

Home Owner and Debtor Protection (Scotland) Bill

Stage Two, 27 January 2010



Summary of key points

- Citizens Advice Scotland (CAS) strongly supports the Bill, which will have a positive impact on our clients who experience debt and/or housing problems.
- We support a number of the proposed amendments to the Bill introduced at Stage Two, in particular: -
 - Amendments 1-3 concerning written notification for voluntary surrender of a home
 - Amendment 4 which introduces a discretionary power to the court, while retaining compliance with pre-action requirements as a condition for application for repossession
 - Amendments 22 and 28 which removes the 14 day time limit in which to recall a decree
 - Amendments 23, 24, 29 and 30 which will allow more than one recall of decree provided the applicant has an entitlement to do so
 - Amendments 47 and 48 which will clarify the role of the approved money adviser in certificated sequestrations
 - Amendment 50 which clarifies the type of dwellinghouse which can be excluded from a trust deed
 - Amendments 56 & 58 which ensure that a debtor will not be responsible for a creditor's court fees when the creditor has failed to comply with the pre-action requirements
- We oppose amendment 59 which seeks to remove s10 in its entirety

Part 1

Section 1 - Voluntary Surrender

Amendments to remove the requirement to sign an affidavit and make consequential changes to replace it with a simpler process (Amendments 1-3).

We welcome these amendments which aim to make voluntary surrender a simpler process for both homeowners and creditors. The initial requirement for an affidavit to be signed would have resulted in additional fees and expenses for homeowners. These amendments will ensure that the new process will be simpler and cheaper than originally proposed, while still introducing a more formal stage in the process.

The introduction of a written notification for the voluntary surrender of property should also ensure that the client (and all those with a right to occupy) has a more formal role and ultimately has more control over the process. We would hope that this part of the process would include a recommendation that the client seek free, independent, impartial money advice. Voluntarily surrendering a home is a significant decision for a homeowner to make, and it is important that the homeowner receive advice to ensure that it is the right decision for them for them.

Section 2 - Court Applications by creditor for possession of property

Amendments to expressly allow the court a discretionary power to make any order it sees fit (including continuation) when considering an application by a creditor for repossession, while still only granting an application if it is satisfied the pre-action requirements have been complied with (Amendment 4)

We are pleased that the Bill introduced pre-action requirements for creditors before being able to proceed to repossess the debtor's home. This amendment provides the court with some discretion in considering a creditor's application, while still retaining the important element that the application cannot be granted unless the creditor can satisfy the court that the pre-action requirements have been complied with.

Section 3 - Court powers in action for possession of residential property

These amendments ensure that if the creditor has taken an action to repossess but has not complied with the pre-action requirements then the costs of this action will not be borne by the debtor (Amendments 56 and 58)

We support this amendment as we believe that it will afford further protection to homeowners where the lender has raised an action and failed to follow the pre-action requirements.

As the Bill currently stands, the lender will still be able to charge the debtor for legal expenses even where the lender's action is dismissed by the sheriff. This amendment seeks to avoid this situation, so that when a lender has failed to follow the pre-action requirements he/she should not expect to charge borrowers for the action raised.

We feel that this will provide an additional reason for lenders to follow the pre-action requirements in full. If they fail to do so, not only would they fail to obtain a decree for possession; they would also have to pay their own solicitors for the cost of raising those proceedings.

Section 6 - Recall of decree

Amendments to remove the references to execution of a charge and the 14 day time limit and make it clear that a recall application is competent at any time before the decree is fully implemented (Amendments 22 and 28)

We fully support the amendments to remove the references to execution of a charge and the 14 day time limit. Many of our clients first seek advice when repossession is imminent and would be outside the proposed 14 day time limit for recall of decree. These amendments will ensure that the Bill will assist homeowners at all stages of the repossession process, and that bureau advisers have the tools to help clients who seek advice at the last moment.

Amendment to allow more than one recall of decree (amendments 23,24,29 and 30)

We are of the view that the amendments that allow more than one recall of decree are an improvement to the Bill. These amendments will allow other interested parties, such as the debtor's spouse or partner, to also have the right to recall. This could be particularly important given anecdotal evidence that increasingly relationship breakdown is being caused by money and housing worries.

Section 7 – Lay Representation

The Bill provides for those facing repossession to have the right to be represented in court by an approved lay representative, with the approval process to be prescribed by subordinate legislation. This provision is very welcome and we expect bureau advisers to take up this role on behalf of their clients.

These are technical amendments to enable the Scottish Ministers to prescribe categories of bodies within the SSI (e.g. those accredited at level 3 against the national information and advice standards) that can approve lay representatives rather than having to name every organisation in the SSI and amend it every time a new organisation is accredited (Amendments 33, 34, 36, 37, 38 and 40)

These are technical amendments to allow for Scottish Ministers to prescribe procedures for removal of approval as a lay representative which is currently not within the Bill (Amendments 35 and 39)

In principle, we have no objections to these amendments however our view will rest on the detail as set out in the regulations.

These amendments will require organisations with lay representatives to provide information to the Scottish Government about those acting as lay representatives. It will help the Scottish Government to monitor how the Act is working and check, for example, that there is appropriate coverage in all courts (Amendments 36 and 40)

In principle, we have no objections to the above amendments however our view will rest on the details as set out in the regulations. We would caution against unduly onerous information requirements and anticipate the provision of information to be confined to numbers and geographical spread.

Part 2

Section 9 – Certificate of Sequestration

We welcome the proposed new route to sequestration for debtors who find themselves outside current debt solutions. Our evidence has found that many debt clients cannot access the LILA route to bankruptcy because they are homeowners, or their income is over the threshold for the scheme, yet they have insufficient income to enter a Protected Trust Deed or the Debt Arrangement Scheme (DAS). Research undertaken by CAS in 2008 entitled “*Restricted Access*”, found that around a quarter of bureau debt clients could not access any of these debt solutions, leaving them in limbo. The proposed Certificate for Sequestration will provide a solution for some clients within this group to deal with their unmanageable debt.

This amendment clarifies that the debtor has to provide evidence that he is unable to pay debts as they become due before the authorised person can grant a certificate for sequestration (Amendment 47)

This amendment requires the debtor to demonstrate that he/she is unable to pay his/her debts as they become due (Amendment 48)

We strongly welcome these amendments. Money advisers had expressed concerns about the process that would have been required for them to be in a position to confirm, that in their opinion, a debtor is unable to pay his/her debts. These amendments mean that the certificate will be signed on the basis of fact, rather than relying on an adviser’s opinion. This will ensure that money advisers are more comfortable granting a certificate.

Section 10 – Trust Deeds

CAS welcomes the changes to Protected Trust Deeds allowed for in the Bill. Section 10 of the Bill enables certain assets and liabilities to be excluded from a protected trust deed while still allowing it to become protected. This has the potential to help debtors who have little equity in their home. The provision is reliant on creditor agreement, so is unlikely to affect many creditors adversely, but will allow some flexibility in the agreement.

Amendment to re-draft section 10 to address a number of issues:

- makes it clear that a creditor cannot be excluded from a trust deed unless they are a secure creditor*
- ensures that a principle dwellinghouse of a debtor can be excluded, rather than a family home (Amendment 50)*

S10 as amended is a very welcome provision in the Bill, and one that we consider will be of great benefit to a number of CAB clients.

We are pleased to see that clients will be able to come to an agreement with their creditors to exclude their homes from a trust deed. The benefits of this provision are that:-

- It will ensure that at the beginning of the trust deed the client has the certainty of knowing whether their home is included or not
- It will help those debtors who have little equity in their homes
- It should avoid clients having to suffer the costs of moving home
- It should avoid clients having to move themselves and other members of their household which potentially would lead to changing schools, loss of support network and difficulties in getting to work
- Clients who have adapted their properties for disabilities are also reassured that their home may not have to be automatically included in trust deed

Furthermore, we welcome the move that the amendment will widen the exclusion of a family home to a dwellinghouse, thus ensuring that those clients who are elderly, single or on a low income may have their property excluded.

Leave out section 10 (Amendment 59)

We strongly oppose the above amendment, based on the perceived benefits of s10 as outlined above.

Conclusion

Citizens Advice Scotland (CAS) strongly supports the Home Owner and Debtor Protection (Scotland) Bill. Its provisions contain proportionate responses to the challenges posed by the recession, and are likely to continue to benefit debtors and homeowners in the long-term.

We have outlined our responses to the provisions in the Bill in this paper, all of which can be addressed in the near future through the Bill or the Statutory Instruments supporting the legislation.

We call on MSPs to ensure that the Bill is enacted in a short time scale in order to help debtors and homeowners at the earliest opportunity.

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