IPA response to the request from the Scottish Government Economy Energy and Tourism Committee for further evidence on the Bankruptcy and Debt Advice Scotland Bill

Of the proposals contained in the Bill, the Insolvency Practitioners Association (IPA) considers that a number of administrative functions could reasonably be delegated to the Accountant in Bankruptcy (AiB) where they require the application of objective, non-contentious criteria.

However, a number of the proposed delegations cannot reasonably be described as administrative, as necessarily involve highly subjective determination. Additionally, we are firmly opposed to the suggested application of self-review to any of the proposed delegation (whether administrative or otherwise).

To address the specific provisions:

1. **Section 4 BADAS – Fixing of contributions and variation of same**

   The Bill proposes that a common tool should be used to measure an individual’s ability to contribute in his/her bankruptcy. We have supported the adoption of such a tool in order to bring consistency and certainty for both creditors, and debtors and their advisers.

   Assessment of a level of contribution using such a tool becomes a largely objective assessment of fact, rather than the exercise of discretion or opinion. We do not object to such administrative matters being be delegated to the AiB.

   The committee should note a substantial departure from the existing provisions in s32 Bankruptcy (Scotland) Act 1985 (as amended). The Bill provides that the use of the Common Financial Tool (CFT) must allow the debtor a ‘reasonable amount of expenditure’ after the sequestration of his estate. Currently, the law provides that the Sheriff, on application of the Trustee, must determine a ‘suitable amount’ for the aliment of the debtor, then ‘fix the amount of the excess and order it to be paid to the trustee’. Case law holds that a sheriff in reaching a decision as to a ‘suitable’ amount for aliment, must have regard to ‘all the circumstances’ (Browns Trustee v Brown 1995 S.L.T. (Sh Ct) 2 Sheriffs are also asked to balance the interests of creditors with those of the debtor, giving due weight to each. This has resulted in cases where, for example, school fees have been taken into consideration. Rental levels for privately rented accommodation have also proved to be contentious.

   Against that background, and in reliance of existing case law, it is not impossible that a debtor would wish to appeal the AiB’s decision about what is ‘reasonable’ if, for example, a child was in his final year at a fee paying school and was in the middle of exams. We submit there should be a right of appeal, given the complexity of case law in this area and the imprecision associated with the term ‘reasonable’. Adjudication of an appeal necessarily requires subjective determination by a party of appropriate qualification and authority; we would suggest a Sherriff.
2. **Section 11 – Sequestration application by executor**

   The IPA supports removal of the requirement for executors of deceased estates to petition the court for sequestration. The provision in the Bill permitting application to the Accountant in Bankruptcy brings the process in line with debtor applications generally and reduces the cost burden on executors.

3. **Section 22 – Sederunt Book**

   The IPA supports the proposed amendment to s62(2) of the 1985 Act removing the requirement for the Court of Session to enact and Act of Sederunt and transferring the powers referred to in that section to the Scottish Ministers.

4. **Section 28 – Replacement of trustee acting in more than one sequestration**

   The IPA is supportive of the proposal that the AIB should deal with the issue of replacing trustees in cases where the original trustee dies or ceases to be qualified to act as an insolvency practitioner (e.g. lacks capacity). The provision could also be extended to cases where cases have to be transferred when an insolvency practitioner moves firm. Such transfers are largely administrative, typically non-contentious and, therefore, do not generally require subjective determination.

   However, in this, as in other provisions, we note the unhelpful and inappropriate provision for the AIB to review her own decision before application may be made to the Sheriff. If an appeal is warranted, the matter is necessarily contentious in nature and, therefore, should be subject to early judicial determination which should not be delayed by virtue of an additional administrative stage.

   Aside from our contention that it is unconstitutional for a government official to be assuming judicial functions, further commentary is provided below on the risks presented by such self-review.

5. **Section 32 – Conversion Protected Trust Deeds to sequestrations**

   The IPA is content with this provision.

6. **Section 33 – Power to cure defects in procedure**

   The IPA is in agreement that the AIB should hear applications to cure clerical or incidental errors or failure to comply with time limits. We are pleased to note that other matters are reserved to the court.

   However, we are opposed to the provision for the AIB to review her own decisions, for the reasons detailed below.

7. **Section 11B – Refusal of the AIB to award sequestration.**

   We are strongly opposed to the provision, as currently drafted as it provides the AIB with unfettered discretion to refuse an award of sequestration which she considers ‘inappropriate’. This represents a significant assumption of judicial powers by the executive and therefore, disregards the longstanding constitutional principle of separation of powers.

   In the early part of this reform process, the AIB wished to provide that the Debt Arrangement Scheme should be the default process available to people with debt
problems and that other solutions should be available only if DAS were inappropriate. This was widely criticised as generally unworkable by the majority of people involved in providing money advice.

As currently drafted, this section of the Bill provides a potential ‘loophole’ through which the original provisions might be re-enacted. There is no right of appeal to a Sheriff, merely a self-review by the Accountant in Bankruptcy.

On a technical point, while section 32 of the Bill proposes to shift applications by trustees seeking to convert Protected Trust Deeds to sequestrations to the AIB, section 37 of the Bill as currently drafted omits these applications from the proposed review process. In effect, as drafted, the Bill results in the anomaly that trustees making these applications would have a right of appeal directly to the Sheriff. Reference is made to section 15 Bankruptcy (Scotland) Act 1985 (as amended) for its terms.

We are concerned that section 11B brings in a self-review provision to a matter which we believe should be heard by a Court (excepting the provision in relation to incomplete applications.)

8. **Section 36 – Review of decisions about interim trustee**
The IPA is content for these matters to be delegated to the AIB but is, as stated elsewhere, unhappy with the proposed self-review process.

9. **General remarks – self-review**
The IPA is opposed to the introduction of a new element of self-review in decision making by the Accountant in Bankruptcy. These arguments are in addition to those propounded above against the assumption of judicial functions by the executive.

Self-review can be defined as a requirement to evaluate the results of a previous judgement or service. We feel that there are inherent difficulties with self-review systems, in terms of practicality, cost and external confidence.

Self-review situations contain threats to independence (or perceived threats to independence) even when safeguards (such as ‘Chinese walls’) are put in place. It is for this reason, for example, that an insolvency practitioner cannot accept an appointment in relation to a company which has been audited by his firm. As an office holder, the insolvency practitioner has to consider whether the company has traded beyond the point it ought – there is a clear conflict if his firm has been advising the company on its situation.

It is often argued that the creation of Chinese walls, where the original work or decision is reviewed by an independent team, is sufficient to mitigate that threat. However, to ensure that these are adequate, Chinese wall policies and procedures must be formalised, organised and incorporated within procedural/policy manuals.

Adequate Chinese walls often include the physical separation of the departments and other restrictions to access, such as separate record-keeping and supervision of inter-departmental communications, all of which comes at considerable costs.

The cost implications of setting up another department within the AIB are quantified
within the financial memorandum as “in the range £3,646 - £17,713” (Bankruptcy and Debt Advice (Scotland) Bill Explanatory Notes p34), based on the cost of administering complaints.

There is no indication that AiB has considered the cost of setting up and maintaining a review team with sufficient independence to provide adequate safeguards. Whilst it is estimated that there will be ‘fewer reviews than complaints’, no evidential basis for this assumption has been provided. Moreover, were this to be the case, it is difficult to see how the costs of an independent review team could be justified when existing apparatus (namely the Courts) is already in place and has the reputed confidence of its users.

Moreover, even if adequate and costs effective safeguards can be put in place, there remains no guarantee that they will be perceived by system users as being sufficiently robust and independent.

Self-review of the original decision by a party whose determination is unlikely to have the confidence of those who requested it, is likely to occasion delay in instigating the judicial process that would invariably follow and an additional layer of cost.

In summary, we envisage increased burden on system users by adopting such a course and little ultimate benefit.