Introduction
R3, the Association of Business Recovery Professionals, is the leading professional association for insolvency, business recovery and turnaround specialists in the UK. It promotes best practice for professionals working with financially troubled individuals and businesses. It has UK-wide representation and debates key issues facing the profession. Most insolvency practitioners (IPs) operating in Scotland are members.

The Association’s Scottish Technical Committee participated in the consultation process that led to the Bankruptcy and Debt Advice (Scotland) Bill. Some of our views and recommendations are reflected in the Bill, but a significant number are not.

General policy objective and our view of the Bill
Broadly R3 supports the policy that “appropriate, proportionate debt management and debt relief mechanisms should be available”. We are not satisfied however that this Bill provides the intended solution.

General comments
We have examined the Bill in detail, but restricted our comments to a higher level review.

We are concerned that the proposals compromise debtor choice and we are not in favour of this policy.

Improvements to the drafting of parts of the Bill are needed. We will submit a note of the errors we have identified under separate cover.

We do not support the removal of most of the sequestration process from the Scottish courts. Many of the matters the Accountant in Bankruptcy proposes to deal with will require judicial review or decision.

Timings are inconsistent. The Bankruptcy (Scotland) Act 1985 ("the Act") when introduced had consistent time scales (e.g. aquirenda, automatic discharge (subject to deferral) and contributions were all three years) and we would welcome a return to that consistency.

If we have not commented on an aspect of policy or section of the Bill, we are broadly in agreement with its intention or drafting. However we may comment further should further points arise.

No consideration appears to have been given to the impact of the Bill on the corporate insolvency regime. We are aware that work on the corporate insolvency
rules is ongoing and that it is intended to remove references to the bankruptcy legislation. We recommend that the new corporate rules be enacted prior to the passing of the Bill.

**Advice and education**
Mandatory money advice must be of the highest quality, and the party providing that advice must be suitably qualified. A system of redress for poor advice must be available. The definition of Money Advisor, which is not yet drawn, must include insolvency practitioners. We recommend that debtors with complex financial affairs must take specific insolvency advice.

We believe that most debtors can budget. Since the reason for their insolvency is likely to be lack of income, corresponding policy initiatives in relation to welfare reform, housing, education, a living wage and payday loans should be considered.

We do not support the policy that discharge of the debtor is linked to financial education.

**Payments by debtor following bankruptcy**
We support the policy of consistency and transparency of calculation of debtor contributions across various debt relief procedures or management programmes. With no details on how the proposed Common Financial Tool (CFT) will look or operate, it is difficult to comment further however. For it to be effective the CFT must have a degree of flexibility, otherwise a rigid programme of contribution will, in our experience, be more likely to fail and thus defeat the intention of improved returns to creditors.

There is no evidence that a debtor contribution order (DCO) for four years will improve returns to creditors. There is an additional cost of monitoring, in gathering and distributing a fourth year of contributions. In our experience, the longer the process, the more likely it is to fail. Further it is not clear why the debtor and the trustee should be permitted to extend the four year period and this seems to contradict the policy intention of a fixed four year period of contribution. Payment breaks already happen in practice and the Bill simply codifies this. We are not sure why a break should be restricted to 6 months. We have already raised our concerns that re-commencing contributions after a break period is notoriously difficult. No consideration seems to have been taken of the impact of a debtor wishing to make payments post discharge to buy out the trustee’s interest in a property, which could see the period of sequestration extend to up to 6 years. This cannot support a policy of debtor rehabilitation.

**Bankruptcy where the debtor has few assets**
We understand that the Minimal Asset Procedure (MAP) will introduce a process of bankruptcy-lite, and remove any confusion in respect of the Low Income Low Asset procedure. Generally we support this policy. We think it inconsistent however that a MAP debtor should be discharged after just 6 months, albeit with the possibility for that period to be extended to 12 months. In a full sequestration, discharge is no longer to be automatic. It is our view that the discharge policy should be the same in all bankruptcy processes.
**Moratorium on diligence**
We understand the policy intention to have a common 6 week period of moratorium pre-entry to statutory debt relief procedures. However the relevant sections of the Bill do not clearly achieve this. For example, it is not clear when the protected trust deed moratorium starts – is it before the trust deed is granted or when it is granted?

The term “diligence” is not defined anywhere in the Bill and this will give rise to complications and potentially court actions. It is not clear how the moratorium provisions will interact with the existing provisions of section 37 of the Act (Effect of Sequestration on diligence). More consideration needs to be given to how these provisions are drafted.

Further, generally as a policy, we do not support the appeals and review process of the Accountant in Bankruptcy. It is not clear how the review and appeal process will affect the moratorium but we are concerned the moratorium period might be extended unduly.

**Application for bankruptcy**
Section 10 of the Bill introduces section 11B to the Act “Refusal of debtor application: inappropriate application”. Although this power is already contained in the 2008 regulations and is being moved to primary legislation, the terms of this section are too vague and widely drawn and fail to take account of the role of the courts in awarding sequestration. If an application satisfies the technical requirements of the Act, the court is compelled to make the award. Giving the AIB the right to refuse to award sequestration on the grounds of it being inappropriate gives the AIB a power which is not extended to the courts in a creditor petition.

This introduces an element of subjectivity to a summary application process where there should be no discretion.

**Administration of estate**
We are broadly supportive of insisting creditors claim early in a process, however in our opinion the pre-2008 position adequately provided for this.

We agree that the ability to shorten the first accounting period should be introduced but think that a minimum 6 month period is arbitrary. To effectively support early payment to creditors, the length of the first accounting period should be determined by the circumstances of the case and not subject to any minimum period.

**Discharge following bankruptcy**
The concept of a debtor’s automatic discharge was introduced in the 1985 Act to directly address the deficiencies of the 1913 Act, where a debtor’s discharge was not automatic, and many were sequestrated in perpetuity. We do not agree that there should be a reversion to a system whereby there has to be an application for discharge. In addition, the complexities of the Bill’s provisions as they are drawn will cause many practical problems and are not proportionate to the issue. We are also very concerned that the proposal that discharge be made dependent on co-operation was not subject to consultation, nor was it adequately highlighted at stakeholder events. The existing system of automatic discharge with a robust process of deferral
works effectively. If the Scottish Government wishes, it could widen, or indeed define, the grounds for deferral, and specifically include debtor co-operation and the financial education of the debtor.

We do not believe that the process of Discharge on Composition is redundant. This process can be particularly helpful for debtors and creditors where early discharge or asset protection is appropriate. These will become increasingly important issues if a four year payment and acquirenda regime is introduced. If the Scottish Government wished to simplify the composition process, it could bring into force the relevant provisions of the Act.

**Records**

The notice of an application for recall in the Register of Insolvencies must also give creditors notice of their right to lodge answers to the application. Alternatively, other provision for notifying the creditors of their right to lodge answers must be made.

**Functions of sheriff and the Accountant in Bankruptcy in bankruptcy**

We do not support the principle of transferring what are currently judicial processes from the courts to the Accountant in Bankruptcy. Such work needs to be done by those with appropriate qualifications and experience. This experience exists in the courts and the accountancy, insolvency and legal professions. As an officer of the court, a Trustee must have direct access to the court for directions, guidance or resolution, in exactly the same way as a Liquidator or Administrator has. The introduction of the Accountant in Bankruptcy into this process is fundamentally misconceived. The framework proposed in the Bill will add delay and cost to the process and is neither suitable nor appropriate to deal with potentially complex scenarios which require immediate resolution.

We accept that responsibility for the recall of sequestration on the grounds of payment in full will transfer to the Accountant in Bankruptcy and recall will be awarded after payment has been made.

The concept of interim recall is however fundamentally flawed. Either a debtor is sequestrated or he is not. Since the recall process is to be simplified (per point above) we can see no benefit of an interim recall process to debtors or creditors.

Proposed new sections 17C and 17D to the Act should be removed from the Bill.

Proposed new section 17E(1)(b) and 17E(4) should also be removed. Discretion is inappropriate if the grounds of recall are payment in full. Discretion is for the court.

Section 17F will require corresponding amendment to remove references to interim recall, discretion of the Accountant in Bankruptcy and the imposition of conditions. None of these are appropriate.

**Review of decisions made by Accountant in Bankruptcy**

The Bankruptcy Restriction Order (BRO) regime should remain with the court and should be pursued in cases where the debtor has been unwilling to agree to restrictions by virtue of a Bankruptcy Restriction Undertaking (BRU). Sequestration
impacts an individual’s status in a variety of ways, and a BRO continues to restrict the debtor post discharge.

The relationship between the period of sequestration, discharge of the debtor, deferral of discharge and a BRO is still muddled. The idea of bankruptcy restrictions was to address conduct issues and punish the debtor with deferral of discharge designed to benefit creditors. However, it is still not clear whether deferral of discharge is designed to benefit the creditors or to punish the debtor. If the debtor’s discharge is no longer automatic, what role does the BRO play?

We recognise the amendments to section 63 and proposed new section 63A of the Act attempt to allocate responsibility for remedying defects between the court and the Accountant in Bankruptcy. However, the drafting is not clear and so open to interpretation. Certain matters must go to the Court. Some timescales cannot be extended (e.g. section 39A).

The introduction of myriad self-review and appeal processes by the Accountant in Bankruptcy is fundamentally misconceived. The Accountant in Bankruptcy has a significant conflict of interest in reviewing her own decisions and the court plays an important role in separating these powers. We accept that she could deal with routine administrative matters but think that the Bill’s presumptions as to what are routine and administrative are not always correct.

The right to value a contingent claim must remain with the courts. Both liquidation and administration currently rely on this provision. It is highly inappropriate for the Accountant in Bankruptcy to be dealing with such complex legal matters. These are not simple numerical calculations but usually turn on a point of law or evidential matters. We can cite for example the case of Burton, Noter [2010]CSOH174¹, referred to with approval by the Supreme Court in re the Nortel Companies, re the Lehman Companies and re the Lehman Companies (No.2) [2013]UKSC52².

**Conclusion**

A return to the consistency and clarity of earlier legislation would be welcome.

We accept the good intentions and some of the changes but there is much in this Bill that is flawed and we welcome the opportunity to present our concerns to the Committee at the evidential stage.

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