SUBMISSION FROM ICAS

Introduction

1. The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents around 20,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK and we have an in-depth knowledge and expertise of insolvency law and procedure.

2. ICAS’s Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members’ views and protect their interests. In the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.

3. ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all of the implications and that alleged failings within the process are supported by evidence.

4. ICAS is pleased to have the opportunity to submit its views in response to the consultation issued by Economy, Energy and Tourism Committee of the Scottish Parliament (‘the EET Committee’) on the draft Scottish Statutory Instrument, The Public Services Reform (Insolvency) (Scotland) Order 2016 (‘the draft Order’).

Key Messages

5. We welcome and fully support the policy objective underpinning the proposed amendments within the draft Order which are to modernise and align where appropriate the corporate insolvency regime in Scotland with those in England and Wales (E&W). Scotland’s main trading partner is the rest of the UK and aligning insolvency processes across the UK legal jurisdictions will result in benefits to creditors as well as strengthening the insolvency regime.

6. We would endorse the amendments to the Insolvency Act 1986 as set out in the draft Order. These will contribute towards the policy objective of modernising and harmonising as appropriate the corporate insolvency regimes within the UK.

7. While the amendments within the draft Order are welcomed, there are several additional amendments which could usefully be made to the Insolvency Act 1986 in relation to devolved matters of corporate insolvency which would further the policy objectives of modernisation and harmonisation (see Appendix 1). These matters were raised with the Accountant in Bankruptcy (‘the AiB) during their recent consultation on this area of work. We understand following discussions with the AiB that in principle they are supportive of these further areas being developed and amended. We would encourage urgent consideration being given to inclusion of these matters in the Order.

8. We would suggest that the Savings provisions within Article 17 should be reviewed and amended where appropriate to ensure that the amendments can be utilised to the fullest extent possible. There are no obvious reasons why the
provisions could not be utilised in existing insolvency proceedings as well as those on and after 1 October 2016. This would enable the significant advantages and efficiencies to be introduced into a greater number of insolvency proceedings.

9. We note that the provisions, in the main, come into force on 1 October 2016. This is, we understand, in anticipation of coterminous introduction of amended corporate insolvency rules in Scotland with the introduction of new insolvency rules in E&W.

10. The timescale to introduce new corporate insolvency rules in Scotland on 1 October 2016 is very challenging, although by no means impossible. It remains a possibility that the proposed introduction of new rules in E&W may be delayed following review of the draft rules by the Insolvency Rules Committee. It is anticipated that the new Scottish corporate insolvency rules will be heavily influenced by the E&W rules if the policy objective of alignment is to be achieved. As a result any delay in the ability to commence new Scottish corporate insolvency rules would presumably impact on the appropriateness of commencing primary legislation provisions. Retaining a degree of flexibility, at this time, in relation to the coming into force of the Order may well be desirable.

**Detailed Response**

11. The corporate insolvency regime in Scotland is partly devolved to the Scottish Parliament under the Scotland Act 1998. Westminster remains responsible for all areas of corporate insolvency with the exception of¹:

   i. the process of winding up, including the person having responsibility for the conduct of a winding up or any part of it, and his conduct of it or of that part; the effect of winding up on diligence; and avoidance and adjustment of prior transactions on winding up.

   ii. certain other matters in relation to social landlords.

   iii. Floating charges and receivers, except in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts.

12. As a result of the partial devolution of certain aspects of the corporate insolvency regime and the parliamentary priorities and time available to consider legislative change in this area, over time a number of practical differences in the corporate insolvency regime in Scotland and E&W have developed.

13. Scotland’s biggest trading partner is the rest of the UK. It is therefore important to the Scottish economy that no unnecessary barriers are created to trading with Scottish businesses. Some businesses will regrettably fail and therefore a robust insolvency regime forms an essential part of creating a strong economic environment within which business can take place.

¹ Schedule 6 Part II Section C2, Scotland Act 1998
14. When a Scottish business fails inevitably a significant number of creditors will be based outwith Scotland and in other parts of the UK. It is important that those creditors are able to have confidence in the insolvency process and interact with it efficiently. Harmonising the detailed procedures of insolvency will ensure that any barriers to accessing the insolvency are minimised.

15. It is important to note that the authorisation of insolvency practitioners is carried out at a UK level. As a result, once qualified and authorised as an insolvency practitioner it is permissible to act as an office holder in relation to a company in Scotland, E&W or Northern Ireland.

16. Where legislation in each jurisdiction varies significantly this introduces risk, inefficiencies and costs to the insolvency process. As a consequence, any measures which can be introduced to minimise variation between legal jurisdictions will result in a more efficient and robust procedure.

17. We therefore fully support the policy objective underpinning the proposed amendments within the draft Order which is to modernise and align where appropriate the corporate insolvency regime in Scotland and the functions of insolvency practitioner operating in Scottish insolvencies with those in E&W.

18. We are pleased to note that the AiB consulted with ICAS prior to the draft Order being prepared and that a constructive dialogue has taken place prior to the draft Order being introduced.

19. We highlighted in our response that although we were in agreement with the proposed amendments and that these would allow a significant step to be made in modernising the corporate insolvency regime in Scotland, there were a number of other amendments which require to be made to complete that process.

20. We are pleased to note that a number of our comments have been reflected in the draft Order. We note however from the consultation response that a number of other significant and important amendments which are required to complete a modernisation of the corporate insolvency regime in Scotland remain to be addressed.

21. Details of the further amendments which we consider should be addressed are included in Appendix 1.

22. In their consultation response, the AiB indicated that further consideration of Scottish Government policy in relation to certain matters was required and would prevent inclusion in the draft Order. In relation to other matters, additional information was requested and has been provided to enable a greater understanding of the issue or the potential solution.

23. We understand that the parliamentary timescales for dealing with this draft Order are such that delaying introduction of the draft Order to further consider the matters highlighted in Appendix 1 would severely impact on the consequential work required for secondary legislation. This would then impact on the ability to commence the new corporate insolvency rules as planned in October 2016 in conjunction with the expected commencement of new rules in E&W.
24. We would encourage amendment to the draft Order to address the outstanding matters highlighted in Appendix 1 where this is possible.

25. Where this is not possible, we would encourage a subsequent Public Service Reform Order be introduced at as early a date as practical to address these issues. This would enable work to be carried out in parallel with the aim of including these further amendments within the insolvency rules to be commenced in October 2016.

26. We would highlight that should there be any slippage in commencement of new rules in E&W then this would provide further scope for further amendments to the corporate insolvency regime in Scotland to be addressed by the Scottish Parliament.

27. We would also note that while it would be useful to co-ordinate the commencement of new corporate insolvency rules in E&W and Scotland this is not an essential requirement. The corporate insolvency regimes in the two jurisdictions have been out of sync in many ways for a significant period of time.

28. We consider that it may be more beneficial to consider delaying the introduction of amendments to the regime in Scotland by a short period and facilitate a more extensive modernised regime to be introduced than to be dictated by the timetable of reform in E&W.

29. The Savings provisions set out in Article 17 of the draft Order result in a number of the efficiencies and advantages arising from the amendments within the draft Order only being available in respect of ‘new’ appointments after 1 October 2016. This creates a situation where insolvency stakeholders including creditors and IPs require adopting different processes and procedures dependent upon the commencement date of the insolvency process.

30. Given the intention behind the amendments is to create a modern and efficient corporate insolvency regime it would be appropriate to make the benefits of the amendments available to procedures irrespective of the commencement date where this is possible and practical.

31. We consider that the provisions in Articles 4 to 15 would be appropriate to be used in relation to the relevant insolvency procedure irrespective of whether the case commence prior to or after 1 October 2016.

32. We note that commencement provisions in Article 1 do not appear to provide for commencement of the amendment provided in Article 2. We assume that this is a typographical error and that Article 1(3) should refer to Articles 2 to 15 rather than 3 to 15.

ICAS
November 2015
## Appendix 1 – Additional Insolvency Act 1986 amendments required

<table>
<thead>
<tr>
<th>Section</th>
<th>Source</th>
<th>Proposed Amendment</th>
<th>Purpose of Reform / Policy Position</th>
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<tbody>
<tr>
<td>IA 1986 s.53(1)</td>
<td>Consideration should be given to allowing the appointment document for a receiver to be authenticated electronically. Potential consequential amendment to remove the restriction in IA 1986 s. 436B(2)(a)</td>
<td>The reform would achieve a more efficient appointment procedure in relation to receivers, and in particular joint receivers, who may be in different locations.</td>
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<td>IA 1986 s.101(4)</td>
<td>Remove reference to powers and duties of commissioners on a bankrupt estate and refer only to such powers and duties as may be conferred and imposed on the liquidation committee by the rules.</td>
<td>The process of bankruptcy and liquidation was previously closely aligned however given changes to the Bankruptcy (Scotland) Act 1985 over recent years this is no longer the case. It is therefore necessary to decouple corporate insolvency and personal bankruptcy legislation in so far as is possible. References to the Bankruptcy (Scotland) Act 1985 should therefore be removed and replaced with explicit terms in the IA 1986 thereby allowing the legislation to be easier to understand and without cross referencing to other legislation. This will also minimise future unintended consequences of changes to linked legislation not being identified.</td>
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<tr>
<td>IA 1986 s.112/s.169</td>
<td>Provide a specific power in legislation for the liquidator in a court winding up to seek the direction of the court</td>
<td>s.112 provides for matters to be referred to the court in a CVWU. There is no such clearly stated provision in relation to a court winding up. Currently this is achieved in a court winding up through the provisions of s.193(3) and the powers of a trustee in bankruptcy. The reform would provide clarity and avoid costs in drafting unnecessarily complex applications to court.</td>
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<tr>
<td>IA 1986 s.169(2)</td>
<td>Remove reference to powers of liquidator being the same as the powers of a trustee on a bankrupt estate and replace with reference to specific powers</td>
<td>The process of bankruptcy and liquidation was previously closely aligned however given changes to the Bankruptcy (Scotland) Act 1985 over recent years this is no longer the case. It is therefore necessary to decouple corporate insolvency and personal bankruptcy legislation in so far as is possible. References to the Bankruptcy (Scotland) Act 1985 should therefore be removed and replaced with explicit terms in the IA 1986 thereby allowing the legislation to be easier to understand and without cross referencing to other legislation. This will also minimise future unintended consequences of changes to linked legislation not being identified.</td>
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<tr>
<td><strong>IA 1986</strong></td>
<td><strong>Various</strong></td>
<td>Remove references to Bankruptcy (Scotland) Act 1985 and replace with specific corporate insolvency text (e.g. s.185, s242(3))</td>
<td>The process of bankruptcy and liquidation was previously closely aligned however given changes to the Bankruptcy (Scotland) Act 1985 over recent years this is no longer the case. It is therefore necessary to decouple corporate insolvency and personal bankruptcy legislation in so far as is possible. References to the Bankruptcy (Scotland) Act 1985 should therefore be removed and replaced with explicit terms in the IA 1986 thereby allowing the legislation to be easier to understand and without cross referencing to other legislation. This will also minimise future unintended consequences of changes to linked legislation not being identified.</td>
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<td><strong>IA 1986</strong></td>
<td><strong>s.193</strong></td>
<td>Repeal s.193(3)</td>
<td>The Insolvency Amendment (Scotland) Rules 2014 introduced rule 4.68B which deals with unclaimed dividends. We therefore currently have the position whereby s193(3) requires reference to s.58 of the Bankruptcy (Scotland) Act 1985 with rule 4.68B also setting out similar provisions. There is therefore a tension between primary and secondary legislation.</td>
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<td><strong>IA 1986</strong></td>
<td><strong>s.218</strong></td>
<td>Prosecution of delinquent directors - Consider extending or creating similar provisions in relation to appointments other than liquidation.</td>
<td>Current provision to report an offence to which a director or member of a company may be criminally liable extends only to court liquidations. It is in the public interest for such activities to be reported no matter the insolvency procedure. Consideration should be given to extending to voluntary winding up and receiverships. Whilst such actions would normally be covered under CDDA reporting and under the code of ethics as professional behaviour of an IP, a statutory basis of reporting would be beneficial.</td>
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<td><strong>IA 1986</strong></td>
<td><strong>s.204</strong></td>
<td>Clarification that s.204 can be used at any time after the liquidator is appointed</td>
<td>Different practices have developed within different sheriff courts in relation to the circumstances when an early dissolution can be obtained. S.204 applications are intended to provide an efficient route for the liquidator to end the liquidation where there are limited assets and the costs of the liquidation exceed realisable assets. Clarifying that an application can be made at any time after the liquidator's appointment will ensure that unnecessary costs to the insolvent estate will be avoided.</td>
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<td><strong>Various</strong></td>
<td><strong>Restore filing requirements to Registrar of Companies/FCA</strong></td>
<td>The amendments brought about by the Scotland Act 1998 which amended filing requirements to the Registrar of Companies and FSA (now FCA) to be made to AiB should be revoked. The requirements in some instances result in additional costs being incurred through double filing while in all instances uncertainty has been created for creditors and other stakeholders over where information is held. In addition there is a lack of transparency in relation to Scottish corporate insolvency procedures as filings made with AiB are not available via a public register/web unlike equivalent E&amp;W procedures</td>
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<tr>
<td>Act</td>
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<td>Proposed Change</td>
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<td>IA 1986</td>
<td>s.178-182</td>
<td>Ability to disclaim onerous property - Creation of similar provisions to those available in E&amp;W subject to appropriate amendment for Scots property law.</td>
<td>It was previously thought that the provisions within the IA 1986 that conferred the same powers of a trustee on a liquidator provided a way in which a liquidator in Scotland could address the issues in s.178-182 to be dealt with in relation to a Scottish winding up. Judgements in the recent case of Scottish Coal have however made it clear that what was previously considered to be the position is not the case. As a result we have an increasingly complex landscape and differing treatment available in liquidation depending upon whether the company concerned is registered in Scotland or E&amp;W and whether property is located in Scotland or E&amp;W. The resultant differentiation has a significant effect on the outcome for creditors and has the potential to impact on the availability of funding (or its terms) for companies as a result of the potential value that can be placed on security.</td>
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<tr>
<td>IA 1986</td>
<td>s.388</td>
<td>Amend references to “Permanent Trustee” in ss.(2)(a) and (4)(b)</td>
<td>Permanent Trustee was replaced with Trustee in BAD 2008. The reference in IA 1986 should be updated to reflect this. (We understand that this may be addressed through the Bankruptcy (Scotland) Bill and an associated order)</td>
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<td>IA 1986</td>
<td>s. 440</td>
<td>We would suggest that further consideration is given to aspects of s.440 would benefit from amendment or repeal in conjunction with the development of the new rules. For example, if the de-coupling of the Bankruptcy (Scotland) Act 1985 from corporate insolvency is desirable then it may be that s.246 would have an application in Scotland and therefore the reference to s.246 should be deleted from s.440.</td>
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