OFFICIAL REPORT
AITHISG OIFIGEIL

# Delegated Powers and Law Reform Committee

**Tuesday 21 March 2023**

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

# Tuesday 21 March 2023

## CONTENTS



## DELEGATED POWERS AND LAW REFORM COMMITTEE

**10th Meeting 2023, Session 6**

**CONVENER**

*Stuart McMillan (Greenock and Inverclyde) (SNP)

**DEPUTY CONVENER**

*Bill Kidd (Glasgow Anniesland) (SNP)

**COMMITTEE MEMBERS**

*Jeremy Balfour (Lothian) (Con)
*Carol Mochan (South Scotland) (Lab)
*Oliver Mundell (Dumfriesshire) (Con)

*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Tom Arthur (Minister for Public Finance, Planning and Community Wealth)

**CLERK TO THE COMMITTEE**

Greg Black

**LOCATION**

The Adam Smith Room (CR5)

# Scottish Parliament

## Delegated Powers and Law Reform Committee

*Tuesday 21 March 2023*

*[The Convener opened the meeting at 09:00]*

## Instruments not subject to Parliamentary Procedure

**The Convener (Stuart McMillan):** Good morning, and welcome to the 10th meeting in 2023 of the Delegated Powers and Law Reform Committee. I remind everyone present to switch their mobile phones to silent.

Under agenda item 1, we are considering two instruments that are not subject to any parliamentary procedure.

### Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules 1999 Amendment) (Sexual Harm Prevention Orders and Sexual Risk Orders) 2023 (SSI 2023/62)

**The Convener:** An issue has been raised on this instrument, which provides new court rules for handling applications to the court arising under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The committee identified an incorrect cross-reference in paragraph (6) of rule 3.54.4, in that the reference to paragraph (4)(b) should be to paragraph (4)(c). The Lord President's private office has confirmed that the cross-reference is an error, and it proposes to rectify it in a forthcoming instrument that will make amendments to the summary application rules.

Does the committee wish to draw the instrument to the attention of the Parliament on the general reporting ground in respect of a cross-referencing error in paragraph (6) of rule 3.54.4?

**Members** *indicated agreement.*

**The Convener:** Does the committee welcome the Lord President's intention to correct the error in a forthcoming amending instrument?

**Members** *indicated agreement.*

**The Convener:** No points have been raised on the following instrument.

### Offensive Weapons Act 2019 (Commencement No 3) (Scotland) Regulations 2023 (SSI 2023/72 (C 6))

**The Convener:** Is the committee content with the instrument?

**Members** *indicated agreement.*

# Moveable Transactions (Scotland) Bill: Stage 2

09:01

**The Convener:** Under agenda item 2, we will consider the Moveable Transactions (Scotland) Bill at stage 2. I ask members to refer to their copy of the bill, the marshalled list of amendments and the groupings of amendments.

We are joined by the Minister for Public Finance, Planning and Community Wealth, Tom Arthur MSP, and Scottish Government officials. I welcome all of you. I remind the minister's officials that they cannot participate in any stage 2 proceedings, but they can communicate to the minister directly.

We have a large number of amendments to the bill to consider and dispose of. If votes are required, I will call for members to vote yes first, then call for members to vote no, and then call for any abstentions. Members should vote by raising their hand. The clerks will collate the votes and pass them to me to read out and confirm the result.

I will take stage 2 slowly so that we have time to manage the process properly.

### Section 1—Assignation of claims: general

**The Convener:** Amendment 54, in the name of Jeremy Balfour, is grouped with amendments 67 and 74.

**Jeremy Balfour (Lothian) (Con):** Good morning. I will set out some context for all my amendments.

Clearly, we are supportive of the bill in principle, and I welcome the comments that the Scottish Government has made. I hope that my amendments will clarify some things and ensure that the bill will work in practice.

I am grateful to the groups that have been in touch with me and have suggested amendments. I am particularly grateful to the Law Society of Scotland, which I have had a number of conversations with and which has helped me with some of my amendments. I hope that my amendments will be dealt with in a constructive way, and I look forward to hearing what the minister has to say.

I turn to amendments 54, 67 and 74, all of which are in my name.

Amendment 54 would expressly allow the assignation document to refer to the claim by reference to another document or data that is not reproduced in the assignation document itself. That is important because a number of invoice discounting systems use online portal-based invoice discounting systems, and we need to ensure that they are able to utilise the register of assignations. Similarly, I am sure that we want to avoid lengthy documents, including customer lists, needing to be uploaded to the register. This approach is coherent with and follows the approach taken to conditions for assignation in section 2(4). I ask the committee to accept amendment 54.

If it passes, amendment 67 would expressly allow the constitutive document in a pledge to refer to the property pledged by reference to another document or data that is not reproduced in the constitutive document itself. I lodged amendment 67 because, having spoken to a number of people in practice, I found that they generally consider that a number of pledges will be composite pledges referring to a large number of the debtor's assets, and that having to upload such asset lists might be prejudicial to debtors. Again, I hope that this is a constructive amendment that the committee can support this morning.

Amendment 74 would affect section 56 of the bill. It expressly allows for an amendment document in respect of a pledge to refer to the property pledged by reference to another document or data that is not reproduced in the constitutive document itself. Again, having spoken to those in practice, I consider that a number of pledges will be composite pledges referring to a large number of the debtor's assets, and that having to upload such asset lists might be prejudicial to debtors. That could also apply in respect of an amendment of a pledge. Amendment 74 will make things clearer for those who are dealing with this day in and day out.

I look forward to hearing the minister's response to my amendments.

I move amendment 54.

**The Minister for Public Finance, Planning and Community Wealth (Tom Arthur):** Amendments 54, 67 and 74, all in the name of Mr Balfour, come from a suggestion by the Law Society of Scotland that it would be helpful to replicate a provision at section 2(4) of the bill in respect of the assignation of a claim that is subject to a condition. That provision enables a condition to be specified by reference to another document.

The amendments would add the provision in respect of assignation documents, constitutive documents for pledges, and documents that amend pledges. We do not think that the amendments are strictly necessary. Section 2 of the bill is about the requirement to specify information. In contrast, the sections now being

amended are just about the requirement to identify something. That much more readily admits to the idea of doing so by reference to an external document. However, if stakeholders consider that such a clarification would be helpful, we have no objections to making the necessary changes.

There are, however, some issues with the precise detail of the amendments. In particular, amendment 54 is technically defective. When read with section 1(2) of the bill, it provides that an assignation document must identify the claim, including by making reference to another document. That could be read as meaning that the assignation document must include reference to another document, which is not the intention.

The other technical difficulties with the amendments are that they refer to data as well as documents. That is unnecessary because of the definition of a document in the Interpretation and Legislative Reform (Scotland) Act 2010. Including it here but not in section 2(4) might also cause difficulties.

I am therefore happy to commit to working with Mr Balfour to lodge suitable amendments at stage 3, if he decides not to press his amendments today. Alternatively, if he wishes to press them, I am happy to support them on the understanding that they will need to be adjusted at stage 3.

**Jeremy Balfour:** I thank the minister for his helpful remarks and explanation. If it is okay with the minister, it would be helpful for the amendments to be agreed to now, but I would welcome working with him to get them absolutely right for stage 3. It would be helpful to have them ready for that, however, so I intend to press amendment 54.

*Amendment 54 agreed to.*

**The Convener:** The next group is on financial collateral arrangements and financial instruments. Amendment 55, in the name of Jeremy Balfour, is grouped with amendments 56, 57, 66, 68, 69, 73, 75 to 78, 80, 82 and 84.

I draw members' attention to the procedural information relating to this group, as set out in the groupings document. I point out that, if amendment 55 is agreed to, I cannot call amendment 56 due to a pre-emption.

**Jeremy Balfour:** Amendment 55 deletes part of section 1(5), which will ensure that part 1 of the bill operates without prejudice to the rules relating to financial collateral arrangements.

Section 1 deals with the assignation or transfer of claims. At paragraph 11, the explanatory notes state:

"Subsection (5) provides that nothing in Part 1 applies to the assignation of a claim as part of a financial collateral arrangement within the meaning of the Financial Collateral Arrangements (No.2) Regulations 2003."

Financial collateral arrangements are defined as

"a title transfer financial collateral arrangement or a security financial collateral arrangement, whether or not these are covered by a master agreement or general terms and conditions".

Financial collateral arrangements are a form of security arrangement designed to simplify the process of obtaining financial collateral. Financial collateral is defined as

"either cash or financial instruments".

Having spoken to the Law Society and others in practice, I believe that the current terms of section 1(5), which makes the proposition that nothing in part 1

"applies to the assignation of a claim as part of a financial collateral arrangement",

lack clarity. Instead, we consider that the provisions of part 1 should be without prejudice to the rules for financial collateral arrangements.

I will now speak to amendment 56 and my other amendments in the group. As the minister and the committee will be aware, the inclusion of individuals in the bill is perhaps the most interesting and controversial part of the bill. The bill does not include the provisions on stocks and shares that were in the Scottish Law Commission's provisional draft bill. The committee has debated the issue, and I know that the minister has made the Scottish Government's view clear. These are probing amendments, so I do not intend to move any of them.

I am looking for clarity on why the Government thinks that it is not possible to have such provisions in the bill. When the Law Commission drafted its bill, it thought that the provisions would be legally competent, and others have given legal advice that they would be legally competent. When the minister gave evidence to the committee previously, he said that, according to the legal advice that he had received, it would be incompetent to have the provisions in the bill. Could he expand on that? In practical terms, this is one of the most important parts of the bill, because it will allow much greater freedom for business to take place, which is what we all want, so it would seem sensible to include such provisions in the bill. I ask the minister to say a bit more about the legal advice.

If the Government's view is that such provisions cannot be included because of whatever reason the minister gives in a moment, I would like to push the minister on another matter. I appreciate that, in his letter to the committee, he said that, once the bill becomes an act, there can be more engagement with the United Kingdom Government

on the matter, but I hear questions from those in practice about how long that will take. I appreciate that that involves two Governments working together, but can the minister give some sort of timescale for when that will happen in practice?

I move amendment 55.

**Tom Arthur:** The committee is aware that, when considering the draft bill that was attached to the Scottish Law Commission's report on moveable transactions, the Scottish Government arrived at the view that the provisions relating to financial collateral arrangements and financial instruments were not within the Scottish Parliament's legislative competence. For that reason, the bill, as introduced, did not include those provisions. Instead, as we have always made clear, our intention is to seek a section 104 order under the Scotland Act 1998 to make the necessary provision.

09:15

We recognise and share stakeholders' view that it is important that the bill's provisions apply to financial collateral and financial instruments. I know that you, convener, recently wrote to the Scotland Office in connection with progress on the section 104 order and I have had the benefit of seeing the response. I hope that the committee is assured that good progress is being made. As I have offered before, I will continue to keep the committee updated on further progress.

I reiterate that any eventual section 104 order will be capable of being made only once the bill has been passed, so the timescales will be dictated by the parliamentary timetable. Our target for commencing the legislation—assuming that the Scottish Parliament passes it—has always been the spring or summer of next year, as that is when the registers and regulations should be in place. That should give us ample time to get the necessary agreements on the section 104 order so that the provisions that are not in the bill, as introduced through the section 104 order, will be able to commence at the same time as the registers.

The bulk of the amendments in the group are outwith the Scottish Parliament's legislative competence, so I am unable to support them, as they would put the passing of the bill at risk. Therefore, I ask Jeremy Balfour not to press them—I appreciate the remarks that he made with regard to them being probing amendments.

Although most of the amendments in the group simply seek to reinsert the provisions that we removed prior to introduction because we considered them to be outwith legislative competence, there are two amendments that are slightly different, albeit that they raise competence concerns of their own.

Amendment 56 attempts to change the position that would apply pending the passing of the section 104 order. I am aware that that was initially suggested by a number of academics, as well as the Law Society of Scotland. However, we have engaged with the academics and practitioners on the SLC's working group on that point and they are now content that matters should be left as they are pending the passing of a section 104 order. The Scottish Government believes that any attempt to say that the two regimes can coexist without making bespoke provision to reconcile any conflicting rules would be unclear, be unhelpful and raise legislative competence issues.

Amendment 84 imposes a reporting duty in relation to progress on the section 104 order. I hope that, from my correspondence with the committee to date, it is clear to members that there is no need for such a duty because I am fully committed to keeping the committee up to date on progress. Those updates will be provided as and when progress is made rather than be tied to an arbitrary date that might not be appropriate.

For those reasons, I ask Jeremy Balfour not to press any of the amendments.

**Jeremy Balfour:** Do you believe that amendment 55 is incompetent? It simply seeks to amend something within the bill. I look for clarification on that if possible, minister.

**Tom Arthur:** Given the progress that we are making with a section 104 order, which will ultimately ensure that the bill achieves the effect that the SLC intended for it to achieve, and given that we look for those provisions to come into effect when the registers go live, the approach that we have set out in the bill is sufficient to meet the SLC's objectives.

I recognise that there is a keen interest in ensuring that the provisions come online and understand the desire to seek any compromise options. However, given that the registers will—we hope—commence next summer, subject to Parliament agreeing to the bill at stage 3, I ask Jeremy Balfour not to press the amendments.

**Jeremy Balfour:** I thank the minister for his helpful remarks. I am pleased that the timescale of next summer is still achievable. I will reflect on what he said before stage 3 but I will not press amendment 55.

*Amendment 55, by agreement, withdrawn.*

*Amendment 56 not moved.*

*Section 1, as amended, agreed to.*

*Section 2 agreed to.*

### Section 3—Transfer of claims

**The Convener:** The next group is on assignations: technical amendments. Amendment 1, in the name of the minister, is grouped with amendments 2, 3, 61, 9, 12 and 65.

**Tom Arthur:** Amendment 1 is a technical amendment that relates to the possibility that there could be competing assignation documents in relation to the same claim. In most cases, the claim would transfer to whichever assignee first benefited from intimation or registration of the assignation document, because that will usually be the final requirement to be met under section 3(2) and so will give rise to the transfer. However, in some cases, it might not be the final requirement to be satisfied.

Amendment 1 deals with the scenario in which the final requirement to be met is the claim becoming identifiable. That might happen if it is a future claim. Amendment 1 provides that, if the final requirement for transfer is met when the claim becomes identifiable as one that is covered by the assignation, the claim transfers to the person who first benefited from registration or intimation in their favour.

Although it should be very unusual for the same claim to be assigned by one person to different people, amendment 1 would ensure clarity by breaking what would otherwise have been a tie. It would also ensure that section 3(5)(c) deals consistently with all the possible ways in which a tie could arise.

Amendments 2 and 3 are technical amendments that relate to the possibility that a claim might be assigned in whole or in part. Although assignation in part is likely to be rare, it is still important that a suitable provision is made for it.

Amendment 2 would have two effects. First, it would provide that what matters is whether it is likely that assignation will make the obligation more burdensome on a debtor, and the question whether the claim can be assigned in part will therefore be assessed when the assignation is made, rather than it potentially appearing to be valid at the time but becoming challengeable when unforeseen events occur later.

Secondly, at the moment, section 5 provides that the requirement for a claim to be divisible in order to be partially assigned applies only where the debtor does not consent to partial assignation. However, a claim that is not divisible cannot be assigned in part. Amendment 2 therefore makes it clear that the requirement for divisibility applies whether or not the debtor consents.

Amendment 3 provides that an agreement about any expense that is attributable as a result of a claim being assigned in part rather than as a whole may be made with the assigner or with the person who was a holder of the claim at the time of agreeing it. That simply recognises that an agreement with a previous holder is valid and that matters do not have to be renegotiated every time that the holder changes.

On amendment 9, it has been suggested that it should be competent to register an assignation document that assigns different claims to different people. The intention would be to restrict the associated application for registration to only the claims that are relevant to the particular assignee in question, and amendment 9 would provide for that.

Amendment 12 would remove section 38, which would disapply the Transmission of Moveable Property (Scotland) Act 1862 in relation to assignations to which part 1 of the bill applies. It would replace it with a section that would repeal the 1862 act in its entirety. That is because, following discussions with the SLC advisory group, we have satisfied ourselves that there is no purpose for which we would want to preserve the 1862 act, even if assignations of financial collateral arrangements were not brought into the bill by a section 104 order, as we expect them to be.

On amendment 61, in the name of Mr Balfour, I understand that the Law Society of Scotland believes that the question of how long a notice should take to be deemed to have arrived ought to be subject to a determination as to the method of service under section 8(6). Our understanding is that amendment 61 is intended to achieve that; unfortunately, however, it does not work and is unnecessary. If someone tries to intimate using a method of service that is not allowed under a determination entered into by the parties, it will not, under section 8(6)(a), be a valid intimation. As such, it is irrelevant when the notice is taken to arrive under section 8(9), because it will not achieve anything.

If someone tries to intimate by post in a case where a particular postal address has been agreed between the parties under the determination, intimation to a different address will be invalid, because of section 8(5)(b). Again, it will be irrelevant when the notice to the wrong address is taken to arrive, because it will not achieve anything.

If someone intimates by post to the address that has been agreed between the parties under the determination, the rule on when it is deemed to arrive under section 8(9) already applies. Indeed, section 8(9)(a) includes an express reference to the fact that the relevant address might have been modified by the parties under subsection (6)(b). Amendment 61 is therefore unnecessary and will

simply confuse matters, and I ask Mr Balfour not to move it.

Mr Balfour's amendment 65, which was also suggested by the Law Society, would mean that those acting in the place of assignees such as trustees and agents would be included in the definition of "assignee". The Government does not believe that that is necessary. Legislation does not normally deal expressly with trustees and agents, given that the general law deals suitably with such aspects, and it would be cumbersome always to have to mention every possible representative capacity in which a person could act. In this case, however, we already have a provision under section 116(2) that explicitly provides that someone who is required to do a thing can have someone else do it for them. I therefore ask Mr Balfour not to move this amendment on the basis that it is unnecessary.

I move amendment 1.

**Jeremy Balfour:** Amendment 61 ensures that, as the minister has outlined, the timescales for valid intimation will also be subject to a determination as to the method of service. As he has suggested, some concerns have been raised about the wording in the bill as introduced that some of the detail in respect of intimation is slightly too prescriptive, and more aspects of intimation, including how long after serving a notice should receipt of such notice be deemed, should be subject to a determination as to the method of service, too. However, I intend to reflect on what the minister has said and will not move the amendment today.

I am still inclined to move amendment 65, which seeks to change the definition of "assignee" by including the assignee's trustees or agents. I accept what the minister has said about provision for this being made later on in the bill, but it is still my view that this amendment is helpful and will give clarity. Simply defining the assignee as

"the person to whom a claim is assigned"

lacks clarity; after all, trustees and agents of the assignee can act on the assignee's behalf, and it is possible for creditors to hold claims and pledges as trustees and/or agents for themselves and other creditors. Amendment 65 simply makes it clear that those acting in the place of assignees are included in the definition of "assignee". Clarity is always a good thing, and the amendment will just put into the bill something that people will be able to understand and refer to.

Finally, I will be supporting all of the minister's amendments.

**Tom Arthur:** On amendment 65, I simply reiterate the point that I made in my earlier remarks that I do not deem it necessary. Indeed, I would highlight again the provision in section 116—"Interpretation of Act"—specifically subsection (2), which states:

"Where, under or by virtue of a provision of this Act, however expressed, a person ("P") is required or permitted to proceed in some way, the provision is to be construed as if any reference in it to P includes a reference to any person authorised by P to proceed in such a way on P's behalf."

I hope that that reassures Mr Balfour and the committee that amendment 65 is not required.

09:30

*Amendment 1 agreed to.*

*Section 3, as amended, agreed to.*

**After section 3**

*Amendment 57 not moved.*

**Section 4—Assignation of claims: insolvency**

**The Convener:** Amendment 58, in the name of Jeremy Balfour, is grouped with amendments 59, 60 and 70 to 72.

**Jeremy Balfour:** The committee will be bored with hearing my voice by the end of the meeting. All my amendments deal with insolvency. I will briefly go through each one.

Amendment 58 replaces an existing ground on which an individual will be considered to be insolvent. The reason for that is that section 4 provides for the legal effect of an assignation document in the event of the assignor's insolvency. Section 4(6) provides for circumstances where

"an assignor who is an individual, or the estate of which may be sequestrated by virtue of section 6 of the Bankruptcy (Scotland) Act 2016, becomes insolvent".

Those circumstances are set out in sections 4(6)(a)(i) to (vi). As initially drafted, they included those where the assignor grants a trust deed for creditors or makes a composition or an arrangement with creditors. I have spoken to practitioners, who consider—as do I—that those circumstances are too vague: a trust deed could only include a privately agreed trust arrangement and a particular specified statutory protected trust deed. I consider that only the latter should apply. In respect of compositions and arrangements with creditors, I note that "composition" was a specific technical term until 2014, when its technical use was repealed. I also note that "arrangement" is a technical term in English law, but not in Scots law. I therefore consider that references to compositions and arrangements should be removed.

Amendment 58 would clarify that where the Accountant in Bankruptcy registers such a protected trust deed, that is a basis for recognition of the assignor's insolvency, and it removes references to "compositions"—a historical technical term in Scotland, which is of no continuing importance—and "arrangements", which are a technical term in England, but not in Scots law.

Amendment 59 would ensure that a company voluntary arrangement—CVA—only constitutes the insolvency of an assignor for the purposes of the assignation provisions in the bill if it affects the relevant claim in question. That would prevent irrelevant CVAs from affecting assignations and would reflect the position adopted in respect of administration receivers set out in section 4(6)(b)(iii).

Amendment 60 would ensure that a restructuring plan that affects an assigned claim under part 26A of the Companies Act 2006 would constitute the insolvency of an assignor. Part 26A deals with arrangements and reconstructions of companies in financial difficulty. Section 901A sets out provisions for part 26A to apply to a company where it is encountering financial difficulties that

"may affect ... its ability to carry on business as a going concern"

and where

"a compromise or arrangement is proposed between the company"

and its creditors or shareholders with a view to

"eliminate, reduce or prevent, or mitigate"

the financial difficulties that it is experiencing. In other contexts—for example, in section 233B of the Insolvency Act 1986—part 26A arrangements are recognised as being relevant insolvency procedures. The bill makes no reference to such arrangements under the 2006 act, and I consider that it should do so to ensure consistency with the wider insolvency law. In line with the approach taken in respect of administrative receiverships, that should apply only to the extent that it affects the claim.

Amendment 71 ensures that a restructuring plan under part 26A of the 2006 act, which affects the encumbered property, constitutes the insolvency of a provider. Part 26A deals with arrangements and reconstructions of companies in financial difficulty. Section 901A sets out provisions for part 26A to apply to a company where it is encountering financial difficulties that

"may affect ... its ability to carry on business as a going concern"

and where

"a compromise or arrangement is proposed between the company"

and its creditors or shareholders with a view to

"eliminate, reduce or prevent, or mitigate"

the financial difficulties that it is experiencing. In other contexts—for example, in section 233B of the Insolvency Act 1986—part 26A arrangements are recognised as being relevant insolvency procedures. The bill makes no reference to such arrangements under the 2006 act and I consider that it should do so to ensure consistency with wider insolvency law. In line with the approach taken in respect of administrative receiverships, that should apply only to the extent that it affects the encumbered property.

Amendment 70 would replace an existing ground on which a provider who is an individual will be considered to be insolvent. Section 47 of the bill provides for the legal effect of a creation of a pledge in the event of the provider's insolvency. Section 47(3) provides the circumstances where

"a provider who is an individual, or the estate of which may be sequestrated by virtue of section 6 of the Bankruptcy (Scotland) Act 2016, becomes insolvent".

Those circumstances are set out in sections 47(3)(i) to (vi). As initially drafted, they include the provider granting a trust deed for creditors or making a composition or arrangement with creditors. Having spoken to those within the profession, it is my view that we should consider that those are too vague. A trust deed could include a privately agreed trust arrangement and a particular specified statutory protected trust deed. The Law Society and I consider that only the latter should apply. In respect of compositions and arrangements with creditors, I note that "composition" was a specific technical term until 2014, when its technical use was repealed. As I have said previously, it is a technical term that is used in English law but not, as I understand it, in Scots law. We therefore consider that references to compositions and arrangements should be removed for clarity.

Amendment 70 would clarify that when the Accountant in Bankruptcy registers such a protected trust deed, that is a basis for recognition of the provider's insolvency, and it would remove references to "compositions"—a historical term in Scotland—and "arrangements" which is a technical term in England but not Scotland.

Finally—you will be glad to hear, convener—I move to amendment 72, which would ensure that a company voluntary arrangement only constitutes the insolvency of a provider for the purposes of the pledge provisions in the bill if it affects the relevant encumbered property in question. That would prevent irrelevant CVAs from affecting statutory pledges, and reflect the position adopted in

respect of administrative receivers set out in section 47(3)(b)(iii).

I appreciate that those are all fairly technical amendments and no doubt lawyers will discuss them for years if they are accepted. However, it is important to pass them because we need clarification around insolvency and how the bill relates to other acts. For that reason, I hope that the committee will accept them.

I move amendment 58.

**Tom Arthur:** I note that Jeremy Balfour's amendments form part of the Law Society of Scotland's response to the committee's call for written evidence at stage 1. I understand that the Law Society considers amendments 58 and 70 necessary because it thinks that the existing references are too vague and considers that only a statutory protected trust deed should be in scope. We tend to think that the wording in the bill as introduced is amply flexible to cover a number of situations; to remove that and replace it with what the amendments propose would only allow for when a protected trust deed is registered by the Accountant in Bankruptcy, at which point it becomes protected. It is therefore too restrictive, and the more flexible wording, in the bill as drafted, would include the granting of a voluntary trust deed as well as a protected trust deed.

The Law Society considers that amendments 59 and 72 are necessary to ensure that what it considers to be irrelevant company voluntary arrangements are prevented from affecting assignations and statutory pledges. Our view is that that is not necessary. The relevant subsections are for ascertaining whether an assignor or provider is insolvent. Whether any voluntary arrangements include this claim or property is not important to that consideration.

Amendments 60 and 71 are considered necessary by the Law Society on the basis that the bill makes no reference to such arrangements under the Companies Act 2006, and it considers that it should do so to ensure consistency with wider insolvency law. Those amendments seek to add a further catch to the corporate insolvency net. Part 26A of the 2006 act enables companies to apply to the court for an order sanctioning an arrangement or a reconstruction agreed with a majority of members or creditors should they find themselves in financial difficulty. Section 901F of the 2006 act refers to the process of the court sanctioning any such agreement.

We previously considered the issue and took the view that provisions under part 26A mainly refer to companies that are in difficulty, as opposed to those that are insolvent, and we tend to think that amendments 60 and 71 have no utility in expanding the corporate insolvency provisions in the bill as introduced. The Scottish Law Commission recognised that the law on insolvency as it relates to assignations and pledges is complex. It was partly for that reason that it included a power to adjust the definition of insolvency, if necessary.

Although we should not defer this matter to regulations if we are convinced that a change is appropriate now, we are not convinced that it has been shown that that is, indeed, the case. I am concerned that the group of changes that are proposed through amendments 60 and 71 might not be sufficiently cohesive. For example, the suggestion seems to be that voluntary trust deeds should not be included but that voluntary restructuring plans should be. In addition, amendments 60 and 71 do not seem to have been as fully considered as they need to be, given that amendment 71 would erroneously change the definition of when an individual is insolvent when the item in question is about being subject to a company restructuring plan.

My preference is therefore that we do not rush into making any changes just now and, instead, that we take the time that is needed to consult relevant academics and the Accountant in Bankruptcy, safe in the knowledge that we will be able to adjust it at a later stage, if it is agreed that changes are appropriate.

For those reasons, I ask Jeremy Balfour not to press amendment 58 and not to move amendments 59, 60 and 70 to 72.

**Jeremy Balfour:** It was just over 30 years ago that I sweated blood and tears when trying to do company law. I am pleased to say that I have never practised it in my life.

However, I have had another look at the amendments in this group and had conversations about them, and I slightly disagree with the minister's position. My view is that we need more clarity around the area of insolvency. It is, as the Law Commission has said, and as the minister has said this morning, very technical, and we should bring more clarity to very technical areas by including the amendments in the bill and enacting them. If the amendments do not achieve what I think that they will achieve, there is room to make changes at a later stage, as the minister has said. However, I think that the amendments would clarify the situation, and it is my intention to press amendment 58.

09:45

**The Convener:** The question is, that amendment 58 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 58 agreed to.*

*Amendment 59 moved—[Jeremy Balfour].*

**The Convener:** The question is, that amendment 59 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 59 agreed to.*

*Amendment 60 moved—[Jeremy Balfour].*

**The Convener:** The question is, that amendment 60 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 60 agreed to.*

*Section 4, as amended, agreed to.*

### Section 5—Assignation in part

*Amendments 2 and 3 moved—[Tom Arthur]—and agreed to.*

*Section 5, as amended, agreed to.*

*Sections 6 and 7 agreed to.*

### Section 8—Intimation of the assignation of a claim

*Amendment 61 not moved.*

*Section 8 agreed to.*

*Section 9 agreed to.*

### Section 10—Protection of debtor who performs in good faith

**The Convener:** Amendment 62, in the name of Jeremy Balfour, is grouped with amendments 63, 4 and 8.

**Jeremy Balfour:** Amendment 62 deletes section 10(3)(b) and (c). Section 10(1) states that a debtor will satisfy the debt if they in good faith pay the last person who they knew held the debt. Section 10(3) includes a provision that a debtor will not be considered to have performed other than in good faith just because the debtor is deemed to have received notice of an assignation of the debt. I consider that, if the assignee can demonstrate that the processes for intimation have been complied with, the onus should be on the debtor to demonstrate that they were in good faith.

Regarding amendment 63, the bill states that the debtor will satisfy the debt if they in good faith pay the last person who they knew held the debt. The bill says that the debtor will not be considered not to be in good faith if they have received intimation of an assignation of a debt. Amendment 63 removes that provision and should be read in conjunction with amendment 62. I consider that, if the assignee can demonstrate that the processes for intimation have been complied with, the onus should be on the debtor to demonstrate that they were in good faith.

I look forward to hearing the minister's reaction to amendments 62 and 63 and his explanation of amendments 4 and 8 in his name.

I move amendment 62.

**The Convener:** I invite the minister to speak to amendment 4 and other amendments in the group.

**Tom Arthur:** Amendments 62 and 63, in the name of Jeremy Balfour, were included in the written evidence from the Law Society of Scotland to the committee during stage 1 of the bill. I understand that the Law Society's view was that, if the assignee can demonstrate that the processes for intimation have been complied with, the onus should be on the debtor to demonstrate that they were acting in good faith.

The amendments remove protection for a debtor who would have been able to rely on the provisions in section 10. Under the current law, a claim would transfer only if the assignation was intimated to the debtor. However, the effect of the changes in the bill is to extend the scope of intimation and to enable registration as a method

of effecting the transfer of a claim. That being the case, the debtor might not know that a claim has been assigned and might in good faith pay an assignor who is no longer the creditor. The onus is placed on the person making the assertion that a debtor has performed other than in good faith. Whether or not a debtor has performed in good faith will depend on the facts of the case.

It is my view that the amendments do not take into account the extension to the scope of intimation and that, in reversing the burden of proof, the amendments would be unfair to the debtor. How could a debtor prove a negative? That is in effect what a debtor would be required to do if they had not, in fact, received notification, even though they might be deemed to have done so. The person intimating the assignation could choose to do so in a way that allows for delivery to be recorded, and therefore gives evidence of delivery, whereas the debtor would have no control over that. For that reason, I ask the member to withdraw amendment 62 and not to move amendment 63.

The new section that is introduced by amendment 4 would provide further protection for a debtor performing in good faith, both where the debtor is unaware of a condition pertaining to the assignation of a claim and where the debtor is aware of the condition but mistakenly thinks that it has been met and performs to the assignee. The claim will not have transferred because the condition has not been satisfied, but, in the circumstances that I have described, which mean that the debtor performs to the assignee, the debtor will be discharged from the claim to the extent of that performance because they will have acted in good faith.

Section 14 applies where notice of an assignation document has been given to a debtor by the assignee, rather than by the assignor. It has the effect that the debtor may request from the assignee reasonable evidence of the assignation document having been granted. Where an assignation document has been granted, the debtor will be entitled to withhold performance from each of the assignor and the assignee until the evidence is provided by the assignee. Where an assignation document has not been granted, the debtor will be entitled to withhold performance until either the purported assignee, or the purported assignor, confirms in writing that an assignation document has not been granted in respect of the claim.

Section 14 also allows a debtor who has not received intimation of an assignation but becomes aware that an assignation document may have been granted, to ask a purported assignor to confirm whether that is the case, and to withhold performance until they receive that confirmation.

Amendment 8 makes it clear that, if the debtor is a co-debtor, and if only one co-debtor makes a request for information, the protection that is given by section 14 to withhold information until the evidence is provided is available only to the co-debtor who made the request and not to other co-debtors. The other co-debtors are likely to be unaware of the request for information, so it follows that their obligation should not also be suspended.

**The Convener:** As no other memberbers wish to speak, I call Jeremy Balfour to wind up and to press or withdraw his amendments.

**Jeremy Balfour:** I support the minister's amendments 4 and 8.

There is a balance to be struck between the rights of debtors and creditors. I accept what the minister has said and will go away and reflect on his comments. For that reason, I seek permission to withdraw amendment 62.

*Amendment 62, by agreement, withdrawn.*

*Amendment 63 not moved.*

*Section 10 agreed to.*

*Sections 11 and 12 agreed to.*

**After section 12**

*Amendment 4 moved—[Tom Arthur]—and agreed to.*

**Section 13—Asserting defence or right of compensation**

**The Convener:** The next group is on assignations: asserting defence or right of compensation. Amendment 47, in the name of Carol Mochan, is grouped with amendments 5, 48 to 50, 6, 7 and 51.

**Carol Mochan (South Scotland) (Lab):** Good morning. I start by saying that I have spoken to the minister and that we are broadly supportive of the bill. I thank the minister and his team for the discussions that we have had. I know that the direction that we want to go in is about getting this right for people. It is much appreciated. As I go through, I hope that what I say shows that I have listened to the discussions with the minister and with the sector, particularly around consumer protection.

In moving amendment 47, I seek to make clear that the possibility of a waiver of defence based on an agreement between assignor and debtor is removed. Amendment 48 is simply consequential on amendment 47, as there would be no agreement to prevent or restrict. As I said, I am grateful to the minister for considering such amendments. If he can set out clearly how the

Government can provide assurances to small businesses and others that waiver of defence is protected, I would not be inclined to press those amendments.

In lodging amendment 49, I have similar intentions to those behind amendment 47. It is my hope that we will provide the maximum level of support to sole traders and individual consumers. I therefore again look to the minister to highlight in his remarks how he will ensure that the bill will offer the protections that the amendment would otherwise provide.

The aforementioned points also remain applicable to my lodging of amendment 50.

I discussed amendment 51 with the minister. I consider it appropriate that there are adequate and sound reporting mechanisms in place to ensure that the impact of the waiver of defence clause is given consideration and that steps are in place to ensure that MSPs can question Government about the impact of that clause should any negative impacts be identified and require mitigation. It may be worth the minister confirming whether he is content that Parliament can request a review at any time and whether he can say with a strong degree of certainty that such calls for a review would be accepted, if challenges were to arise.

It is my view that having reporting expectations set out in the bill would remove challenges that we may face further down the line if ministers find themselves unwilling to review legislation that is having unintended negative consequences.

I move amendment 47.

**The Convener:** I invite the minister to speak to amendment 5 and to other amendments in the group.

**Tom Arthur:** Carol Mochan's amendments would remove the ability of debtors and assignors to agree to waive defences that, in relation to a claim, the debtor might have against the assignee. Her amendments seek to remove that right as a whole but also, alternatively, to remove specifically the right of individuals who are not acting in the course of a business and sole traders to make such an agreement.

I know that the committee said in its stage 1 report that it had considered whether the option to waive defence clauses should be removed for all but that it was mindful of the potential impact of that on business freedom and on small businesses that may wish to retain that possibility.

I recognise that Ms Mochan asked for reassurance. I would therefore like to state on the record that I met Colin Borland, policy lead for the Federation of Small Businesses in Scotland, and asked whether it had any concerns about waiver of defence clauses. The FSB indicated that it had not received any representations from its members on that subject and did not have strong views on it.

10:00

The Scottish Government has also not received any representations from members of the public about the practice of waiver of defence clauses. It therefore seems that they are not an issue of concern to stakeholders, and it would be unfortunate if business freedom to make such agreements were to be removed in the absence of any harm being identified.

Amendment 51 would place a duty on the Scottish ministers to prepare and publish a report setting out the impact of the waiver of defence clause in section 13(1). We will want to continue dialogue with organisations such as the Federation of Small Businesses to gauge how the legislation is helping or, possibly, hindering them, and we will learn from that engagement. A formal review after a prescribed period of time seems unnecessary given the lack of any indication of current problems. That would be dictating now the use of future resources when there may never be any issue with the provision, and attention may be better used elsewhere.

**Jeremy Balfour:** I appreciate what the minister says, but if everything is fine, the review can be a very quick process. There is concern that we do not know how this will work in practice. I would have thought that having a more formal process of carrying out a review would give stakeholders the opportunity to have input into the process. If there is not, how do stakeholders go about having that input into how it works in practice?

**Tom Arthur:** I recognise the point that Mr Balfour makes and the original intention behind Ms Mochan's amendment. The Government has regular dialogue with a range of business representative organisations, and there is regular dialogue and engagement at ministerial level, so should any issues arise, there would be an opportunity in the first instance for that direct communication to the Government and, as a consequence of that direct engagement, the Government could consider whether any review or further action was required.

Beyond that, Parliament has a very important role to play. All ministers are accountable to Parliament and are subject to questions by other parliamentarians and by committees. Should concerns arise, there are avenues through direct engagement with the Government from representative organisations or through the activities of parliamentarians holding the Government to account for concerns to be flagged

and for any review to be undertaken. I add that it would not be only for the Government to have that opportunity, should it be required; Parliament, at any time and in any capacity, via committees or otherwise, can choose to instigate a review of any piece of legislation. That is routine and good practice.

In light of the continued close engagement that takes place between the Government and business and the fact that ministers and the Government are held to account by Parliament, which provides an opportunity for questions and updates on how the provisions of the bill operate in practice, I ask Ms Mochan not to press her amendments.

The Government amendments are intended to respond to criticism of the effect of section 13 from stakeholders and practitioners in the field in relation to rights of compensation and other similar rights that the debtor may have against the assignor. Amendments 5, 6 and 7 respond to concerns of members of the Scottish Law Commission's advisory group on moveable transactions that relate to the impact of the provision on compensation, set-off, retention, balancing of accounts or counterclaims, rather than on defences.

Amendments 5 and 6 remove wording that it was considered might not exactly replicate the existing common-law rule whereby a debtor can, after the claim is assigned, assert a right of compensation, set-off and so on that the debtor had against the assignor against the assignee.

Those provisions are replaced by amendment 7, which is intended to preserve the current position, in which notice of the assignation is intimated but has the effect of ensuring that the registration of an assignation is not to be treated in the same way as intimation. Whereas giving notice of intimation of the assignation would have the effect that subsequent dealings between the assignor and the debtor would not be included in any calculation of compensation and so on that the debtor could not assert against the assignee, registration is not to have that effect, unless accompanied by other actings, which would be treated as notice to the debtor that the claim had been assigned.

**The Convener:** I invite Carol Mochan to wind up and to press or withdraw amendment 47.

**Carol Mochan:** I appreciate the minister's comments on how seriously the matter has been taken, so I will not press amendment 47.

*Amendment 47, by agreement, withdrawn.*

*Amendment 5 moved—[Tom Arthur]—and agreed to.*

*Amendments 48 to 50 not moved.*

*Amendments 6 and 7 moved—[Tom Arthur]—and agreed to.*

*Section 13, as amended, agreed to.*

### After section 13

*Amendment 51 moved—[Carol Mochan].*

**The Convener:** The question is, that amendment 51 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 51 agreed to.*

### Section 14—Right to withhold performance until information as to assignation is provided

*Amendment 8 moved—[Tom Arthur]—and agreed to.*

*Section 14, as amended, agreed to.*

*Sections 15 to 22 agreed to.*

### After section 22

*Amendment 9 moved—[Tom Arthur]—and agreed to.*

*Sections 23 to 30 agreed to.*

### Section 31—Searching the assignations record

**The Convener:** The next group is on fees. Amendment 64, in the name of Jeremy Balfour, is grouped with amendment 81.

**Jeremy Balfour:** Amendment 64 is for future proofing the bill, which I hope will become an act, with regard to fees for third sector organisations. We held a helpful evidence session with a number of groups and received written evidence on the issue of the fee not having to be paid by a third sector organisation for the service if it has to go to the register. I know that the minister helpfully wrote to the committee at the beginning of this week or the end of last week to say that the Government was not persuaded of the need for such a provision. I would be interested to know a wee bit more about why the Government has gone down that road.

I accept two things. First, I accept that we want the register not to be a loss leader, if I may put it that way, but to break even. However, we also need to protect some of the most vulnerable people in our society from having an expense that might stop them being able to go forward.

Secondly, I accept that the fee that the Government imagines, which will come into force next year, is not large, comparatively speaking, but we do not know where that fee will go in future. It is possible that it could stop vulnerable people accessing a register that others can afford to access.

It is not my expectation that people from third sector organisations will use the register frequently, but I think that, when it is necessary for such an organisation to do so, the fee should be waived. I look forward to hearing what the minister has to say about amendments 64 and 81.

I move amendment 64.

**Tom Arthur:** I note that Jeremy Balfour's amendments 64 and 81 will exempt not-for-profit money advisers from the fee structure that will apply to searches of the assignations record and the statutory pledges record in cases in which those advisers do not charge individuals for their services. I appreciate that that takes forward a recommendation to that effect from the committee's stage 1 report, but that report was written at a time when the bill would have allowed individual consumers to grant a pledge.

The committee will be aware that I set out the Scottish Government's position in two letters, and I am happy to reiterate that position now. The Scottish ministers are in consultation with the keeper of the registers of Scotland, who is empowered by section 110 of the Land Registration etc (Scotland) Act 2012 to set the level of fees that applies to cover the costs of maintaining and operating the registers that are under the keeper's control. Any proposal to exempt any class or group of persons from the fee structure will mean that the costs will need to be met from elsewhere, either by passing them on to other users of the registers—which I think we can all agree would be unfair—or by those costs being met from the public purse. That should be given very careful consideration, given the current budgetary pressures that we face.

**Oliver Mundell (Dumfriesshire) (Con):** I question whether we all think that what the minister suggested would be unfair. My argument in response to what the minister said is that, as business and commercial users of the legislation will get a serious benefit from its passing, should the fees that they pay to access the register not be used to help to protect the most disadvantaged in our society?

**Tom Arthur:** I am about to come on to a couple of practical points, Mr Mundell. You will be aware that I have lodged amendments to remove individuals from being able to grant a statutory pledge under part 2 of the bill. If that change is made, it is unclear to me why not-for-profit money advisers would routinely be searching the register of statutory pledges on behalf of their clients.

As I indicated in my recent letter, there is also some doubt over whether searches of the register of assignations would be of much assistance to not-for-profit money advisers, given that, when debts have been assigned in a bulk assignation transaction, it is highly unlikely that the debtor's name will be on the register, and because the register can be searched only by reference to the assignor of the debt, not the debtor.

In addition, the system has been designed so that the debtor is not expected to search the register. That is why the bill provides that a simple failure to search the register does not mean that the debtor is acting in bad faith if they make payment to the original creditor.

It is also important to recognise that the fees that will apply for registration events and searches in the two new registers will be the subject of consultation before the fee structure is established in regulations under the bill. That consultation is, in my view, the best vehicle for a proper examination of all the issues, and I am happy to reassure members of the committee that the consultation will explore the issue of fee exemptions.

Therefore, I think that it would be inappropriate to bring forward any part of the fee structure for the two new registers in advance of that consultation. It is for those reasons that I ask the member not to press amendment 64 or to move amendment 81.

10:15

**Jeremy Balfour:** I said in my opening remarks on the amendments that I did not think that this sort of thing would happen frequently. I note the minister's use of the word "routinely", and I agree with him; my hope is that, if we get the bill right, what we are talking about will be the exception rather than the rule.

However, I think that that leads to a slight contradiction in the minister's argument that, because this will happen so often, it will put extra costs on others to meet. I think that the proposed provision will be used irregularly, but it might well be required from time to time as the legislation develops. This is an important message for Parliament to send out, and it is important for the Parliament to give the Scottish Government a steer on this—indeed, more than a steer—and to set out where we think that we should end up,

which is that we do not think that the third sector should be involved in having to pay the fee in question.

I accept what the minister has said about consultation being carried out on the issue once the bill becomes an act, but I point out that the committee, in its report, was certainly of the view that not-for-profit third sector organisations should not be charged for such searches. We want to give the public and the Scottish Government the clear message that charging in those circumstances is not a road that we want to go down.

For that reason, I will press amendment 11.

**The Convener:** It is amendment 64.

**Jeremy Balfour:** I apologise—I meant amendment 64.

**The Convener:** The question is, that amendment 64 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 64 agreed to.*

*Section 31, as amended, agreed to.*

*Sections 32 and 33 agreed to.*

### Section 34—Assignee's duty to respond to request for information

**The Convener:** The next group of amendments is on response to information requests. Amendment 10, in the name of the minister, is grouped with amendments 31 to 34.

**Tom Arthur:** Section 105 makes it clear that a person entered into the register as the secured creditor in respect of a statutory pledge should be obliged to respond to a request for certain information about that pledge. Section 105(1)(a) sets out that the information to be provided in response to a request will vary, depending on the facts. If the person is the secured creditor, they can be asked, first, to specify whether property specified in the request is encumbered property and, secondly, to describe the secured obligation. If the person registered as a creditor is no longer or has never been the secured creditor, they must provide information to that effect and, if relevant, details of the person to whom they assigned the pledge and any further known details of subsequent assignees.

Section 105(1)(a)(ii) provides that the secured creditor should also provide a description of the secured obligation. However, the committee has received representations to the effect that it is not clear why a secured creditor should disclose the nature or extent of the secured obligation to anyone other than the provider of the pledge, who will have that information anyway. We understand that that disclosure requirement does not arise in relation to other types of security interest, so it is felt that there ought to be a limit to what information an entitled person should be permitted to obtain, pursuant to section 105, given that they will obtain confirmation of whether the relevant property comprises encumbered property under section 105(1)(a)(i), which is what should be important.

The deletion of section 105(1)(a)(ii), as provided under amendment 32, will remove the requirement to provide details of the secured obligation. Amendments 31 and 33 are consequential on that change.

Amendments 10 and 34 deal with a different aspect of information requests. If an entitled person does not receive a response to a request for information about a statutory pledge, they can apply to the court in respect of that failure under section 105(6). Amendment 34 simply permits a court to stipulate a period other than 14 days to require a secured creditor to respond to a request for information under a court order, although 14 days will remain the default period.

Amendment 10 makes a similar change in relation to section 34, under which an entitled person may ask a person identified in the assignations record as the assignee for information on whether a claim has been assigned or whether a condition has been satisfied. If the request is not complied with, the court may order a response.

I move amendment 10.

*Amendment 10 agreed to.*

*Section 34, as amended, agreed to.*

### Section 35—Liability of Keeper

**The Convener:** The next group is on errors in search results. Amendment 11, in the name of the minister, is grouped with amendment 35.

**Tom Arthur:** Amendment 11 amends section 35 so that failure of the keeper's search system in relation to the assignations record and the register of assignations will be added to the list of scenarios in which the keeper will be liable to pay compensation for any loss that is suffered as a

result of a failure to identify the assignor correctly. The issue applies equally to the register of statutory pledges, so amendment 35 makes a similar amendment to section 107 in relation to when a search fails to correctly disclose the provider of a statutory pledge.

I want to be clear that the amendments do not relate to wrong information being submitted by the applicant or entered into the register by Registers of Scotland. Rather, they cover situations in which the register is correct but the search engine malfunctions and does not disclose information that is sought correctly. In those circumstances, the keeper should be liable if a searcher suffers loss as a result of that failure.

I move amendment 11.

*Amendment 11 agreed to.*

*Section 35, as amended, agreed to.*

*Sections 36 and 37 agreed to.*

**Section 38—Disapplication of Transmission of Moveable Property (Scotland) Act 1862 to assignations to which this Part applies**

*Amendment 12 moved—[Tom Arthur]—and agreed to.*

*Section 38, as amended, agreed to.*

**After section 38**

**The Convener:** The next group is on a report on assignation. Amendment 52, in the name of Carol Mochan, is the only amendment in the group.

**Carol Mochan:** I do not wish to repeat myself, as amendment 52 serves a similar purpose to that of amendment 51. At the end of section 38, I wish to make it incumbent on the Government to report within three years on the assignation of consumer credit debts. The report should

"consider, in particular, the impact the removal of the need for intimation has had on debtors."

I consider it important that we monitor impacts and produce relevant reports to ensure that we constantly develop the legislation and that it continues to meet the needs as intended.

I move amendment 52.

**Tom Arthur:** As the committee is aware, the bill makes it possible for intimation to take place by means of registration of the assignation document in a new register of assignations. That is intended to address concerns about the current system being expensive and cumbersome due to the need to intimate to all debtors, and about the inability to deal with future claims and debtors.

There is a misconception that, currently, in a bulk assignation of consumer debt, assignations are intimated to debtors and that the bill will remove the need to intimate to such debtors. In fact, the committee has heard evidence that, due to the various workarounds—such as using English law—that have been put in place to, in effect, circumvent the difficulties with the current system, debtors are currently not being notified. That is not problematic because either the parties are happy for the debtor to continue to pay the original person or there is protection for debtors who do not know to pay the new person in cases in which the payment right ought to have transferred across.

It is therefore difficult to see how amendment 52 would work in practice, as it is based on a misunderstanding that, currently, such intimation routinely takes place. In particular, the amendment refers to

"the removal of the need"

to intimate to debtors. As I have just mentioned, that ignores the fact that, at present, in a bulk assignation of consumer debt, debtors are commonly not notified due to the various workarounds.

**Jeremy Balfour:** I accept what the minister has said, but is one reason for the bill not to encourage intimation to take place more regularly? I accept that people have been using English law, so intimation has not been happening but, once the bill's provisions are in place, surely intimation will be more common.

**Tom Arthur:** The provision is to introduce a new register of assignations, which is about simplifying the existing process. At the moment, we have a de facto process whereby intimation is not taking place, which requires complex workarounds. The introduction of a register of assignations will mean that those complex workarounds will no longer be required, so intimation will still be an available option. Intimation is not, as amendment 52 suggests, being removed. It is not the reality that intimation routinely takes place when the workarounds are already in place.

In my view, the amendment reflects a misunderstanding of the reality of the current situation, which is that the workarounds are being used regularly. Among other things, the bill seeks to ensure that, rather than having to use those complex workarounds in Scotland, we will have access to the new register of assignations, which will help to simplify the process.

As I set out in my letter to the committee earlier this month, when I met a range of consumers and money advice representatives to discuss stage 2 amendments, their view was that nothing more

was needed in relation to consumers and the assignation of debt. In the event that their view were to change in the future, we would, of course, engage with them on that. However, the prescriptive nature of a predetermined review would not lend itself well to that.

I hope that that reassurance aids the committee's understanding that amendment 52 is not needed, and I ask that it not be pressed.

**Carol Mochan:** I appreciate the minister's remarks and, given the discussion that has followed, I will not press amendment 52.

*Amendment 52, by agreement, withdrawn.*

### Section 39—Interpretation of Part 1

*Amendment 65 moved—[Jeremy Balfour].*

**The Convener:** The question is, that amendment 65 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 65 agreed to.*

*Section 39, as amended, agreed to.*

### Section 40—Pledge

*Amendment 66 not moved.*

*Section 40 agreed to.*

*Section 41 agreed to.*

### Section 42—Delivery

**The Convener:** The next group is on pledge: technical amendments. Amendment 13, in the name of the minister, is grouped with amendments 21, 79, 27, 29, 83, 39 and 41.

**Tom Arthur:** Amendment 13 relates to section 42 of the bill, which reforms and codifies the law on the delivery of property to a secure creditor for the purpose of creating a possessory pledge. In relation to section 42(1)(c), it had been thought that it would be necessary to provide that a person who is holding property on behalf of a creditor should be a fully independent third party. However, representations were made to the committee that that might not always be possible or desirable.

We understand that delivery of warehouse goods is sometimes effected for the purposes of creating a pledge by instructing the custodian to hold the goods for the pledge when the custodian is a sister company of the pledger, on the basis that the pledger does not control the custodian. Reference to such custodians as being independent of the pledge provider appears to eliminate the current option and might require increased custody costs to be incurred by the pledge provider. Amendment 13 therefore simply removes the requirement for the holder of the property to be fully independent.

Amendment 21 makes a minor change to the position where a secured creditor wishes to purchase all or any of the property that is the subject of a pledge enforcement notice. That already has to happen by means of a public auction. However, instead of the price having to bear a reasonable relationship to market value, it will now have to be that price or more. That will allow a secured creditor to purchase something at above market value, if they wish to do so.

Amendment 27 tweaks the effect of section 92(6) of the bill, which deals with whether an entry in the statutory pledges record would be considered to be seriously misleading in relation to the description of property that is encumbered by a statutory pledge. The amendment is technical and is intended to remove any doubt that if it is not quite clear whether property is of one type or another, it may be described as two different types of property.

10:30

At present, the registration would be ineffective if the view was taken that one of those descriptions was erroneous. The amendment will ensure that the registration would be effective, so long as the property is described

"as being of a type that it is".

A search of either type would disclose the property.

Amendment 29 relates to the procedures around correction of the register of statutory pledges in a case where the registered creditor has failed to comply with a demand for correction from a person with an interest in the pledge. The amendment relates to the right of a secured creditor to object to a proposed correction under section 97(4).

It may be that, in some rare cases, the party who is the registered secured creditor may not actually be the secured creditor, due to an error or an off-register assignation. It would seem appropriate that the true secured creditor should be entitled to object to the proposed correction.

The amendment therefore broadens the right to apply to the court to oppose the making of a correction to cover the actual secured creditor as well as the registered secured creditor. The amendment also makes provision for the registered creditor to pass on the notice of the proposed correction, subject to their being able to do so.

Amendments 39 and 41 respond to the committee's comments on the delegated powers memorandum, and to the committee's recommendation in its stage 1 report

"that the ... Government ... amend the Bill at Stage 2 to make regulations under section 53(8) subject to the affirmative"

resolution in all cases, so

"that there can be enhanced scrutiny of and proposal to specify the classes of motor vehicle that"

certain protections should

"not apply to."

The committee recommended that the powers should be amended to be subject to affirmative procedure in all cases, and I am happy to comply with that request.

I turn to Mr Balfour's amendments. I understand that amendment 79 is intended to clarify that only prior ranking diligence can extinguish a pledge. However, section 76, which this amendment seeks to amend, is not concerned with the ranking of such things; it is concerned only with when an application for correction must be made.

The level of description that is used there will have no effect on the law of the interaction of pledges and diligence. Indeed, I am concerned that amendment 79 could have the opposite effect from that which is intended, because it could be read as implying that only a particular type of diligence is to result in a correction but all diligence would extinguish the pledge. I therefore ask Mr Balfour not to move the amendment. If he has particular concerns about the general law in that area, I am happy to put those concerns to the SLC's advisory group on his behalf.

Amendment 83 seeks to add trustees and agents to the definition of "secured creditor" in the bill. However, that definition already includes

"any successor in title, or representative, of a secured creditor".

Further provision is made on representatives in section 116(2). As a result, we believe that amendment 83 is unnecessary and potentially confusing. I ask Mr Balfour not to move it, on the basis that the policy that I believe that these amendments are designed to achieve is already provided for.

I move amendment 13.

**Jeremy Balfour:** I thank the minister for his comments so far. He is right that amendment 79 seeks to clarify that only the execution of prior ranking diligence will extinguish a statutory pledge. In the light of his comments, however, I will not move that amendment, and I will go away and reflect on the matter with regard to stage 3.

With regard to amendment 83, I go back to a debate that we had earlier this morning. Again, this amendment seeks to extend the interpretation of a "secured creditor". I note that the minister believes that that is already in the bill, and I accept that. However, I still think that my amendment would provide greater clarity, and I will explain briefly why. The bill does not include a "trustee or agent" in the interpretation of a "secured creditor". The amendment provides a fuller definition of the parties defined as a "secured creditor".

In corporate finance transactions, it is likely that a club or syndicate of lenders jointly lend to a corporate debtor. Here, one will take security in their own name as security agent or security trustee to hold the security for the benefit of all lenders. Thus, for example, HSBC, the Bank of Scotland and the Royal Bank of Scotland could jointly agree to advance a loan to ABC Ltd, in various proportions, with one of them—say, the Bank of Scotland—holding all the security granted in respect of the aggregate amount of the loan owed to all the lenders. Although the Bank of Scotland would have the benefit of the security, it would be misleading to think of it as the sole beneficiary of the security as it would be holding it as trustee or agent for all the lenders.

Amendment 83 would bring clarity and, in practical terms, it would be helpful for business. I will seek to move it in due course.

**The Convener:** As no member has indicated that they wish to comment, I invite the minister to wind up.

**Tom Arthur:** I have nothing further to add.

*Amendment 13 agreed to.*

*Section 42, as amended, agreed to.*

### Section 43—Constitutive document

**The Convener:** The next group is on pledge: individuals. Amendment 14, in the name of the minister, is grouped with amendments 15, 16, 16A, 16B, 17 to 20, 22, 37 and 38.

**Tom Arthur:** My amendments in this group give effect to the Scottish Government's undertaking to remove the ability of individual consumers to grant a statutory pledge.

Amendment 17 will remove from the bill section 48, which allowed the provider of a statutory

pledge to be an individual as long as the pledge met certain criteria.

Amendment 16 is the most important amendment in the group. It provides that it will not be competent for individuals to grant a statutory pledge unless the individual falls within a specified exception. The primary exception is where the

"individual is acting in the course of"

their own business and

"the encumbered property is a permitted asset"

that will be used

"wholly or mainly for the purposes of the individual's business".

The amendment will also permit individuals to grant a pledge if they are acting as a trustee of a charity or as a member of an unincorporated association. In such cases, a permitted asset would have to be an asset of the charity or owned on behalf of the unincorporated organisation.

**Jeremy Balfour:** I thank the minister for lodging those amendments, which are helpful and will get the committee to where we want be. However, I am looking for clarification. There is a balance to be got right in the treatment of individuals as opposed to sole traders. We started our discussions on the bill by saying that the threshold here could be £1,000. Would there be any advantage in considering, at stage 3, whether the situation could be clarified further by having the figure increased to, say, £5,000 or £10,000? Would that give absolute clarity to individuals, or would it not bring them any benefit? I genuinely seek clarification on that point so that we can keep a balance between individuals and sole traders.

**Tom Arthur:** Yes. I will to come on to that later in my remarks. We propose, through amendments, to increase the threshold to £3,000 and for regulation-making powers to allow for that figure to be increased subsequently.

I will pick up from where I was in my remarks prior to taking that intervention, when I was discussing charities and unincorporated organisations. We think it important that such bodies in the form of, for example, sporting clubs, should be able to raise finance on the strength of their own assets. I wanted to ensure that that was on the record.

For a corporeal asset to be pledged by a relevant individual, that asset will also need to be worth a certain amount. That rule previously applied only to individual consumers, but it will now be a rule for sole traders and the other narrow categories of individual who are to be allowed to grant a statutory pledge. It provides added protection on top of the rule that assets need to be of a certain type—essentially, a business asset. The Government has also accepted the committee's recommendation that the threshold should be raised to £3,000. It can also be raised in future by regulations. That, coupled with the rule about how the asset is owned or used, effectively means that household goods cannot be pledged. As we did previously with consumers, we have taken a power to specify particular assets that cannot be pledged. Although we do not expect to need to use it, it would allow us to plug any gaps were they to arise.

In its stage 1 report, the committee recommended that the Government should consider

"creating more protections in the Bill for sole traders",

since, in many cases, they will be in a similar position to individual consumers.

I consulted the Federation of Small Businesses on that point. Its view was that no specific protections were required for sole traders, who should be treated as adults in the business world.

However, the Government has lodged amendment 20, which provides that a court order will be required if a pledge is to be enforced against a sole trader. The FSB has indicated that it thinks that that is a useful protection. Sole traders are also protected by amendment 16, of course, in that they are not allowed to pledge assets that are unrelated to their business or that fall beneath the £3,000 threshold, so they will not be able to pledge essential items that are in their home.

Amendments 14, 15, 18, 19, 22 and 38 are consequential amendments that reflect the removal of section 48 and the removal of the ability of individual consumers to grant a statutory pledge.

Amendment 37 adds amendment 16's new regulation-making power to the list of delegated powers that will be subject to the affirmative procedure.

I turn to Carol Mochan's amendments. Amendment 16A would exclude from permitted assets household goods that are essential for heating, cooking or laundry purposes, so that it would not be possible to use such items as collateral for a loan under a statutory pledge. That applies only to those such as sole traders who are able to grant a statutory pledge under amendment 16, not the general population.

In our view, the proposed monetary threshold of £3,000 would cover all goods that are used for heating, cooking or laundry purposes in a home, and it is therefore unnecessary to make special provision for those. It also seems very unlikely that any prospective creditor would lend on the basis of such collateral, or that assets that are used for those purposes in a home would meet the

business purposes element of the permitted assets test.

The tests that are already applied are designed precisely to exclude ordinary household goods. Adding a further rule may result in complexity and unintended consequences—for example, it might prevent a sole trader who provides cooker installations from granting a pledge over their business stock.

We have the power to carve out further things from the definition of permitted assets, if we need to do so in the future, but we do not want to unnecessarily overcomplicate matters and potentially create a situation in which unintended consequences could arise.

On amendment 16B, I appreciate it may seem a good idea to provide that the monetary limit for the value of property to be pledged be subject to annual update in line with the retail prices index, but that is unnecessary. In the past few years, prior to the recent surge, inflation has been relatively low, and the current figure is expected to fall.

The threshold is already being increased to £3,000. That is ample for excluding household white goods and similar, and there is a power for the threshold to be increased further, as and when appropriate.

It is worth bearing in mind that that figure is not the only means of ensuring that ordinary household items are not pledged. A sole trader would have to be acting in the course of their business, and the asset would have to be one that was used wholly or mainly for the purposes of the business. The threshold is therefore less critical than it was when it was applicable to—and only to—ordinary consumers.

Amendment 16B does not provide for the threshold to be changed on the face of the act—which, we believe, would lead to significant confusion. However, to amend the figure in the act would mean that the regulations would have to be made annually. Since any rise is likely to be of a negligible order, we do not believe that that is the best use of parliamentary time. It would be more efficient simply to update the figure every few years, taking into account the level of inflation that is prevalent at the time. The figure in the act may have to be amended more often if inflation is higher, but less often if it is lower. Therefore, a set period for amendments does not seem appropriate. For all those reasons, I ask Carol Mochan not to move her amendments.

I move amendment 14.

**Carol Mochan:** I will speak to my amendments in the group. The minister has spoken to his amendment 16, and I am really pleased with his points about its being one of the most important amendments. Clearly, he listened to the committee on that point.

I am content with the points that he made about amendment 16A on household goods. I am keen to make sure that people would not lose those goods, which they use for heating, cooking and laundry. However, I would be grateful for further reassurance that the minister might be able to produce some guidance notes so that the bill makes that clear. I appreciate that the minister has put that on the record, so that might not be necessary.

As the minister said, amendment 16B is pretty self-explanatory. As recommended in the committee's report, it is important that the figure in (2)(b) in amendment 16 is automatically updated annually, on an agreed date, by reference to the retail price index. The amendment seeks to ensure that such assurances are written explicitly into the bill. There would be an expectation that the ability to increase that figure, should it be necessary, would remain within the delegated powers of the Scottish Government. Amendment 16B is procedural, and an attempt to ensure that we are clear that the RPI must be referred to annually in relation to the figure in amendment 16.

I appreciate that the minister may consider an annual review to be overkill, but I believe that it would be a helpful step and would provide Parliament with the reassurance that we are regularly reviewing the legislation in relation to the RPI.

**Tom Arthur:** I reiterate my sincere thanks to the committee for its input on this issue. I also put on record my sincere thanks to the money advice organisations and those in the small business community who have engaged on this. Clearly, the key challenge has been to get the balance right; I believe that the suite of amendments from the Government has achieved that balance. We are protecting individual consumers but not denying small businesses and sole traders the opportunity to utilise the provisions in the legislation. I know that that will be warmly welcomed.

I recognise the well-intentioned nature of Carol Mochan's amendments, but I do not think that they are required. On the risk relating to household goods, as has been touched on, the existing provisions in the amendments effectively mean that household goods would not fall under the category of goods that could be used as collateral for a statutory pledge, owing to the fact that they are goods that are not predominantly used for business, and indeed are likely to be under the £3,000 monetary threshold.

I acknowledge the intent behind amendment 16B, which pertains to an annual increase in the

monetary threshold, but a better approach would be to have greater flexibility. The way in which the amendment is drafted means that there would be no change on the face of the bill, which would necessitate complex calculations, unless ministers were to bring forward annual updates. However, as I outlined in my earlier remarks, such updates could be negligible, particularly as we move towards a period of lower inflation.

On that basis, I ask Carol Mochan not to move her amendments, and ask the committee to support my amendments.

*Amendment 14 agreed to.*

*Amendment 15 moved—[Tom Arthur]—and agreed to.*

*Amendment 67 moved—[Jeremy Balfour]—and agreed to.*

*Section 43, as amended, agreed to.*

**After section 43**

*Amendment 16 moved—[Tom Arthur].*

*Amendment 16A not moved.*

*Amendment 16B moved—[Carol Mochan].*

**The Convener:** The question is, that amendment 16B be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 16B agreed to.*

*Amendment 16, as amended, agreed to.*

**Section 44—Competence of creating statutory pledge over certain kinds of property**

*Amendment 68 not moved.*

*Section 44 agreed to.*

*Sections 45 and 46 agreed to.*

**After section 46**

*Amendment 69 not moved.*

**Section 47—Creation of statutory pledge: insolvency**

*Amendment 70 moved—[Jeremy Balfour].*

**The Convener:** The question is, that amendment 70 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 70 agreed to.*

*Amendment 71 moved—[Jeremy Balfour].*

**The Convener:** The question is, that amendment 71 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 71 agreed to.*

*Amendment 72 moved—[Jeremy Balfour].*

**The Convener:** The question is, that amendment 72 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 72 agreed to.*

*Section 47, as amended, agreed to.*

**Section 48—Providers who are individuals**

*Amendment 17 moved—[Tom Arthur]—and agreed to.*

*Sections 49 to 53 agreed to.*

**After section 53**

*Amendment 73 not moved.*

*Sections 54 and 55 agreed to.*

**Section 56—Amendment of statutory pledge**

*Amendments 18 and 19 moved—[Tom Arthur]—and agreed to.*

*Amendment 74 moved—[Jeremy Balfour]—and agreed to.*

*Section 56, as amended, agreed to.*

*Section 57 agreed to.*

**After section 57**

*Amendment 75 not moved.*

*Sections 58 to 63 agreed to*

**Section 64—Whether court order required for enforcement**

*Amendment 20 moved—[Tom Arthur]—and agreed to*

*Section 64, as amended, agreed to.*

*Section 65 agreed to.*

**After section 65**

*Amendment 76 not moved.*

**Section 66—Secured creditor's right to sell**

*Amendment 21 moved—[Tom Arthur]—and agreed to.*

*Section 66, as amended, agreed to.*

*Sections 67 to 69 agreed to.*

**Section 70—Secured creditor's right to protect and manage the property**

*Amendment 77 not moved.*

*Section 70 agreed to.*

**Section 71—Secured creditor's right to appropriate**

*Amendment 22 moved—[Tom Arthur]—and agreed to.*

*Amendment 78 not moved.*

*Section 71, as amended, agreed to.*

*Sections 72 to 75 agreed to.*

**Section 76—The Register of Statutory Pledges**

*Amendment 79 not moved.*

*Section 76 agreed to.*

**After section 76**

*Amendment 80 not moved.*

*Sections 77 to 90 agreed to.*

**The Convener:** With that, we will take a five-minute comfort break.

10:57

*Meeting suspended.*

11:02

*On resuming—*

**Section 91—Supervening inaccuracies: protection of third parties**

**The Convener:** The next group is on pledge: supervening inaccuracies. Amendment 23, in the name of the minister, is grouped with amendments 24 to 26, 28 and 30.

**Tom Arthur:** This is a technical group of amendments relating to section 91 of the bill. A number of other sections of the bill protect good-faith purchasers more generally, but this section is concerned specifically with the situation in which people rely on the register but the register is wrong.

Section 91 provides that a person who acquires encumbered property for value in good faith and exercising reasonable care will acquire the property free from the pledge, in certain circumstances. Those circumstances are where the person searches the register but the entry in the statutory pledge as recorded at the time of acquisition has come to include an inaccuracy in the entry that is seriously misleading or an inaccuracy by reason of the removal of an entry from the record.

Amendment 23 can be taken in two parts but the changes both relate to encumbered property that has an identifying number—for example, a vehicle identification number. First, the effect of amendment 23 is that, in relation to an entry where the property has an identifying number, the purchaser will receive the property free from the pledge in the circumstances that I have just mentioned only if that identifying number is wrong or absent and it was a requirement under the register's rules to include it. If there was no such requirement, but the person who was registering the statutory pledge included the number voluntarily, the property would be immune from the reach of section 91. That reflects the fact that people should not be penalised for including

additional information, and it brings the section into line with the rules that apply under section 92 at the time that the pledge is created.

Secondly, it is possible that an identifying number that is correctly included at the time of registration could later be removed by some malfunction or mistake. The entire entry could also be removed in error, which means that the fact that the entry previously had a searchable identifying number will be of no help. Even though that is likely to be a very rare occurrence, it could have significant consequences for those involved. Amendment 23 therefore provides that, in such circumstances, the good-faith buyer will be protected and will acquire the property free from the pledge.

Amendment 30 will adjust the rules about what register search facilities must be provided to take account of the fact that, in light of amendment 23, there will be no significance to an identifying number for property being wrong in cases in which that information was not mandatory.

Amendments 24 to 26 and 28 are consequential to amendment 23. They will simply update cross-references.

I move amendment 23.

**The Convener:** As members have no questions, I ask the minister to wind up.

**Tom Arthur:** I have nothing further to add, convener.

*Amendment 23 agreed to.*

*Amendments 24 and 25 moved—[Tom Arthur]—and agreed to.*

*Section 91, as amended, agreed to.*

### Section 92—Seriously misleading inaccuracies in the statutory pledges record

*Amendments 26 to 28 moved—[Tom Arthur]—and agreed to.*

*Section 92, as amended, agreed to.*

*Sections 93 to 96 agreed to.*

### Section 97—Response to application for correction under section 96(6)

*Amendment 29 moved—[Tom Arthur]—and agreed to.*

*Section 97, as amended, agreed to.*

*Sections 98 to 101 agreed to.*

### Section 102—Searching the statutory pledges record

*Amendment 30 moved—[Tom Arthur]—and agreed to.*

*Amendment 81 moved—[Jeremy Balfour].*

**The Convener:** The question is, that amendment 81 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 81 agreed to.*

*Section 102, as amended, agreed to.*

*Sections 103 and 104 agreed to.*

### Section 105—Secured creditor's duty to respond to request for information

*Amendments 31 to 34 moved—[Tom Arthur]—and agreed to.*

*Section 105, as amended, agreed to.*

*Section 106 agreed to.*

### Section 107—Liability of Keeper

*Amendment 35 moved—[Tom Arthur]—and agreed to.*

*Section 107, as amended, agreed to.*

*Sections 108 to 110 agreed to.*

### Section 111—Interpretation of Part 2

*Amendment 82 not moved.*

*Amendment 83 moved—[Jeremy Balfour].*

**The Convener:** The question is, that amendment 83 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 83 agreed to.*

*Section 111, as amended, agreed to.*

*Section 112 agreed to.*

**After section 112**

**The Convener:** The next group is on electronic documents. Amendment 36, in the name of the minister, is grouped with amendments 40 and 42 to 46.

**Tom Arthur:** This group of amendments, which relates to electronic signatures, responds to the committee's recommendation that the bill be amended to require only simple electronic signatures, given that advanced or qualified electronic signatures can create barriers to conducting business for most users. The matter was originally raised by Jeremy Balfour at stage 1, and I am grateful to him for doing so.

Section 116 currently defines the term "authenticated" with reference to section 9B(2) of the Requirements of Writing (Scotland) Act 1995, which provides that

"An electronic document is authenticated if the electronic signature of"

the person who is authenticating it

"is incorporated into, or logically associated with, the electronic document ... was created by the person by whom it purports to have been created, and ... is of such type, and satisfies such requirements (if any), as may be prescribed by the Scottish Ministers in regulations."

Regulation 2 of the Electronic Documents (Scotland) Regulations 2014 requires a signature to be "an advanced electronic signature", whereas section 9G(1)(d) of the 1995 act further provides that

"it is not competent ... to record or register"

an electronic document

"in any other register under the management and control of the Keeper of the Registers of Scotland"

unless sections 9G(2) and (3) both apply to the document. That means that the document must be presumed, under section 9C or 9D or by virtue of section 9E of the 1995 act, to have been authenticated by the granter, and the document, electronic signature and any certification must be

"in such form and of such type as are prescribed by the Scottish Ministers in regulations."

Regulation 3 of the 2014 regulations provides that

"For an electronic document to be presumed authenticated ... under section 9C ... the ... signature ... must be ... an advanced electronic signature; and ... certified by a qualified certificate"

for signature. That means that assignation documents under part 1 of the bill and constitutive documents for statutory pledges under part 2 must be signed using an advanced electronic signature, and for them to be registered, they must also be certified by a qualified certificate.

The Government has consulted stakeholders on this issue, including the Federation of Small Businesses and the Registers of Scotland, with the FSB indicating that it thought that forms of authentication beyond simple electronic signatures were costly to small businesses. It is understood that the jump in cost and complexity between each level of signature is likely to be significant. Therefore, I believe that, to encourage the use of the new registers and to avoid unnecessary costs, with smaller start-up businesses in mind, simple electronic signatures would offer the best option.

11:15

Amendment 45 is the critical amendment in the group, as it removes the requirement for electronic signatures to be authenticated through the use of an advanced or qualified electronic signature. Therefore, it will be possible to use a simple electronic signature. However, it will still be possible to use advanced or qualified electronic signatures if parties wish to do so.

Amendments 42 and 44 will remove the current definitions of "authenticated" and "executed". Although amendment 45 replaces the definition of "authenticated" with rules for the authentication of a document, it retains a substantive definition of the execution of a document.

Amendment 45's new section 116(1B) will allow ministers to modify sections 116(1A)(a) and (b) in place of section 116(3), which amendment 46 removes.

Amendment 40 amends section 114 to replace the reference to section 116(3) with one to section 116(1B). That will ensure that regulations under section 116(1B) will be subject to the affirmative procedure.

Amendment 43 consequentially defines "electronic signature" in section 116(1) for the purposes of the bill, because the definition in section 12(1) of the Requirements of Writing (Scotland) Act 1995 is no longer imported into the meaning of "authenticated", as amendment 42 will remove the cross-reference to section 9B(2) of the 1995 act.

Section 9G(1)(d) of the 1995 act stipulates that it is not competent

"to record or register ... a document in any ... register under the management and control of the Keeper of the Registers of Scotland",

unless it includes a qualified electronic signature. Amendment 36 makes it clear that section 9G(1)(d) of the 1995 act will not apply to the registration of documents under the bill, so a simple electronic signature will suffice for

authentication, although there is nothing to stop parties using advanced electronic signatures or qualified electronic signatures if required to do so.

I move amendment 36.

*Amendment 36 agreed to.*

*Section 113 agreed to.*

**After section 113**

*Amendment 84 not moved.*

**The Convener:** The next group is on a review of the act. Amendment 53, in the name of Carol Mochan, is grouped with amendment 85.

**Carol Mochan:** Amendment 53 is similar to amendments 51 and 52, although it applies to the legislation more widely and to how it is implemented.

Part of the amendment seeks to provide further protection to sole traders and small businesses, making it incumbent upon the Government to

"consider the operation of provision relating to statutory pledge on sole traders and small businesses."

As my amendment states, it is important that we do that

"as soon as practicable after the end of the review period",

which, for the purposes of the section, would be three years to the day after royal assent.

A report of the review would be laid before Parliament to ensure that MSPs were able to hold Government to account on the implementation of the legislation.

The minister and I have had discussions on the issue. I hope that he can see the intention behind the amendment, which is to ensure that Parliament can effectively scrutinise the legislation and hold the Government to account, based on the findings of a three-year review.

I move amendment 53.

**Jeremy Balfour:** I thank the minister for his amendments on electronic documents in the previous group, which were really helpful. I welcome them completely.

My amendment 85 is almost identical to amendment 53. I have nothing further to add. If amendment 53 is agreed to, I will not move my amendment.

**Tom Arthur:** Amendment 53, in the name of Carol Mochan, and amendment 85, in the name of Jeremy Balfour, are, as Mr Balfour has acknowledged, almost identical in terms and would place a requirement on the Scottish ministers to undertake a review of the act and report on that review after the end of the review period, which would be three years after the legislation receives royal assent.

In addition, amendment 53 requires that the review places a particular emphasis on the impact of the statutory pledge provisions on sole traders and small businesses. I appreciate that those are based on a recommendation contained in the committee's stage 1 report, although they have been modified slightly from the report's proposal in order to reflect the removal of individual consumers from the statutory pledge provisions. I responded to the committee in writing back in December about that recommendation and it may be helpful if I restate my concerns about including such a requirement in the bill.

As I referred to earlier in relation to other amendments, there is nothing to stop either the Scottish Government or the Scottish Parliament from carrying out a review of any aspect of a piece of legislation at any time. That is, of course, a good thing. Undertaking such reviews, as and when the need for them becomes apparent, is, in my view, a more flexible and responsive approach.

**Oliver Mundell:** This piece of legislation has been kicking around for a number of years. It took a long time to get it to Parliament and a long time for the Government and Parliament to give it the priority that people in the legal and business communities felt it deserved. Does it not, therefore, seem unlikely that Parliament will find time to look at any small issues or tweaks that need to be made to the legislation without such a provision being in place?

**Tom Arthur:** I appreciate the comments that Mr Mundell makes, but my view is that there is nothing in the legislation that precludes the possibility of a review and my concern is primarily around having it to a fixed timescale—for example, three years from royal assent. The registers will not come online until next summer at the earliest, so that is already a year lost. We are not looking at a three-year period of the act being in operation, but at a two-year period, so it is important that there is flexibility.

I recognise Parliament's interest in the issue and why it wants to nail something down in statute to ensure that a review takes place, but it is incumbent on Government and, indeed, on Parliament more widely to keep all legislation under review and to respond to issues as and when they arise. I take the view that a more flexible approach will allow us to respond at a more opportune time and consequently not find ourselves in a situation where we would be undertaking a review prematurely.

**Oliver Mundell:** If the amendment was tweaked at stage 3 to give an option to delay the review by a further year or two years, would that make it

more flexible and more in line with the minister's thinking?

**Tom Arthur:** I am not going to give any commitments on that right here, other than to say that I would be more than happy to engage with any members to discuss that ahead of stage 3. We would want to consider exactly what was being proposed and consider the proposals in the round. However, I recognise the need for flexibility, and if there is an opportunity for compromise, I am happy to have that discussion. I hope that the committee will appreciate that as an example of the flexible and pragmatic approach that I have sought to demonstrate throughout the work that we have undertaken on the legislation. If members of the committee—or, indeed, any members of Parliament—wish to have that discussion ahead of stage 3, my door is always open and I would very much value the opportunity to do that.

In my response to the committee's stage 1 report, I provided the following example:

"if this legislation had been in force earlier and had included such a review provision, the disruption to business caused by the coronavirus pandemic would likely have rendered any review premature because many relevant business activities would have been quite different from normal for a substantial amount of the period under review, but it would nonetheless have been necessary for the review to proceed."

Conversely, if we felt that it was appropriate to carry out a review of the legislation sooner and wanted to do so after two and a half years, the amendments would still cause us difficulties. They would require us to carry out yet another review just six months later, because the amendments provide that the review cannot be undertaken until

"after the end of the review period".

Those are just some of the difficulties with trying to second-guess when will be the most appropriate time to review legislation. However, I want to assure the committee that we will still want to work closely with organisations such as the Federation of Small Businesses to gauge how the legislation is helping them—or, possibly, hindering them—and we will learn from that engagement. It is my view that that would be a more dynamic, responsive and proportionate approach, as opposed to the more prescriptive method provided for by the amendments. Committee members will be aware that the legislation contains a range of ministerial powers that will enable us, with the Parliament's approval, to modify the legislation in the light of that engagement.

For those reasons, and given my openness to engage in further dialogue ahead of stage 3 around a perhaps more flexible approach, I would ask that the amendment 53 is not pressed and amendment 85 is not moved.

**Carol Mochan:** I absolutely take note of the minister's position on engagement, which I do not doubt for one minute. Nonetheless, we need to push scrutiny in the Parliament, and I will press amendment 53.

**The Convener:** The question is, that amendment 53 be agreed to. Are we all agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**

Balfour, Jeremy (Lothian) (Con)
Mochan, Carol (South Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)

**Against**

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)

**The Convener:** The result of the division is: For 3, Against 2, Abstentions 0.

*Amendment 53 agreed to.*

*Amendment 85 not moved.*

### Section 114—Regulations

*Amendments 37 to 41 moved—[Tom Arthur]—and agreed to.*

*Section 114, as amended, agreed to.*

*Section 115 agreed to.*

### Section 116—Interpretation of Act

*Amendments 42 to 46 moved—[Tom Arthur]—and agreed to.*

*Section 116, as amended, agreed to.*

*Sections 117 and 118 agreed to.*

*Long title agreed to.*

**The Convener:** That ends stage 2 consideration. I thank the minister and his officials for their attendance.

That concludes today's meeting. The next meeting will take place on Tuesday 28 March.

*Meeting closed at 11:28.*

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba