus on the reform of bankruptcy law and the wider law relating to debt and enforcement generally at the expense of the devolved aspects of corporate insolvency law. Particularly in the current economic climate, however, a Scottish corporate insolvency law in which every available procedure is modernised and fit for purpose is equally as important as a Scottish bankruptcy law which fulfils these criteria. It is therefore to be hoped that now that the issue of re-reservation has finally been resolved, rapid progress will be made in relation to the devolved aspects of corporate insolvency law as well as bankruptcy law notwithstanding the difficulties which remain as a result of the maintenance of the original reserved/devolved split.

58 As to an assessment of the Scottish Parliament's legislation on insolvency to date, effectively its legislation on bankruptcy, like its wider legislation on debt and enforcement generally, this has been underpinned by a general theme of the

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<sup>175</sup> *Ibid.*, recommendation 6.2.

<sup>176</sup> *Ibid.*, recommendation 6.3.

<sup>177</sup> *Ibid.*, recommendation 6.4.

creation of a modern system which is fit for purpose and strikes an appropriate balance, a theme which in broad terms also underpins the current reforms. The cumulative effect of the legislation to date, which has sought to bring about comprehensive and integrated reform, has been to bring about a major shift in the balance in favour of debtors. The current reforms, however, can be seen as seeking to shift the balance back towards creditors in at least some respects. Inevitably, there are different views on where the correct balance lies and whether the current reforms will strike a better balance or not. In this respect, it must be noted that the effects of the legislation enacted by the Scottish Parliament, at least up to and including the BD(S)A 2007, can be seen as consistent with European initiatives with their emphasis on reduction of the stigma of bankruptcy and a fresh start for (non-culpable) debtors<sup>178</sup> and as generally benchmarking well against international standards on consumer bankruptcy.<sup>179</sup> The current reforms also explicitly seek to take account of European and international developments.<sup>180</sup> It is suggested, however, that the comment made in the course of the Stage 1 debate on the BD(S) Bill that care must be taken that the pendulum does not swing too far in *either* direction is instructive.<sup>181</sup> Care must also be taken to ensure that the ongoing reform is coherent and takes proper account of the likely consequences.

59 As to the way in which the Scottish Parliament functions has shaped the legislation to date, it is notable that some measures have had cross-party support while others have been more controversial. The legislation provides an interesting

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<sup>178</sup> In particular the work being carried out by the European Commission: see *Bankruptcy and a Fresh Start: Stigma on Failure and Legal Consequences of Bankruptcy* (2002), available at: [http://ec.europa.eu/enterprise/entrepreneurship/sme2chance/doc/stigma\\_study.pdf](http://ec.europa.eu/enterprise/entrepreneurship/sme2chance/doc/stigma_study.pdf); *Best Project on Restructuring, Bankruptcy and A Fresh Start: Final Report of the Expert Group* (2003), available at: [http://ec.europa.eu/enterprise/entrepreneurship/sme2chance/doc/failure\\_final\\_en.pdf](http://ec.europa.eu/enterprise/entrepreneurship/sme2chance/doc/failure_final_en.pdf); Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the Regions, *Overcoming the Stigma of Business Failure – For a Second Chance Policy Implementing the Lisbon Partnership for Growth and Jobs* (5 October 2007) (COM (2007) 584), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:DKEY=456594:EN:NOT>; *Business Dynamics: Start-ups, Business Transfers and Bankruptcy* (January 2011), available at: [http://ec.europa.eu/enterprise/policies/sme/business-environment/files/business\\_dynamics\\_final\\_report\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/business-environment/files/business_dynamics_final_report_en.pdf); *A Second Chance for Entrepreneurs: Prevention of Bankruptcy, Simplification of Bankruptcy Procedures and Support for a Fresh Start, Final Report of the Expert Group* (January 2011), available at: [http://ec.europa.eu/enterprise/policies/sme/business-environment/files/second\\_chance\\_final\\_report\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/business-environment/files/second_chance_final_report_en.pdf). See also Communication from the Commission to the Council, the European Parliament and The European Economic and Social Committee, *A New European Approach to Business Failure and Insolvency* (12 December 2012) (COM (2012) 742), available at: [http://ec.europa.eu/justice/civil/files/insolvency-comm\\_en.pdf](http://ec.europa.eu/justice/civil/files/insolvency-comm_en.pdf) (all sites last accessed 5 July 2013).

<sup>179</sup> See D. McKenzie Skene and A. Walters, “Consuming Passions: Benchmarking Consumer Insolvency Law Systems” in P. Omar (ed), *Insolvency Law: Issues, Themes and Perspectives* (2008, Ashgate, Aldershot).

<sup>180</sup> Scottish Government, *Consultation on Bankruptcy Law Reform* (February 2012), Part 4.

<sup>181</sup> Scottish Parliament, *Official Report*, column 25919 (24 May 2006).

study in how the Parliament treats SE policy, ranging from initial rejection in the case of the corporate insolvency (re)reservation provisions of the Scotland Bill<sup>182</sup> to the more common seeking of clarification or changes, particularly in relation to matters such as delegated powers, where the SE response is often, if not always, positive. It has also raised issues relating to drafting, with serious questions arising regarding the quality of the drafting in particular of the BD(S) Bill and the HODP(S) Bill and associated delegated legislation, and to consultation, with serious questions arising regarding the consultation on Part 2 of the HODP(S)A 2010 and its truncated timetable generally. Nonetheless, it is clear that the committee system, which is pivotal to the Parliament's procedures, has generally served it well in relation to the legislation in this area, notwithstanding lack of expertise in what is admittedly a highly technical area. This is partly due to the ability to appoint an adviser in an appropriate case, as was done in the case of the BD(S) Bill, and partly due to the fact that the system of evidence-taking allows both policy and technical issues to be aired and debated. In this respect, the Calman Commission's general endorsement of the committee system seems well justified notwithstanding its suggestions for further improvement.

60 In conclusion, therefore, it might be said that the effect of devolution on insolvency law in Scotland so far has been mixed. The Scottish Parliament has brought about extensive reform of bankruptcy law and the wider law of diligence and debtor protection in Scotland which has taken account of developments in England and Wales but continued to reflect a distinctively Scottish approach to these areas and it looks set to continue on this path with the current reforms. It has, however, sadly neglected the devolved aspects of corporate insolvency law, a situation which it is hoped will soon be remedied, and there are clearly some important lessons to be learned from the experiences of the previous legislation. Provided these issues are addressed, however, it is thought that cautious optimism for the forthcoming legislation may not be unjustified.

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<sup>182</sup> Although the Parliament's stance may, of course, now change following the conversion of the then minority administration into a majority administration.