Introduction
I am a former licensed insolvency practitioner, having surrendered my insolvency permit some four years ago. I entered the insolvency profession in 1983, and latterly ran my own business in Aberdeen, with more than 2,000 personal insolvency appointments in my own name. I wrote a book on Bankruptcy in 1995, and I am presently under commission by legal publishers to update that book, but only after the legislative reforms are implemented which flow from this Bill and other proposed legislation on personal insolvency. I have lectured for over 15 years on personal insolvency to students sitting the specialised insolvency examinations, and I have regularly updated the Personal Insolvency Study Pack used by these students. At present I am a freelance debt counsellor to business and consumers, and in August of last year, I became the first individual under the DAS Regulations of 2011 to become an approved money adviser in his own right for the Scottish Government’s Debt Arrangement Scheme.

I can view the proposed legislation in an independent manner, because I now have no commercial interests which might sway me to take one view as opposed to another. I submitted my response to the Bankruptcy consultation in May of last year, and I have also responded to the Scottish Law Commission on their proposals for consolidation of the bankruptcy law in Scotland.

In this current response I have used, for simplicity, the term “Clause” to denote the Bill and the term “Section” to denote the Bankruptcy (Scotland) Act 1985, shortened to “the 1985 Act”.

What is your general view on the Bill and broadly, are you supportive of it?
I am very pleased to see that so many of the proposals in last year’s consultation have not landed up in the Bill, and this may show that the consultation responses were recognised. As with most proposed legislation, however, we find some proposals in the Bill which were not trailed, and which did not form part of the consultation, and some of these are unwelcome.

Time and space does not permit me to deal with some of the minutiae, the detail of which could be improved in the drafting. Suffice to say that I am broadly supportive of the measures proposed in the Bill, but in many parts of the Bill, I am extremely unhappy about the mechanism by which some of these measures are to be implemented, and in this regard I am referring to the transference of powers from the courts to civil servants, which I address in some detail below.

Did you take part in the Scottish Government's consultation on the Bill and have your views been reflected?
Yes, but that simple answer in the positive does not indicate that I am happy with some of the proposals and powers which did not feature in the consultation but now appear in the Bill.
My view on the proposals within the Bill
As previously stated, I am broadly in support of the measures proposed, and there is little point in extending the size of this document merely to endorse what is in the Bill. The following comments therefore relate only to those proposals which cause me some concern.

Advice and Education
There is unanimous approval to the concept that those entering “voluntary” sequestration should require money advice from an authorised person, and I endorse that.

The term “money adviser” is commonly used by many to denote someone from the non-fee charging sector, and to not embrace insolvency practitioners and their staff. Arguably, insolvency staff have far more knowledge and experience of the detail of sequestration procedures than those outwith the profession. It is regrettable that “money adviser” is used so often by the AiB in documentation regarding personal insolvency. If it is the intention of the AiB to include insolvency staff in giving approved money advice, I would suggest the AiB use a different term, to prevent a perceived alienation of the insolvency profession.

Clause 2 of the Bill refers to a new Section 5C(2)(b) in the 1985 Act defining a “money adviser” as someone who has a “prescribed description”. In existing legislation quite recently enacted, viz. Regulation 3 of the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010, there is a definition of a person authorised to grant a Certificate of Sequestration and the “authorised person” mirrors those who can be approved money advisers in the DAS Regulations. It is therefore difficult to understand why this same definition of “authorised person” cannot be used to define the “money adviser” who is now required to give a debtor financial advice in all cases involving a debtor application for sequestration, and thus avoid the necessity for “reinventing the wheel”.

Moratorium on diligence
This principle has to be welcomed, both from the point of view of the creditor who could expend time and costs unnecessarily, and for the debtor who will be under less creditor pressure during this period. At stakeholder meetings, when discussing the proposed moratorium, the question was asked as to whether such a moratorium should extend to creditors’ petitions for sequestration, as well as debtor applications, i.e. “compulsory” sequestration as well as “voluntary” sequestration

Whilst conscious of the provisions of section 37 of the 1985 Act, this merely acts retrospectively to protect the vested estate of the debtor for the benefit of creditors generally. Section 37 does not give the above-mentioned double benefit of the proposed moratorium legislation.

At present the existence of a creditor’s petition which has been presented to court, but where sequestration has not yet been awarded, can only be confirmed by virtue of an expensive search of the Register of Inhibitions and Adjudications. It is a statutory requirement (Section 5(6) of the 1985 Act) that the AiB has to receive a copy of any creditor’s petition on the day the petition is presented to the court. The AiB has the knowledge and could record this as an “unawarded” petition in the
Register of Insolvencies. The Register of Insolvencies is to be the place where all intentions are recorded which trigger the six week moratorium, and it will be this Register which is the all-encompassing database with access to creditors free of charge. Is it not therefore logical and consistent to register a creditors’ petition in the Register of Insolvencies?

As far as the proposed new sections of the 1985 Act are concerned (sections 4A to 4D, introduced by Clause 8 in the Bill), I am not the only one who finds the proposals as drafted extremely cumbersome and confusing, particularly 4D, almost to the point that it is impossible to pass comment. The potential moratorium periods relating to trust deeds are virtually impossible to ascertain.

Recall of sequestration
Perhaps the most welcome feature to me in the Bill was the procedure now to be applied when a debtor is seeking a recall order due to settling in full the claims from creditors and covering all the costs of sequestration. I am however not at all happy with the proposed involvement of the AiB in the process. The undoubted merits of the new proposals can be implemented independent of the involvement of the AiB in replacing the court. More on this matter below.

There was no mention at all in the consultation that the present grounds for recall were to be altered in any way, and the explanation in paragraph 249 of the Policy Memorandum does not detail why there is a requirement to repeal one of the present grounds that the debtor “has given sufficient security for payment of the debts”.

Transference of powers
There is undoubtedly increasing time and cost pressures on the Scottish Court Service, and this will not be assisted by the current legislation to reduce the number of sheriff courts in Scotland. It is therefore laudable that, provided it is appropriate to transfer some functions from the court, then this should be seriously considered.

Throughout the original consultation and now in the documentation accompanying the Bill, constant reference is made to “administrative” functions (paras. 226 & 229 of the Policy Memorandum) or to matters which are “straightforward” (para. 278 of the Policy Memorandum).

Whilst I am prepared to accept that matters such as incidental applications under the proposed new section 63A may fall into this category of “administrative” or “straightforward”, I have to take considerable exception with the thought that the following functions are equally as “administrative” that they justify removing the decision-making responsibility from the justiciary to unqualified civil servants:

- Trustee seeking directions (Clause 24 of the Bill)
- Removal of trustee (Clause 29 of the Bill)
- Agreeing Contingency Claims (section 35 of the Bill)

We are dealing here with a judicial process. Whilst the vast majority of sequestrations are now consumer-debt sequestrations where the debtor has applied for self-sequestration, the seriousness of this judicial process should not be removed. There are still many important non-consumer sequestrations, and many
creditor-petition sequestrations, where it may be assumed that there will be less debtor co-operation than those cases where award follows a debtor application. Because the sequestration cases in which the AiB is appointed as trustee comprise a very high percentage of consumer debt cases, and the private insolvency profession tend to deal with creditor driven sequestrations, the exposure of the AiB to creditor driven and trading sequestrations is far less, and this is undoubtedly reflected in what in my view is an inexperienced approach to what functions are believed to be “administrative” and what are not.

As an aside, para. 36 of the Financial Memorandum states that an application to court to defer a discharge “does not happen often” and there have only been 3 cases recently where AiB as trustee, has applied to the sheriff court for a deferral of discharge. If a similar poll had been taken of insolvency practitioners you would find a much higher incidence of such applications, and this again demonstrates the differing types of cases handled by the AiB as opposed to the insolvency profession, which then must question the statistical validity which underpins the policy making.

Para. 274 of the Policy Memorandum refers to “Removal of trustee”, and the document states “it is understood that this is not a common process and therefore the Bill provides that AiB will deal with this type of application”. I would suggest that this rarity of court involvement would extend to all three matters which are the subject of the above three bullet points. But surely there is no logic here in the policy argument. Firstly the aggregate time of courts in any of these three matters is extremely low to achieve the objective of saving the time of the courts. Secondly and much more importantly, does the rarity of court involvement not show that these matters are quite the reverse of “administrative” and “straightforward”, and therefore require the involvement of legally qualified sheriffs, rather than unqualified civil servants.

If fully trained and regulated insolvency practitioners feel that they require direction, that professional wishes those directions to come from the court, and not from an Executive Agency of the government, who considers it sufficiently unimportant of the retention of technical knowledge and experience within its staff, to allow the only exam-qualified employee to leave for another civil service department. Insolvency is a highly technical area, and the importance of experience and knowledge cannot be understated. Those in the legal and insolvency profession spend years in passing exams and have subsequent continuing professional educational requirements. Are we really to believe that these qualified practitioners should seek directions from a civil servant as opposed to a sheriff? The idea is preposterous.

Moving to the question of removal of a trustee, the proposed amended Section 29 of the 1985 Act will provide that “if the AiB is satisfied that there are reasons to do so” a trustee can be removed by the AiB without any requirement to consult the creditors, the commissioner(s) or anyone. This could lead to abuse by the AiB if a particular insolvency practitioner is under the radar solely of the AiB. The existence of an appeal process cannot be an argument to defend a situation where the AiB has greater powers than the recognised professional body which regulates and authorises that trustee to remain in practice. This is an absolutely impossible situation, and is undoubtedly a step far too far with what some people might suggest was a ridiculous power trip.
The incidence of a court application to determine the validity or otherwise of contingency claims is rare, and again rare because the legally qualified opinion of a sheriff is sought in determining what can be an extremely complex situation.

I urge those who have the responsibility of voting on this legislation to seriously consider the proposals for the transference of powers, even if that were the only alteration to be made to the proposals in the Bill.

**Matters omitted from the Bill**

**Relevant date for claims from creditors**
Where sequestration results from a creditor’s petition, the date of sequestration (being the date of presentation of the petition) is the relevant date for claims from creditors. The date when bankruptcy is awarded is always a later date, and during that intervening period creditors can continue to trade with the debtor and extend credit with no knowledge of the existence of the bankruptcy petition. There is no intention to have a six week moratorium where the sequestration is “compulsory” rather than voluntary. For the last five years there has been a provision in statute to allow for bankruptcy hearings to be continued, and this can extend for some considerable time the period between the date of sequestration and the date of award of bankruptcy. The present situation can be very detrimental to suppliers of sequestrated trading debtors.

In the consultation there was an attempt to address this issue at 14.10, but those asking the question had completely misunderstood the facts. There is no indication in the subsequent consultation report on responses as to whether responses were negative or positive, albeit that the questions were incorrect in the first place.

There is a very simple drafting solution to this problem, although account should also be taken of the possibility of recording the warrant to cite to a creditors' petition in the Register of Insolvencies (see above when commenting on the 6 week moratorium).

**Voluntary sequestration of a partnership**
A self-employed debtor who is a sole trader is entitled to present an application for his sequestration on the grounds that his apparent insolvency has been established by the actions of an unpaid creditor. If that same debtor had set himself up in the same business with his wife as a partner, and the financial problems of the business are such that apparent insolvency of the trading partnership has been constituted by the actions of an unpaid creditor, it is not possible for that partnership to present an application for its own sequestration. This seems both illogical and unjust. It is of course possible for a partnership to present a petition for its own sequestration with a concurring creditor, but it is widely known that it is almost impossible to obtain the co-operation of an unpaid creditor to incur time and costs in concurring for no financial benefit. The only other option at present is for the partners to grant a trust deed with the sole objective being to have the trustee exercise his entitlement to immediately convert the trust deed to sequestration in terms of Section 6 (4) (b) (ii). If this Bill is designed to modernise the legislation, surely we want to prevent this unnecessary convolution. The drafting solution here is so simple.
We have all been burdened for the last decade with never-ending legislation relating to personal insolvency, and although we expect to see subsequent legislation regarding thorny question of land attachment/the family home in sequestration, it was to be hoped that this “modernising” Bill would have produced clarification, simplicity, and logic, but I have raised only two matters which have been omitted in that objective. For once speed does not seem to be of the essence with this Bill, and I hope that serious consideration will be given to these two matters.

Inaccuracies in documentation accompanying the Bill
- In both para. 320 of the Policy Memorandum and para. 51 of the Financial Memorandum, it states that there are only three access routes to self-sequestration. There are in fact four access routes, the fourth being where the debtor “has granted a trust deed (which is not a protected trust deed by reason of the creditors objecting, or not agreeing............” – section 5(2B)(c)(iii) of the 1985 Act.
- Para. 92 of the Policy Memorandum describes DAS as a debt relief procedure, when it is in fact a debt management procedure
- The glossary of terms continues to retain the obsolete status of “permanent trustee”

And as a final thought............
Para. 43 of the Financial Memorandum estimates the costs to amend the ROI to allow the withholding of information on debtor’s addresses to take 8 weeks of IT development time at an aggregate cost of £24,000. Can the cost of this simple amendment be real? I need say no more.