Mr Murdo Fraser MSP  
Convener, Economy Energy and Tourism  
Committee,  
Scottish Parliament,  
Edinburgh  
EH99 1SP

Date:  
1 November 2013

Dear Mr Fraser,

Thank you for offering me the opportunity to respond to the follow-up evidence submitted by ICAS and the IPA. I have made some general arguments in the main body of this letter and also annexed some more detailed comments on particular points made by ICAS and the IPA in their submissions. I hope that what I have to say will be helpful to Committee.

ICAS and the IPA have raised two principal concerns - that certain functions which the Bill proposes should be transferred from the courts to the Accountant in Bankruptcy (“AiB”) (which ICAS and the IPA argue should instead be retained by the sheriff), and that this transfer may create scope for a conflict of interest within AiB. I would like to begin my response by re-stating something that is, for us, one of the cornerstones of this legislation. The aim in introducing this Bill to ensure that “fair and just processes of debt advice, debt relief and debt management are available to the people of Scotland.”

For us, “fair and just processes” means processes that eliminate duplication, enable swift and appropriate decision-making and minimise costs for all parties – debtors, creditors and the public purse. It is in pursuit of exactly these ambitions that our Bill proposes to move certain functions from the courts to AiB – because we believe that this transfer will support decisions that are fair, that can be made expediently and that come at less cost.
I would like to highlight a couple of things. Firstly, nothing in this Bill removes the individual's right of ultimate appeal to the courts. This is a fundamental right, it is one which AiB absolutely supports and it is not something that I would ever wish to see revoked.

Secondly, in relation to internal or self-review procedures - a process whereby a public sector decision is made subject to internal review by the decision-making body before onward appeal is normal practice and there are examples across the public sector. In Scotland, our Local Authorities review decisions internally (e.g. on council tax liabilities). NHS Scotland reviews decisions about care, treatment and services internally. The Scottish Government and the Scottish Parliament, along with every other devolved public body, review decisions under the Freedom of Information (Scotland) Act 2002, before appeal to the Information Commissioner's Office becomes available.

Examples can be found elsewhere, including on agricultural subsidy under the Rural Payments (Appeals) (Scotland) Regulations 2009, and at HMRC and DWP. For what it is worth, I also understand that when ICAS takes decisions (e.g. on a member's misconduct) and the member disagrees - that decision is reviewed by an internal board or committee and not a fully independent body. These arrangements are not new, they are not unusual and, if adopted, they will by no means be unique to AiB.

Turning to the potential for such arrangements to give rise to a conflict of interest and the issues around properly separating the original decision from the review - without wishing to labour the point above, the other organisations and public bodies noted above (including ICAS) manage this without significant difficulties.
I am quite clear that members of the reviewing team must have no previous involvement in the original decision. Arrangements to make sure this happens are already in place and are used to carry out analogous reviews of decisions under the Debt Arrangement Scheme ("DAS"). We have carried out 21 such reviews since the new Debt Arrangement (Scotland) Amendment Regulations 2013 came into force in July, only one of which has, so far, required a further, onward appeal to the sheriff. I would stress again it is appeal to the sheriff which ensures the procedures are fair.

I know that ICAS is concerned that AIB does not have “sufficiently skilled and experienced personnel available to be able to adequately consider directions on such matters.” Setting aside the fact that my staff drafted the operating manual that our insolvency practitioner ("IP") providers refer to in administering cases or that we take calls, almost every day, from staff at IP firms seeking our advice - let me say that our current complement includes individuals who have been making decisions in relation to Scottish statutory debt solutions for almost a decade.

Members of my staff are CPPI ("Certificate of Proficiency in Personal Insolvency") qualified and two of them were recognised as Scotland’s top CPPI students, in 2011 and 2012 respectively. It will come as no surprise that I absolutely stand by their ability to take on these new responsibilities and carry out their work to the required standards.

The IPA makes the further point that, “if an appeal is warranted, the matter is necessarily contentious in nature and, therefore, should be subject to . . . judicial determination”. I feel obliged to point out that “contentious” and “complex” are not the same thing. The fact that two parties disagree does not automatically mean that the matter over which they disagree is involved or complicated.
Furthermore, in the event that the matter is complex, my staff will do exactly as a sheriff might do, e.g. when there is a difficult question of accountancy to be resolved. I think it is fair to say, with the greatest of respect, that most sheriffs do not hold qualifications in accountancy and that, when they are required to make a determination on such matters, they will often seek advice. We are fortunate in that we have access to specialist advisers (legal and others) and we make use of their services when we need to. And, of course, in the event that the matter is irresolvably contentious, there remains the ultimate right of appeal to the courts.

There are other advantages to these transfers. Making AiB responsible for these functions will centralise decision-making and make some of it more consistent. It is a fact that since bankruptcy decisions moved to the sheriff following the Bankruptcy and Diligence etc. (Scotland) Act 2007, different sheriffs have, at times, made different decisions where the circumstances of the case have been the same. With these provisions in effect, AiB will be able to maintain a log of all decisions and directions issued by sheriffs, together with AiB’s own practice in making decisions which we will add to as we begin to make decisions ourselves. This will help ensure that consistent decisions are taken across Scotland.

You will be aware that this is not the first time that we have proposed a transfer of functions from the judiciary to AiB. The 2007 Bankruptcy and Diligence etc (Scotland) Act also removed the process for debtor applications from the courts to AiB. I do not believe that anyone would reasonably argue that this transfer has not been a success.
I do believe that it is right for these responsibilities to come to AiB. As you know, we have the support of the Scottish Courts Service in this and I am grateful to Eric McQueen for his letter to you, particularly his acknowledgement that “the transfer of these functions will allow decisions to be made at the appropriate level and improve the efficiency of the process, freeing up time in the court programme to deal with matters which require judicial consideration and decision.” I entirely agree with this conclusion and fully expect that, over time, evidence of sound and sensible practice by my agency and my staff will bear it out.

Yours sincerely

Rosemary Winter-Scott
Annex

ICAS

(Numbered references are to paragraphs of the ICAS response of 21 October)

Directions – sections 3 and 3A of 1985 Act and section 24 of the Bill

7. & 8. The ability of AiB to refer the matter to the sheriff allows the expertise of the court to be retained where possible (as on subsequent appeal from AiB’s direction). There appears to be a misunderstanding that AiB is taking its own direction – it simply refers the matter to the sheriff to rule on the matter.

9. We do not understand the argument that it is inequitable between a liquidator and trustee in bankruptcy on whether they have access to the court. We do not see why consistency is a material consideration. While liquidators and trustees in sequestration play a vital role in the process, we think this is as much if not more about the affected debtors and creditors, and the effectiveness and efficiency of the processes. We think company insolvency matters are likely in many (though not in all) cases to be more complex than personal insolvency cases. As noted above, the Bill retains access to the court in personal insolvency matters.

Contractual powers of the trustee – section 42 of 1985 Act and section 30 of the Bill

15. We do not understand the argument that this is not administrative because an application (at present to the court) under section 63 to cure a defect would have applied. The fact that this could be cured by a general power to apply to court to cure a defect in procedure does not mean that this particular power cannot be transferred, or is not considered administrative. Many of the matters entrusted to the sheriff by the Act are of a nature to be considered administrative and not judicial.
BROs – section 56A etc. of 1985 Act and section 31 of the Bill

19. We agree that the evidence for imposing a BRO must be capable of being tested by the courts. That possibility is supplied by appeal under section 56E.

22. We do not understand the point about conflict of interest in this context. Many enforcement authorities are responsible (not least in the sense of being accountable to Parliament) for the enforcement of a regime and for the outcomes against which the success or otherwise of the BRO regime will be measured.

Power to cure defect – section 63 of 1985 Act and section 33 of the Bill

24. We are glad to see the acknowledgement of the attempt to separate out more minor administrative matters from more significant matters for the court. We think the two matters the trustees highlight - waiving non-adherence to timescales in relation to audit, and determination of accounts and subsequent appeal periods - highlight the administrative nature of the functions transferred.

26. On the point about the direct conflict of interest in the AiB taking decisions where AiB is also trustee, the procedure in the Bill is carefully structured so AiB takes and notifies the decision which is then subject to review and appeal if there are any concerns with the decision taken. The initial decision in such a case can only be made once an initial proposal is made and representations are taken into account under the procedure set out in section 63A(4) to (6).

Valuation of contingent debt – paragraph 3 of Schedule 1 to 1985 Act and section 35 of the Bill

32. There is no direct conflict of interest in the AiB taking decisions where AiB is also trustee. Where a decision of the AiB on a valuation is made under
paragraph 3(2) as trustee, the application is for AiB as trustee to review and reconsider her own decision as trustee. That is then subject to appeal to the sheriff under paragraph 3(6). It was thought unfair to subject private trustees to an equivalent duty to reconsider their valuation where that was challenged.

IPA

(Numbered references are to numbered points in the IPA supplementary written evidence to the Committee)

1. Section 4 of the Bill – fixing contributions

The AiB, sheriff and other authorities deciding on contributions under the provisions would have to have regard to all of the circumstances in applying the test of reasonable amount of expenditure. In relation to aliment, section 5D(4) expressly require the regulations made in relation to the Common Financial Tool to make provision for allowing an amount of aliment and the debtor’s “relevant obligations” in that connection to the debtor.

A Debtor Contribution Order can be challenged in relation to its initial imposition by AiB in relation to a debtor application by seeking recall from the sheriff under section 16, as part of the initial decision. This is however unlikely to be necessary as the Common Financial Tool will have given the debtor an estimate of how much they will pay.

On creditor petitions, the sheriff has agreed to impose the bankruptcy, and the scope for factual dispute should be limited by the Common Financial Tool, and judicial review would be available if the decision was not soundly based in fact.

At any time for a change of circumstances as at present in challenging an Income Payment Order an application can be made to the trustee for a variation (s.32E), which can then be appealed up to the sheriff (s.32G).
4. Section 28 – replacement of trustee

Far from being “unconstitutional”, as noted in the body of this letter such reconsideration self-review powers are common.

7. Section 11B – refusal of AiB to award sequestration

We respectfully suggest the IPA are in error here on the effect of the Bill.

The ability of AiB to refuse a debtor application for bankruptcy is already provided for in the law at present under the Bankruptcy (Scotland) Act 1985 in the Bankruptcy (Scotland) Regulations 2008 as amended¹. This is a consequence of the changes made in moving debtor applications for bankruptcy to AiB in the Bankruptcy and Diligence etc. (Scotland) Act 2007. Section 10 of the Bill merely puts this on the face of the 1985 Act, as noted in the Explanatory Notes to the Bill. There is no assumption of judicial powers beyond that.

While it is true that this provision allows inappropriate debtor applications to be rejected, there would need to be reasonable grounds for that, as part of the normal current process for seeking more information from the debtor. Accordingly, there is no “loophole”.

It is wrong too to say that there is no right of appeal. Following review by AiB, appeal is provided for at present against refusal of a debtor application in section 15(3A) of the 1985 Act. Section 15(3D) as inserted by section 37 of the Bill would preserve the right of appeal to the sheriff following the review.

Technical point - applications to convert Protected Trust Deeds

On the technical point about applications to convert Protected Trust Deeds to sequestrations under section 59A et seq of the 1985 Act as amended by section 32 of the Bill, again this is not correct on the effect of the Bill.

Section 59C(2A), as amended by section 32(5)(b) of the Bill deems the provisions of the 1985 Act generally to apply to an order made by the AIB converting (or not converting) the trust deed under section 59C(1) as if it was a determination by AIB or a debtor application under section 12(1) where the member State liquidator was a concurring creditor.

- Accordingly, the usual appeal rights apply—in particular see section 15(3A) of the 1985 Act, refusal can be appealed by the concurring creditor and that would apply to the member State liquidator. The changes made by section 37 of the Bill substituting section 15(3A) and adding/modifying review and appeal rights are also relevant here.

- In respect of the debtor and other persons having an interest, section 16 will also on the same basis allow petition to the sheriff for recall of sequestration, where there is an order to convert.

That allows the matters to be put to the court on the same basis as for award of sequestration. There is other recourse available where the conversion is granted, such as reduction (see e.g. section 14(4)) or judicial review.

9. General remarks - self-review

In relation to the new element of self-review and as stated in the body of the letter above - a reorganisation of AIB staff has already taken place and the review team has been relocated to a separate area of the building from where the operations staff are based. We have considered the expense of this reorganisation in great detail and are confident that these costs and any additional training costs required will be met from our budget.