BANKRUPTCY & DEBT ADVICE (SCOTLAND) BILL

SUBMISSION FROM THE ROYAL FACULTY OF PROCURATORS IN GLASGOW

Introduction
This submission is made on behalf of the Royal Faculty of Procurators in Glasgow (RFPG). The RFPG is a body incorporated prior to 1668 and continues to serve the needs of the legal profession in Glasgow and West Central Scotland. It acts as a representative body for solicitors practising in the Glasgow area and also provides members access to an extensive law library, an education programme, audit services and is used a venue in the city centre for a wide variety of events.

General view on the Bill
The Bill represented an excellent opportunity to consolidate bankruptcy legislation. The Bankruptcy (Scotland) Act 1985 has been amended by a variety of acts most notably the Bankruptcy (Scotland) Act 1993, the Bankruptcy & Diligence etc. (Scotland) Act 2007 and the Homeowner & Debtor Protection (Scotland) 2010.

It may be that as the 1985 Act underpins so many other related Acts and statutory instruments, particularly in relation to its application to the Insolvency Act 1986 and statutory instruments made there under, that it was felt a wholesale replacement for the 1985 Act would be a tall order. As a result, the Bill as presently conceived makes a variety of amendments to the 1985 Act which are at times difficult to follow.

It would perhaps be helpful if a "1985 Act as amended" were published in draft form detailing all the proposed amendments so that these could be more easily seen in context. However, that is perhaps simply the writer's preference.

RFPG agrees with the general premise of the Bill that there should be access to fair and just processes of debt relief and debt management for the people of Scotland, which takes account of the rights and interests of those involved, that those who can pay should pay and that the rights and needs of those in debt should be balanced with the rights and needs of creditors and businesses. Indeed, it would be difficult to argue against those principles.

Participation in the consultation
RFPG did not participate in the Scottish Government's consultation on the Bill.

Advice and education
The Bill makes provision for compulsory money advice from an approved money adviser for anyone considering accessing a statutory debt relief or debt management product together with a mandatory requirement for certain individuals to participate in financial education.

We support the requirement for all debtors voluntarily entering into a debt relief or debt management product to obtain advice beforehand. If such advice is being provided in the commercial sector then there may be issues arising in respect of the cost to debtors or paying for that advice. In relation to the free sector, the policy will only meet its objective if the free sector is adequately funded and resourced to
provide sufficient access to advice for debtors. In the Financial Memorandum to the Bill the clear focus appears to be upon the free sector (comprising 91 public sector organisations presently delivering money advice). Accordingly, free sector money advisers are likely to require increased budgets to meet the goals of the Bill.

As regards participation in financial education, the policy objective is to seek to prevent individuals from suffering repeated financial difficulties. As a policy this is unobjectionable. The Bill proposes that financial education will be provided to those suffering from a second insolvency event within 5 years. The course is not mandatory and must only be undertaken where the trustee believes it would be appropriate for the debtor. That may place an unduly onerous burden upon individual trustees in determining whether or not the course would be appropriate and may lead to inconsistencies of approaches between different trustees.

Financial education might also be undertaken by those who are under investigation in relation to a Bankruptcy Restriction Order. Persons in that category are likely to be so categorised because of dishonesty or, for example, gambling addictions. It may be such persons would not particularly benefit from financial education (though, of course, a trustee may well come to that conclusion and not insist upon it).

There are two items of concern in relation to this proposal. The first is that the trustee must not require a person to undertake the course if unable to do so by reason of disability or physical or mental illness. It is not clear on what basis a trustee would have the expertise to make such a determination. Would the trustee for example require to obtain a medical report and if so, at whose expense?

Secondly, a debtor must not be required to undertake a financial education course if they have already done so at any time in the preceding five years. One would have thought that a debtor in those circumstances may well benefit from another financial education course.

Separately, there does not appear to be any direct penalty on a debtor who fails to participate in a course. It may be that such penalties will be included under regulations or will be caught by the debtors general duty to co-operate with the trustee. However, it is more common within the 1985 for specific penalties to be prescribed for failure to co-operate with particular parts of the Act.

**Payments by debtor following bankruptcy**

The development of a common financial tool is to be welcomed, particularly if that tool allows a degree of flexibility to reflect the differing circumstances in which a debtor might be found. It is difficult to comment upon the likely impact of a common financial tool until the "trigger figures" have been established.

In relation to Debtor Contribution Orders a fixed period of contribution of 48 months represents a reasonable half way house between the present Scottish regime of three year contributions and the five year period for contributions found in England and Wales in the IVA market.

However, whereas the level of contribution where not agreed was previously fixed by the court that function will now be carried out by the Accountant in Bankruptcy.
Whilst there is no objection to that change in principle, in most other circumstances where powers have been transferred from the court to the Accountant in Bankruptcy there is a review and appeal mechanism. Whilst there is a review and appeal process in relation to variation/removal of a debtor contribution order by a trustee and in relation to payment breaks there is no such right of review or appeal in relation to the fixing of the Debtor Contribution Order itself. We would respectfully suggest that such a review and appeal process should be considered in order to protect the interests of both debtors and creditors.

In relation to payment breaks it is not entirely clear why a debtor would wish to apply for such a break. Where, for example, a debtor suffers a period of unemployment or change in employment then that will surely have a material impact upon the debtor’s financial circumstances so that it would be appropriate to apply for variation or removal of the contribution order.

The position is perhaps even more pronounced in relation to leave from employment because of the birth or adoption of a child as such an event plainly has a material impact upon the debtor’s alimentary obligations in assessing the debtor’s contribution.

A payment break may be appropriate where the debtor experiences some other unforeseen circumstances (car breakdown or home repairs for example) which are not circumstances envisaged by the current Bill which would entitle the debtor to seek a payment break. It is respectfully submitted that it would be just for the law to allow a payment break in certain “crisis” situations.

Minimum Assets Process
This new process is intended to replace the existing low income, low asset (LILA) route into insolvency. It will be important that there are robust checks at the outset of such cases to ensure the “MAP” process is not being abused by those with assets or able to make a debtor’s contribution.

We would further comment that the restriction on credit propose be inserted as section 55A of the 1985 Act may be somewhat confusing to debtors. A credit limit of £2,000 is easily understood. However, the following provision restricting obtaining credit where the debtor has debts amounting to £1,000 more may lead to confusion, particular where, for example, the debtor has previously borrowed less than £1,000 but interest accruing on the debit balance creeps the overall balance over £1,000. One might consider it less confusing simply to fix a £2,000 limit without any additional restriction.

Moratorium on Diligence
The moratorium on diligence for a period of six weeks is keeping with the present provisions for a debt payment programme and provides a level of consistency of approach. This is to be welcomed.

Administration of estate – time frame for creditor claims etc.
In relation to creditor claims, it is proposed that creditors must submit a claim within 120 days notice. Whilst there is a saving provision for claims submitted not later than eight weeks before the end of the accounting period which are accompanied by a
reasonable explanation for failure to submit the claim timeously, in reality creditor claims are often overlooked by creditors due to administrative oversights. Whilst unfortunate, such oversights are common. Provided such an oversight would amount to a "reasonable explanation" then we see no difficulty with this. However, if a claim is submitted late then it would seem unjust that a valid creditor could not participate in a dividend to which it ought to be entitled where that claim is received before the trustee makes a dividend to other creditors.

The situation is quite different, of course, where a creditor submits a claim after distribution to creditors. It is quite right that such a creditor should only participate in any additional dividends in subsequent accounting periods.

In relation to acquirenda it is to be welcomed that the period for acquirenda coincides with the ordinary period for debtor contributions i.e. four years.

**Discharge following bankruptcy**
The present procedure is that the debtor is entitled to a discharge from bankruptcy automatically on the expiry of a period of one year unless an application is made to the court to defer the debtor’s discharge.

The Bill seeks to introduce a new policy in relation to discharge whereby the trustee must actively discharge the debtor.

The requirement for the trustee actively to discharge the debtor seems likely to lead to an increase in the administrative burden of managing a sequestration. It is also seems inevitable that this will lead to a significant increase in the number of disputes between trustees and debtors as to whether or not the Discharge is appropriate.

At present, applications for deferment of Discharge are relatively rare, principally because, with the exceptions of applying for income payment orders and certain provisions relating to Bankruptcy Restriction Orders, there is little impact upon a trustee’s powers occasioned by the debtor’s discharge. The debtor is still required to co-operate with the trustee, make over acquirenda and continue to pay any contribution from income.

An Application for Discharge must include a declaration by the trustee that the debtor has complied with any debtor contribution order. That particular provision is perhaps misconceived as a debtor will only be a small way into a four year payment programme when, the ordinary course, a trustee will submit an application for discharge. The trustee cannot, of course, predict whether or not a debtor will continue to comply with the contribution order post discharge.

There may well be an element of confusion by debtors who receive the discharge believing that this means they need no longer contribute towards their bankruptcy. Furthermore, in the event there is a dispute where a trustee refuses to grant the Discharge then that may discourage the debtor from continuing to co-operate with the trustee.

On the whole, the provision for automatic discharge appears to have been a sensible policy in the 1985 Act as it relieves an administrative burden from the trustee and
avoids a situation where debtors may remain undischarged for a lengthy period of time. We would respectfully suggest this change of policy be rethought.

**Transfer of functions from the Sheriff to Accountant in Bankruptcy**

It is proposed that a variety of functions be shifted from the Sheriff Court to the Accountant in Bankruptcy. In so far as these powers relate to purely administrative functions then these are unlikely to be controversial.

However, there are two areas of concern in relation to issues which are likely to be highly contentious. The first is in relation to debtor contribution orders. The second is in relation to Bankruptcy Restriction Orders.

In relation to debtor contribution orders we would rehearse our concerns noted earlier that there is no right of review or appeal in relation to the Accountant in Bankruptcy's decision. In many cases this decision will have the largest impact on the outcome of the sequestration for both the debtor and creditors. It is important that such a decision be open to scrutiny.

In relation to Bankruptcy Restriction Orders, these are presently based loosely upon a Company Director disqualification whereby an Undertaking may be given by a debtor (section 56)(G) of the 1985 Act as an alternative to an "application for Bankruptcy Restriction Order".

Given that Bankruptcy Restriction Undertakings appear untouched by the Bill one would reasonably conclude that Bankruptcy Restriction Orders will only be required in contentious cases. It is submitted that from the point of view of natural justice it would be inherently unfair that the party who decides to seek a bankruptcy restriction order is also the party which considers counter representations by the debtor and is the party who ultimately decides whether or not to grant the restriction order.

We would submit that the correct balance is to be found in the present model where it is left to a Sheriff to determine if the grounds for making an Order are made out. This is particularly so where the behaviours which the Court can presently take into account includes potential fraudulent behaviour and is, accordingly, quasi-criminal.

At the time of writing the Accountant in Bankruptcy's website makes reference to 26 bankruptcy restriction orders granted in 2013 which, compared to the number of personal insolvencies, is an extremely small number. Presumably, the Accountant in Bankruptcy is selecting cases where the misconduct is particularly serious. We would have thought it important to keep such applications within the domain of the Sheriff Court in order to convey to debtors the seriousness with which any Bankruptcy Restriction Order is taken. If the power is transferred to the Accountant in Bankruptcy then the perceived gravity of a bankruptcy restriction order may be reduced.

Accordingly, it is respectfully submitted that Bankruptcy Restriction Orders remain within the remit of the Sheriff Court.
**Review of decisions made by Accountant in Bankruptcy**

In general terms where administrative functions are being transferred to the Accountant in Bankruptcy it is an important safeguard that appellants have a right of review and appeal to the Sheriff in relation to certain decisions.

Particularly in relation to the appeal stage, two concerns rise. The first is the affordability of an appeal. Will, for example, successful appellants be entitled to recover expenses from the Accountant in Bankruptcy? Will there be funding made available via for example the Scottish Legal Aid Board to enable appeals to be made with the benefit of legal representation for those who cannot afford it? If the answer to these questions is in the negative then that is a considerable disincentive to potential appellants.

The second concern is the extent to which it will be possible for a co-herent jurisprudence to be established in relation to appeals. Different Sheriffs may of course take different views on how bankruptcy law is to be applied. Whilst this issue potentially arises at present it may well prove very difficult for the Accountant in Bankruptcy to treat all cases consistently if different Sheriffdoms take different approaches to certain types of appeals.

However, on the whole, if the transfer power results in a reduction in costs in the Bankruptcy process then this will no doubt be welcomed by creditors and debtors alike.