I write further to your call for evidence in regard to consideration of the above Bill. The following are my personal comments and not representation of the views of my firm, nor of any clients.

My name is Joel Martin Conn. I am a solicitor and notary public, regulated by the Law Society of Scotland. I am accredited by the Law Society of Scotland as a specialist in Debt and Asset Recovery law. Since qualifying in 1998, I have predominantly practised in the fields of commercial litigation and debt recovery and, for much of this time, have been involved in attending to matters relating to personal and corporate insolvency, predominantly for creditors but also giving advice to individuals in financial distress or in a form of debt relief or bankruptcy. (I am called upon to give similar advice to companies and directors in regards to corporate insolvency.) In regards to my relevant publications, my article *Deferral of Debtor's Discharge from Sequestration* was published in the Scottish Legal Gazette in September 2012 [Vol 80, No 3, pp69-73].

**General comments**

The Bill in general proposes a significant shift of power from the Sheriff Courts to the Accountant in Bankruptcy ("AiB"). In addition, in respect of changes to arrangements for discharge from sequestration (where the AiB will now be called upon to determine whether discharge should be granted), these are matters that represent whole new powers to be given to the AiB, not currently held by the courts.

I have a significant concern about the AiB's ability to resource the dispensing of such powers. In respect of matters concerning whether or not to grant a discharge, approve a contribution, give directions, or grant recall of sequestration, all of these matters require quasi-judicial determination. Though the AiB currently dispenses authorisation to insolvency practitioners to undertake certain steps, provides guidance in cases and will make decisions on such steps in its own cases, I can think of no circumstances where the AiB is making such quasi-judicial decisions, subject to appeal to the Sheriff. (Their current powers in approving a Debt Arrangement Scheme [Regulation 25 of the Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141)] are not subject to appeal and are, therefore, not necessarily a model for any expanded decision-making role.)

My respectful submission is that it is not yet possible to assess whether the AiB as a department holds sufficient expertise so as to provide such quasi-judicial decision making. If it does not, the estimates for resourcing must be considered critically as significant training or recruitment shall be required to give effect to these new roles. Alternatively, external legal support will need to be obtained and there appear to be no costings in regards to procurement of such legal support.

Following a stakeholder event at which a speaker from the AiB set out these proposals prior to publication of the Bill, I corresponded with the AiB to seek clarification as to the number of recalls in sequestration that were undertaken in
recent years and how many were intimated but not advanced. I did not receive a response and I am concerned that this data has not been collated (or cannot be). I am concerned that similar lack of data exists in respect of current approval of Income Payment Orders and Income Payment Agreements (roughly equivalent to the proposed powers for debtor contributions in section 4 of the Bill).

Notwithstanding the Financial Memorandum (commented on further below), one is left with the concern that there is insufficient evidence to inform the question of resourcing should the provisions of the Bill be passed as currently drafted. Indeed, either end of the spectrum could have significant implications to the public purse and the delivery of these services. At one end, the volume of applications to the AiB in respect of recalls in sequestration and contentious income contributions might be very low and the AiB’s work in setting up the necessary processes to resource such decision making will greatly exceed the savings to the Scottish Court Service of no longer requiring to deal with such applications. Conversely, the volume of such applications may significantly exceed the capacity of the resources the AiB intends to provide and the determination of these important issues will deteriorate compared to their current undertaking by the Sheriff Courts.

It is my submission that without clear evidence on the expected volumes of applications and proposals for resourcing determination of such applications by the AiB, it is preferable to leave such matters with the Sheriff Court system where resourcing exists, procedures are in place and there is a learned body of Sheriffs already in place to adjudicate.

The question of resourcing in regard to applications for discharge of bankruptcy should the provisions of the Bill be passed is a significant further matter. Again in private correspondence, I requested from the AiB data on the number of applications for deferment of discharge of sequestration over recent years but this data did not appear available. (The Financial Memorandum to the Bill suggest the AiB herself sought only three within recent times [para 36].) Conversely, the AiB can estimate the volume in applications for discharge should the provisions come into force as there will be one in each and every bankruptcy commenced after these provisions come into force. Indeed, when one adds contentious applications for discharge by the debtor (where the debtor lodges an application in circumstances where the Trustee does not think discharge is warranted) there will be yet further applications for the AiB to attend to.

If the provisions for removing automatic discharge - which provisions I am broadly in favour of - come into place there will be significant increase to the AiB’s work. This may flood any systems put in place to attend to other new and existing roles. (I give my alternative submission on discharge below. In short, consideration could be given to merely extending the period for automatic discharge beyond the current 12 months.)

In summary, although there is no significant reason why the AiB as a Scottish Government agency could not hold a significant first instance role in adjudicating on a number of these applications, it does not currently do so. If the reasoning of transfer of power is to free up capacity on the Sheriff Court system, then clear evidence would require to be laid before Parliament as to the current call upon the
Sheriff Court system of such applications. Only then can there be proper comparison and consideration of the likely extra resourcing required by the AiB.

One cannot discount that there is a public good in the decisions in such matters being made at the debtor's local Sheriff Court in open forum. This seems unlikely to be fulfilled if these powers were undertaken centrally in the AiB's offices and by written representations. Further, there is a question as to the level of legal training and education necessary for the AiB to give equivalent quality of service in regards to certain of powers to be transferred - such as the power to provide directions or on contentious contribution matters - which are currently provided by experienced and learned Sheriffs, often further to oral and written legal submissions from Trustees and their legal advisers.

I would submit that a significant shift of powers from the courts to the AiB can be justified only if there is a significant cost saving to the public purse in general. The justification for removal of such powers from the Sheriff Court system (and thus local, open determination of contentious matters) does not seem made out by the Bill.

**Section 4: Debtor Contribution Order**

It would appear that initial decision, to make the initial Debtor Contribution Order, appears to have no right of appeal. It is not immediately clear why there is a lack of right of appeal and one should be introduced.

Turning to those rights of review or appeal that do exist, in the case of a debtor appealing against the decision by the Trustee to vary or remove a Debtor Contribution Order, if the Trustee is the AiB then the review is still carried out by the AiB themselves. Given that many reviews will be likely to be against decisions of the AiB (where the AiB is Trustee), the requirement for an initial stage of review back to the AiB would seem an unnecessary and burdensome procedure from the position of a debtor.

I would propose that an appeal is permitted straight to the Sheriff in respect of any determination under 32A, 32B, 35E, 32F with no initial review to the AiB. My concerns about the resourcing of any such review powers by the AiB are repeated herein.

**Proposed section 32D: Deduction from debtor's earnings**

Such proposals are to be welcomed. The current enforcement of breaches of Income Payment Orders and Income Payment Agreements is difficult. One does however note the significant further regulations to be provided in this area in terms of proposed section 32D(5) and further representations may be required at that time. The interface between the current diligence procedures for arrestment of earnings and those intended by the regulations require further scrutiny and should not be drafted without such due regard.

**Section 8: Moratorium on Diligence**

It is submitted that the expansion of a moratorium to sequestration and trust deed is unnecessary and potentially disruptive to the process of debt recovery in Scotland.
The current moratorium in place in respect of entering into a debt arrangement scheme is one itself should be reviewed and potentially restricted. There is anecdotal evidence (and certainly my personal experience) showing that "unscrupulous" debtors are seeking to enter the DAS Register purporting to proceed with DAS Applications when they have no intention of concluding the process but simply wish to delay further diligence against them. This does not detract from the scheme as a whole but suggests that there can be abuse of the moratorium process.

I would submit that an overriding power to allow a creditor to advance to seek sequestration should be introduced even in regard to the DAS moratorium provisions currently in place. It is unclear what grounds exist for extending a moratorium to debtor's own sequestrations and trust deeds as proposed within the Bill. There is no parallel in Insolvency Law for prioritising a debtor's own insolvency steps. In corporate insolvency the wishes of the creditors are usually paramount in selecting the form of insolvency and insolvency practitioner [St Clair and Drummond Young, The Law of Corporate Insolvency in Scotland (3rd edition), para 4-18: "Following the policy,....of trying to give effect of the wishes of the creditors in appointing liquidators, the Court has confirmed the appointment of an auditor as liquidator..."]. In regards to the appointment of an administrator by the company or its directors, where there is a floating charge holder, the floating charge holder must be provided with five business days notice prior to appointment by the company or its directors, so that they may consider appointing their own administrator [Insolvency Act 1986, Sch B1, para 26].

Further, broadening the moratorium as proposed would leave the system open for an unscrupulous debtor to seek money advice and purport to be interested in entering into any of the three forms of debt relief but thereafter do nothing while spending the six week moratorium divesting himself of assets and/or running up further debts.

Section 16: Discharge of Debtor

It is unclear what mischief is being sought to be corrected. It was only 2008 that the period for automatic discharge was reduced from three years to one year to bring us in line with England and Wales. The proposed amendments shall leave us significantly out of kilter with personal insolvency in that jurisdiction. Although there is no requirement for consistency in this field but, given the recent reports of "bankruptcy forum shopping" by Republic of Ireland debtors seeking personal insolvency in England and Wales, one wonders whether Scottish debtors may seek to make themselves bankrupt in England so as to be guaranteed a one year discharge rather than submit to the open-ended system as proposed. This unintended consequence may not be an entirely theoretical one.

It seems likely that the number of deferment of discharge applications at present is low partially due to the cost and time constraints of a Trustee seeking such a deferment application. It should not, however, be ignored that the grounds under which deferment of discharge can or should be sought are still relatively unclear. One has the overwhelming sense from section 16 and proposed amendments therein that they are aimed at "conduct" grounds but there is little case law showing deferment being sought or granted on such grounds at present. (The recent case of AiB v Campbell, 2012 SLT (Sh.Ct) 35 is the only example I can identify.) It begs the question as to what level of desire there is by trustees to seek deferment on such
conduct grounds (or in general). If it is low, is such a change abolishing automatic discharge required at all?

If the chief mischief is that it was thought that 12 months (or rather nine months from the date of sequestration, which in practice can be seven months or less from the date of award of sequestration) is an insufficient time for a trustee to decide whether deferment of discharge is justified, gather evidence and proceed to Court (perhaps instructing agents to do so) then the more obvious amendment to the law is simply to lengthen the period for automatic discharge beyond 12 months (perhaps 18 months, two years or simply return to the previous three year period).

Personally I have little difficulty with the suggestion that discharge should be earned rather than be a right and the amendments proposed have much to commend them. I remain concerned, however, about the resource implications from AiB in creating the structures necessary to determine applications and in particular applications by the debtor in terms of proposed section 54(4) to request their own discharge. Such a request by a debtor for his own discharge is likely to be contentious (as the Trustee may have not sought discharge due to concerns with the debtors’ conduct). It is not clear whether the proposed review procedure in section 54(B) will be undertaken solely on written submissions and whether legal aid may be available to debtors for such a significant application. Indeed there will be cost implications for the Trustees themselves as the creation of this new step in process (of preparing a report on discharge and circulating) will increase their work and thus their likely fees in each and every case.

Further, as expressed in respect of debtor contributions, there is a concern as to the creation of an internal review by the AiB before a further right of appeal to the Sheriff. The requirement for internal review by the AiB seems inappropriate and burdensome on debtors, creditors and Trustees.

Section 24: Application by Trustee to AiB for directions
It is respectfully submitted that the AiB does not currently possess the necessary in-house expertise to give directions on legal matters to any extent greater than currently undertaken. Trustees regularly seek the AiB’s comment. I have heard anecdotally of reports of delays in receipt of responses and of vague responses. To oblige the Trustee to seek the AiB’s directions in all cases, and thereafter insist on a further internal review of such directions by the AiB prior to any appeal to the Sheriff, would seem unduly burdensome.

Furthermore, it begs the question as to what timescale the initial direction will be given by the AiB and the procedure for attending to the review (which implies that representations may be given by creditors, etc. but does not indicate how debtors and creditors are to know about the review of the direction).

Disposal of any such powers by the AiB would seem likely to require additional appropriately trained (if not legally-qualified) personnel. I comment on the financial assessments below but would note that I can identify no assessment of the costs for this provision contained in those financial notes. Certainly, there seems to be no assessment of the significantly increased external legal advice that the AiB may
require in respect of responding to a request for directions that demand consideration of significant legal points.

The intermediate step of an internal review by the AiB would seem to be further unnecessary, requiring the AiB both to hold a quasi-judicial role in providing the direction and thereafter a quasi-appellant role in reviewing same. Consideration should be made, at least, for removal of the review step.

In short, this power would not appear to assist Trustees any greater extent than their current engagement with the AiB and there would be a significant diminishment to the current process of seeking determinative directions from the court. There is no guidance as to the number of such directions being sought annually from the courts, and thus the burden upon the AiB to appropriately resource the provision of such directions would seem unlikely to justify the removal of a direct line between the Trustees and the Courts.

Sections 25 and 26: Recall of Sequestration

The Bill proposes removing the power of the Sheriff to determine applications for recall of sequestration where the application is other than arising from a creditor's petition and includes the ground that the debtor was not apparently insolvent. Proposed section 26 thus introduces a raft of new provisions that will cover all recalls of sequestration on the grounds of repayment, whether the original sequestration was by the debtor themselves or by a creditor's petition.

This is a significant additional power to the AiB which would not simply be an administrative function. In private correspondence with the AiB, the suggestion was that she perceived that such extension of power was on par with the 2008 transfer of powers from the courts to the AiB for determining debtor's own sequestration applications. No such parallel applies however. In a debtor's own application pre-2008, the Sheriff had no discretion on awarding of sequestration provided the papers were in order and the act of granting sequestration was solely an administrative function.

One cannot say that section 17 of the 1985 Act (as current) in regards to recall of sequestration is merely administrative. Even where the Sheriff is satisfied that full repayment had been made, it was still within the Sheriff's discretion whether to recall an award of sequestration ["...the Sheriff may recall an award of sequestration if he is satisfied in all circumstances of the case..."]. Such discretionary wording continues in proposed Section 17E in regard to the proposed power of the AiB to award recall of sequestration. The new provisions will thus result in a sizeable new discretionary and quasi-judicial power to the AiB. It is submitted that without significant evidence of a need for such a transfer of power (such as an unusual strain upon the Sheriff Court Service of such applications for recall, which could be better resourced by the AiB), there are no grounds for such a transfer of powers.

I would further respectfully submit that the drafts of the Bill have underestimated how contentious recall of sequestration on the grounds of payment can be. As accepted by the proposed amendments, recall could be sought on the grounds, "... that the debtor has paid or is able to pay the debtor's debts in full..." (proposed Section 17A(1)). It is frequent that recall petitions are suggested, and indeed introduced to
the court, where no payment has been made and there is no evidence that the debtor is able to pay. Such petitions can thus be contentious in themselves.

In regard to the timescale for attending to such applications, as set out in the Bill, I would repeat my concerns that many such petitions at present can be contentious, even if they purport to be on the grounds of full repayment. At present, the costs incurred by Trustees in attending to ill-founded applications, or applications that start with insufficient preparation and, thus, require significant input by the Trustee before there is full repayment, can leave the Trustee’s remuneration vague until just before final recall by the court. As the AiB will then be determining the recall only if the Trustee’s remuneration is repaid, it leaves a situation whereby the Trustee’s remuneration can become an issue of controversy in itself at a late stage. (At present, the Trustee’s remuneration need not be determined prior to recall (though, in practice, it normally is).) I would, again, respectfully submit that the drafters have underestimated the potentiality of these applications dragging on and becoming contentious, at least in regards to finalising of Trustee’s remuneration and obtaining payment of same by the debtor prior to recall under these proposed amendments.

Finally, in respect of the proposals for interim recall introduced by proposed section 17C, it is unclear what mischief is being cured by interim recall. The debtor will not be formally recalled until later and the import of interim recall is unclear.

Comments on the financial implications within the Financial Memorandum
The assessment of costs in respect of power to defer discharge seems extremely optimistic. They seem to be assessed only in respect of the AiB’s costs in regard to discharge and not the additional costs of other Trustees in applying for the deferments. Such costs will now be introduced in each and every case, as opposed to the handful of cases where deferment is sought before the court as at present. This cost burden will be borne by creditors as a whole. There seems to be no assessment as to the costs on the AiB in considering contentious applications for deferment.

In respect of the comments in paragraphs 40 and 41 that the transfer of bankruptcy administrative functions will be cost neutral through the AiB recovering the full cost from application fees, this begs the question as to what the application fees will currently be.

The AiB however says they do not expect the level of fees of the new processes to exceed the current level set by the Sheriff Courts. The sums as quoted thus require some significant critical assessment by the Committee. Further, such fees would represent new fees to debtors, which may be a strain, and to Trustees, impacting on creditors as a whole.

It is noticeable that no estimate is given as to the savings of costs at the Sheriff Courts, which it is submitted would be relatively minor given that the apparent low volume of such applications at present. The significant new functions would however create a requirement on the AiB to provide whole new administrative, adjudicative and appellant functions (with appropriately trained and successively senior staff throughout). No costs appear to be given in regards to legal advice in regards to reviews or contentious applications. This seems a significant omission.
If I can be of any further assistance, please do not hesitate to contact me.