SUPPLEMENTARY EVIDENCE – TRANSFER OF POWERS FROM THE COURTS TO THE ACCOUNTANT IN BANKRUPTCY

Bankruptcy and Debt Advice (Scotland) Bill
Introduction
1. The Institute of Chartered Accountants of Scotland (ICAS) regulates circa 75% of insolvency practitioners (IPs) who take appointments in Scotland and we have an in-depth knowledge and expertise of bankruptcy law and procedure. ICAS regulated IPs will play a key role in delivering a robust debt management and debt relief regime for the people of Scotland.

2. 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.

3. ICAS was pleased to provide oral evidence to the Economy, Energy and Tourism Committee on 9 October 2013. Subsequently to that evidence being provided, we have been requested to provide further information to the committee on the proposed transfer of functions from the sheriff courts to the Accountant in Bankruptcy (AiB) and in particular which functions should remain with the sheriff courts.

4. ICAS is supportive of removing administrative functions from the courts. We are of the view however that certain of the functions proposed to be moved are not low level administrative functions but are functions which requires evaluation of often complex legal matters or impact on the rights of individuals and should therefore be retained by the courts.

5. Appendix 1 to our written response to the Stage 1 Call for Evidence at item 32 sets out those functions which are proposed to be transferred to the AiB and which we consider should be retained by the courts. These items are expanded on below:

Functions which we believe should not be transferred to the AiB

Application for directions
6. IPs are highly qualified and experienced individuals and with a significant amount of commercial expertise. In addition, in performing their functions they also have access to a wide range of advisors including, but not limited to, legal advisors. It is therefore only in circumstances where there is substantial uncertainty that an office holder would seek directions. We understand that relatively few applications are made to the court currently.

7. The application to seek direction is often based on a complex area of law or legal principle and therefore it is appropriate that the skills and experience of the courts is retained in these matters.\(^1\)

8. Proposed new section 3A(3) states “The Accountant in Bankruptcy may, before giving a direction on any particular matter under this section, refer the matter to the sheriff by making an application for direction in relation to that matter.”. It does not seem efficient for the AiB to make an application to court for their own direction to enable them to then issue a direction to a trustee.

\(^1\) Examples include:
DIRECTIONS BY DONALD IAIN McNUTT TRUSTEE ON THE SEQUESTRATED ESTATES OF GARY BROWN [2009] ScotSC 156 (15 October 2009)
9. It is inequitable that a liquidator in relation to a company and a trustee in a sequestration, both being officers of the court, should not have the same access to the court to seek direction.

10. We are concerned that the AiB does not have sufficiently skilled and experienced personnel available to be able to adequately consider and issue directions on such matters.

11. The requirement to seek directions is often precipitated by a matter of urgency. The courts currently respond to matters of urgency well.

**Contractual powers of a trustee**

12. The Bankruptcy (Scotland) Act 1985 contains powers to allow a trustee to adopt a contract entered into by the debtor prior to their sequestration where it is considered beneficial to the sequestration to do so. Once a request is made to a trustee for them to adopt a contract, the trustee must take such a decision within 28 days "or within such longer period…as the sheriff…may allow…".

13. The contractual arrangements are almost certainly to be of a commercial nature and therefore in considering a late application the implications of the commercial outcome of granting or not granting the trustee an additional timescale to adopt the contract out with the statutory timescale must be taken into account.

14. In considering the implications, it is expected that detailed consideration of the terms of the contract would be required and that it could be expected that such terms may involve detailed legal consideration of the terms of the contract.

15. Section 42 (which deals with this matter) contains specific provision for the court to consider the request to extend the time period. Had this consideration been of an administrative nature, it is unlikely that specific provision would have been necessary as there are general provisions under section 63 to allow a ‘defect in procedure’ to be cured (rectified).

16. We are concerned that the AiB does not have sufficiently skilled and experienced personnel available to be able to adequately consider and conclude on the appropriateness of allowing a trustee to adopt a contract out with the timescale set.

**Bankruptcy Restriction Orders (“BROs”)**

17. Bankruptcy restrictions are currently administered through the AiB agreeing a voluntary ‘Undertaking’ from a debtor or through the imposition of an ‘Order’ of the Court.

18. The proposed Bill removes undertakings resulting in the sole remedy being the AiB being entirely in control of the whole process and imposing BROs.

19. As a matter of principle, it is inappropriate that where a person does not agree with the conclusions reached by the investigators (that they have acted in a manner which warrants further restrictions on them) that they should not have the ability to test the evidence.
20. The testing of evidence is one which is judicial in nature. The restrictions under which an individual is placed as a result of a BRO being issued against them is a matter involving human rights. Neither of these are administrative in nature.

21. It would be inconceivable in Scotland that a system which impacts upon an individual’s ability to freely go about their business would allow one body to act as investigator and ingatherer of evidence, reviewer of evidence and public interest, tester of evidence and dispenser of justice. There are direct comparisons to the criminal legal process and the process being promoted in the Bill would be similar to Police Scotland being responsible for policing, procurator fiscal services, the jury and the judge.

22. We are concerned that there is a direct conflict of interest in the AiB being responsible for the policy and operation of BROs and the outcomes against which the success or otherwise of the BRO regime will be measured.

**Power to cure defect**

23. While many applications to court under the current provisions permitting defects to be cured are administrative in nature, a significant number will involve complex legal matters and understanding of the implications of allowing the defect to be cured.²

24. While we note there has been an attempt to separate out aspects between the AiB and the court being responsible for allowing a defect to be cured, we do not consider that the scope of separation is appropriate. Examples of where the power may be safely used would include the ability to waive non-adherence to timescales in relation to audit and determination of accounts and subsequent appeal periods.

25. We are concerned that the AiB does not have sufficiently skilled and experienced personnel available to be able to adequately consider and conclude on matters which are non-administrative.

26. We are concerned that there is a direct conflict of interest in the AiB taking such decisions where the AiB is also the trustee.

**Valuation of debt depending on contingency**

27. Provisions relating to valuing a creditors claim allow a trustee to place a value in relation to that claim in so far as it is contingent. Any interested person has the right to appeal to the sheriff who may affirm or vary that valuation. Similarly, where there is no trustee, then a creditor may apply to the sheriff to value their contingent claim.

28. The value of a creditors claim is highly important as it will be this amount which will determine their pro-rata share of dividends in the sequestration.

29. IPs are highly qualified and experienced individuals and with a significant amount of commercial expertise. In addition, in performing their functions they also

² Examples include:
have access to a wide range of advisors. Many IPs are also Chartered Accountants or have other accountancy qualifications. They are therefore well placed to consider the initial valuation of contingent debts.

30. The valuation of a contingent claim inevitably involves complex accounting and legal issues and most often involving significant sums which shall have a material effect on the outcome for the creditor concerned and all other creditors in the sequestration.

31. We are concerned that the AiB does not have sufficiently skilled and experienced personnel to be able to adequately consider and issue determinations on matters of contingency.

32. We are concerned that there is a direct conflict of interest in the AiB taking such decisions where the AiB is also the trustee.

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