Executive Summary

Introduction
The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Banking, Company and Insolvency Law sub-committee and the Consumer Law sub-committee. These committees are comprised of senior and specialist lawyers (both in-house and private practice) and legal academics.

The Society has examined the Bill in detail but has restricted its comments to a higher level review. Where we have not commented on a particular aspect of policy or section of the Bill, we are broadly in agreement with what is proposed.

The Society welcomes the opportunity to consider the Bankruptcy and Debt Advice (Scotland) Bill. Specific comments in response to the call for evidence issued by the Economy, Energy and Tourism Committee can be found at appendix 1. The Society also has the following general comments to make.

General comments
We support the policy objectives of the Bill, namely to “ensure that appropriate, proportionate debt management and debt relief mechanisms are available to the people of Scotland”. However, we have a number of concerns about how the Bill proposes to implement these policy objectives. Our general concerns are outlined below.

Removal of judicial involvement and unnecessarily cumbersome and lengthy appeal process
The Society is extremely concerned about the removal of many parts of the sequestration process from the Scottish courts. We are opposed to the removal of the safeguard of judicial involvement at the outset in areas where the legal rights of the debtor and creditors are directly affected. Sequestration gives rise to important issues affecting individuals many of which are not simple administrative matters but involve legal rights and obligations which require judicial determination.

Extended role of AIB and potential for conflict of interest
We are concerned about the extended role of the Accountant in Bankruptcy (AiB) and the significant potential for conflicts of interest. We believe that the AiB will have a significant conflict of interest in reviewing its own decisions. Currently, the court plays an important role in separating these powers. We accept that the AIB could
deal with routine administrative matters but the Bill’s presumptions as to what are routine and administrative are not always correct.

We are also concerned about the AiB’s ability to deliver the required services and the funding of the AiB. The Society believes that important legal matters affecting individuals’ fundamental rights should be dealt with by properly qualified people.

**Limitations on a debtor’s right of choice**
We are concerned that the proposals restrict and compromise debtor choice and access to sequestration. We are of the view that provided a debtor meets the criteria for a particular process, they should be able to choose to enter that process.

**Removal of Automatic Discharge**
We consider the removal of automatic discharge to be a retrograde step, which reintroduces the undesirable effects of the Bankruptcy (Scotland) Act 1913, which left debtors undischarged. We believe it will not benefit creditors and will also be unfairly prejudicial to debtors.

**Lack of clarity in the relationship between discharge, deferral of discharge and Bankruptcy Restriction Orders (BROs)**
There appears to be a general lack of clarity in the relationship between the period of sequestration, discharge, deferral of discharge and Bankruptcy Restriction Orders (BROs), which the Bill ought to clarify.

**The concept of interim recall is fundamentally flawed**
We consider that the proposed introduction of interim recall is fundamentally flawed. We consider that there can be no middle ground – either a debtor is sequestrated or he is not.

**Impact on corporate insolvency**
Changes in bankruptcy legislation will have a direct impact on the corporate insolvency regime in Scotland; however no consideration appears to have been given to this point. We are aware that work is being undertaken on the corporate insolvency rules but understand that (at least at this stage) it is not proposed to decouple personal and corporate insolvency law in Scotland and have two separate independent regimes.

**Failure to deal with the debtor’s home**
It is disappointing that the Bill does not deal with the complex issue of the debtor’s family home, which is frequently the most problematic issue in personal bankruptcy.
Appendix 1 - Commentary on Bill Sections

The Society’s comments on specific Bill sections, as set out in the Economy, Energy and Tourism Committee’s call for evidence, are found below.

Advice and education (Sections 1-2)
We believe that money advice and financial education are good ideas in principle. We also agree such advice should be available but we are not convinced that such advice should be mandatory. Any mandatory money advice would have to be of the highest quality, and be provided by suitably qualified people. A system of redress for poor advice would also need to be available.

As yet the Bill does not contain a definition of "money adviser" or the qualifications required. We believe the legislation would be improved if a definition were to be included.

We are concerned about proposals linking discharge of the debtor to financial education. The existing system of automatic discharge with a robust process of deferral works effectively. If necessary, the grounds for deferral could be widened and specifically include debtor co-operation and the financial education of the debtor.

We would welcome clarification on whether the cost of providing mandatory money advice has been assessed and who will meet this cost.

Payments by debtor following sequestration (Sections 3 - 4)
We support the policy of consistency and transparency of calculation of debtor contributions across the various debt relief and management procedures. However, it is arguable that the proposed Common Financial Tool ("CFT") is too rigid and prescriptive and there should be some latitude allowed to the Insolvency Practitioner to allow for unusual circumstances. Without further details of the proposed CFT it is difficult to comment further.

The Society considers that there is insufficient evidence that a debtor contribution order for four years will improve returns to creditors. Furthermore, it is unclear why the debtor and trustee should be permitted to extend the four year period. This seems to contradict the policy of having a fixed four year period of contribution and there appears to be no protection for the vulnerable debtor who might be unfairly pressurised into agreeing a longer contribution period.

We are uncertain why a break should be restricted to 6 months. Payment breaks already happen in practice, although re-commencing contributions after a break period can be difficult.

No consideration seems to have been taken of the impact on a debtor wishing to make payments post discharge to buy out the trustee’s interest in a property.

Section 32C(3) - it should be remembered that debtor’s income does not vest in the trustee so rather than refer to "income" this section should refer to "income contributions."
Sequestration where debtor has few assets (Sections 5 - 7)
Generally we support the Minimal Asset Procedure (MAP) but do not agree that a MAP debtor should be discharged after 6 months, with the possibility for that period to be extended to 12 months. The period of sequestration for MAP should be the same as the ordinary sequestration procedure, namely 12 months. There should be consistency across all bankruptcy processes. In addition, if discharge is no longer to be automatic in ordinary sequestration, the same policy should apply to MAPs.

Section 2ZB (a) - reference to section 33(1) of the Act is not sufficient as it does not make clear, for example, that pensions are excluded. It would be better to make reference to assets excluded by virtue of section 33(1) of the Act and other Acts.

Moratorium on diligence (Section 8)
We understand the policy intention of having a 6 week period of moratorium prior to entry to statutory debt relief procedures; however, the relevant sections of the Bill do not clearly achieve this. Further consideration should be given to the drafting of these provisions. The Society would make the following comments and recommendations:

Section 4A(a) – we would welcome clarification as to whether this section also applies to executor applications.

Section 4A(b) – refers to the trust deed being granted but it is not clear when the moratorium starts - before or after the trust deed is granted? In addition, it is the trustee not the debtor who takes steps to obtain protected status.

Section 4C - the term “diligence” is not defined anywhere in the Bill. We would recommend including a definition of this term.

Section 4C(3)(d) – arrestments are "executed" by the creditor not "granted."

One possible way to clarify matters would be for sections 4A and 4B to be redrafted so the provisions apply to specific procedures rather than to specific entities e.g. 4A apply to sequestrations and trust deeds and 4B should apply to DAS.

It is unclear how the moratorium provisions interact with the existing provisions of section 37 of the Bankruptcy (Scotland) Act 1985 (Effect of Sequestration on diligence.) We would welcome clarification on this matter.

We do not support the policy of an appeals and review process by the AiB. It is not clear how the review and appeal process will affect the moratorium but there is clearly the possibility that there will be delays. Furthermore, there is the possibility that the moratorium period could become very lengthy, which will adversely affect the interest of creditors.

Application for sequestration (Sections 9 - 12)
Section 10 of the Bill, which introduces section 11B to the Bankruptcy (Scotland) Act 1985, allows the AiB to refuse to grant what the AiB considers to be an inappropriate application. Although this power is already contained in the Bankruptcy (Scotland) Regulations 2008, and is being moved to primary legislation, we are concerned that
the terms of this section are too vague and give the AiB too much discretion. Courts do not have such discretion in awarding sequestration. If an application satisfies the technical requirements of the Act, the court must award sequestration. We consider that if a debtor meets all the requirements for sequestration, they should be entitled to an award of sequestration. We are concerned that the AiB is being given powers which the courts currently do not possess.

**Administration of estate (Sections 13 – 15)**

We generally support the policy of insisting creditors claim early in a process. The pre-2008 legislation (Bankruptcy (Scotland) Regulations 2008) adequately provided for this.

We agree with the proposal that the trustee should be able to shorten the first accounting period; however it is not necessary to specify a minimum 6 month period. 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 sequestration (Sections 16 – 20)**

The concept of a debtor’s automatic discharge was introduced in the Bankruptcy (Scotland) Act 1985 to address the deficiencies of the Bankruptcy (Scotland) Act 1913, where a debtor’s discharge was not automatic, and many were sequestrated in perpetuity. We do not agree with the proposal that a debtor must apply for discharge. Furthermore, we do not agree that discharge should be made dependent on co-operation.

We consider that the existing system of automatic discharge with a robust process of deferral works effectively. If necessary, the grounds for deferral could be widened and specifically include debtor co-operation and the financial education of the debtor.

As currently drafted, the provisions in the Bill relating to discharge are unnecessarily complicated.

The process of Discharge on Composition does continue to have a role and can be particularly helpful for debtors and creditors where early discharge or asset protection is required. These will become increasingly important issues if a four year payment and acquirenda regime is introduced. There are provisions in the Bankruptcy and Diligence etc. (Scotland) Act 2007 which could be brought into force to simplify the composition process.

**Records (Sections 21 – 23)**

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 creditors of their right to lodge answers must be made.

**Functions of sheriff and Accountant in Bankruptcy in sequestration (Sections 24 – 35)**

We consider that the transfer of a number of functions from the courts to the AiB is fundamentally misconceived. We agree that a distinction can be drawn between legal and administrative matters and agree that the AiB can deal with administrative matters. However, many of the functions which it is proposed are undertaken by the
AiB are not administrative matters but are legal matters which require judicial involvement. We are concerned that the AiB will not have the appropriate qualifications and expertise to deal with such legal matters.

Giving the AiB a 'quasi-judicial' role, as well as administrative functions, creates a conflict in the AiB’s responsibilities between the legal rights and interests of debtor and creditors (which must have priority) and considerations of administrative efficiency (which must be subordinate). The Society considers that the AiB should be free to concentrate on administrative efficiency and not be put in the position of having to balance conflicting priorities.

As an officer of the court, a Trustee must have direct access to the court in exactly the same way as a Liquidator or Administrator has such access to the court. Debtors and creditors also have a right to have their civil rights and obligations determined by an independent and impartial tribunal. Given the plethora of roles and responsibilities, which it is proposed are to be undertaken by the AiB, there is considerable concern that conflicts of interest will arise and that public confidence in the AiB could be undermined.

We consider that the proposals in the Bill are likely to add delay and cost to the process. The proposed framework is not suitable for dealing with situations which require immediate resolution. The right to make application to court should be preserved, although the option of referring a matter to the AiB could also be available.

As a matter of principle if a sheriff awards sequestration, it would seem appropriate that a sheriff should order recall. However, we can see the logic of recall of sequestration on the grounds of payment in full being dealt with by the AiB as an administrative matter. We agree that recall should only be awarded after payment has been made.

The concept of interim recall is fundamentally flawed. Either a debtor is sequestrated or he is not. We can see no benefits to an interim recall process. We therefore consider the proposed new sections 17C and 17D to the Act (section 26 of the Bill) should be removed.

The proposed new sections 17E(1)(b) and 17E(4) should also be removed. If the grounds of recall are payment in full, we would consider it inappropriate for the AiB to have any discretion on whether or not to award recall. If there is to be any discretion exercised, that must be a matter for the court.

Section 17F (section 26 of the Bill) will require amendment to remove references to interim recall, discretion of the AiB and the imposition of conditions as none of these is appropriate.

Section 28 - 28A(6)(a) - should say "the former trustee or his representative" - to cover situation where the former trustee has died.

Section 29(6A) – Should it be "the commissioners" or "a commissioner" who can apply? Should the debtor be able to apply?
Review of decisions made by Accountant in Bankruptcy (Sections 36 – 40)

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 number of ways and continues to restrict the debtor post discharge so is a matter that should be dealt with by the court.

The relationship between the period of sequestration, discharge of the debtor, deferral of discharge and a BRO is still unclear. Bankruptcy restrictions were introduced to address conduct issues and punish the debtor whereas deferral of discharge is designed to benefit creditors. If the debtor’s discharge is no longer automatic, the Society would question what role the BRO plays if the debtor’s discharge is no longer automatic.

It should be made clear that a debtor should be automatically discharged after a specific period, and the trustee given the option to make application for deferment. This should apply where it would benefit creditors and also apply to Bankruptcy Restriction Orders where the debtor has failed to cooperate.

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 AiB. However, the drafting is not clear and so open to interpretation. For example, it is unclear what a "clerical and incidental error" is. Further consideration should be given to the drafting of these provisions.

The proposed self-review and appeal process by the AiB is fundamentally misconceived. The AiB has a significant conflict of interest in reviewing its own decisions and the court plays an important role in separating these powers. We accept that the AiB could deal with routine administrative matters but 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 these provisions. We would consider it inappropriate for the AiB to be dealing with such complex legal matters. These are not simple numerical calculations as can be seen from 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.

Miscellaneous amendments (Sections 41 – 48)

Consequential amendments will be necessary if any of the points made above are accepted.

---