



The Scottish Parliament  
Pàrlamaid na h-Alba

# **Delegated Powers and Law Reform Committee**

**54th Report, 2013 (Session 4)**

**Bankruptcy and Debt Advice  
(Scotland) Bill**

**Published by the Scottish Parliament on 30 October 2013**

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The Scottish Parliament  
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## **Delegated Powers and Law Reform Committee**

### **Remit and membership**

#### **Remit:**

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
  - (a) any—
    - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
    - (ii) [deleted]
    - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
  - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
  - (c) general questions relating to powers to make subordinate legislation;
  - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
  - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
  - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
  - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
  - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

#### **Membership:**

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## Delegated Powers and Law Reform Committee

### 54th Report, 2013 (Session 4)

#### Bankruptcy and Debt Advice (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 17 September and 29 October 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Bankruptcy and Debt Advice (Scotland) Bill at stage 1 (“the Bill”).<sup>1</sup> The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).<sup>2</sup>

#### OVERVIEW OF BILL

3. This Bill was introduced by the Scottish Government on 11 June 2013. The Economy, Energy and Tourism Committee is the lead Committee.
4. The Bill makes changes to the law of personal insolvency in Scotland. The Bill principally amends the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”). The 1985 Act operates alongside the Bankruptcy and Diligence (Scotland) Act 2007. The Scottish Government intends to consolidate the 1985 Act as amended by this Bill as part of the 2013/14 legislative programme.

#### DELEGATED POWERS PROVISIONS

5. The Committee considered each of the delegated powers in the Bill.

<sup>1</sup> Bankruptcy and Debt Advice (Scotland) Bill [as introduced] available here:  
[http://www.scottish.parliament.uk/S4\\_Bills/Bankruptcy%20and%20Debt%20Advice%20\(Scotland\)%20Bill/b34s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Bankruptcy%20and%20Debt%20Advice%20(Scotland)%20Bill/b34s4-introd.pdf)

<sup>2</sup> Bankruptcy and Debt Advice (Scotland) Bill Delegated Powers Memorandum available here:  
[http://www.scottish.parliament.uk/S4\\_Bills/Bankruptcy\\_and\\_Debt\\_Advice\\_Bill\\_DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Bankruptcy_and_Debt_Advice_Bill_DPM.pdf)

6. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

Section 1: new section 5C(1)(d) of the 1985 Act – Sequestration of living debtor: money advice: prescribing matters on which advice must be taken.

Section 1: new section 5C(2)(b) of the 1985 Act – Sequestration of estate of living debtor: money advice: prescribing descriptions or classes of money adviser.

Section 2: new section 43B(1) of the 1985 Act – Financial education for debtor: prescribing course of financial education.

Section 5 Inserted sections 5(2ZA), 5(2ZB)(b) and 5(2ZB)(c) of the 1985 Act – Debtor application: prescribing types of benefit, periods, property and sums applying where debtor has few assets; prescribing value of vehicle; prescribing disregarded assets.

Section 5: inserted section 5(2ZC) of the 1985 Act – making provision about valuation of assets.

Section 5: inserted section 5(2ZD) of the 1985 Act – modifying few asset criteria.

Section 7; inserted section 55A(2) of the 1985 Act – Discharge, conditions, etc: power to prescribe amount of credit.

Section 9: inserted section 2(8) of the 1985 Act – Statement of undertakings: power to prescribe form of statement of undertakings.

Section 16: inserted sections 54 and 54A of the 1985 Act – Discharge of debtor: power to prescribe form of certificate of discharge.

Section 18 – Deferral of discharge where debtor cannot be traced :-

Inserted section 54D of the 1985 Act – power to prescribe form of certificate of discharge.

Inserted section 54D – power to prescribe form of deferral notice and application form, debtor not traced.

Inserted section 54E – power to prescribe form of application and notice.

Inserted section 54F – power to prescribe form of notice and certificate of discharge where subsequent debtor contact.

Section 20: inserted sections 58B and 58C of the 1985 Act – Assets discovered after trustee discharge: appointment of trustee: power to set amount applying where assets discovered after trustee discharge.

Section 21: amended section 1A of the 1985 Act – Register of insolvencies: prescribing the form of the register of insolvencies.

Section 22: amended section 62 of the 1985 Act – Sederunt book: power transferred to the Scottish Ministers including power to amend new Schedule 3A to the 1985 Act.

Section 26: inserted sections 17A, 17D & 17F of the 1985 Act – Recall of sequestration by the AiB: power to set periods for recall.

Section 42: amended section 8A of the 1985 Act – power to set time limit for debtor application for sequestration of limited partnership.

Section 44: amended section 14 of the 1985 Act – Effect of sequestration: power to prescribe form sent by trustee to renew period of inhibition.

Section 50 – Ancillary provision.

Section 52 – Commencement.

Schedule 1: – MAP debtors with few assets:

Schedule A1, paragraph 1(4) – power to prescribe form for debtor’s current state of affairs

Schedule A1, paragraph 2(5)(a) – power to prescribe total value of debtor’s assets

Schedule A1, paragraph 5(4) – modified power to prescribe form of debtor’s current state of affairs

Schedule A1, paragraph 2(7) – power to modify duty to consider when few asset process ceases to apply

Schedule 3 – minor and consequential amendments paragraph 28(a):  
Inserted section 72(1A) – different provisions for different classes of case.

7. At its meeting of 17 September the Committee agreed to write to Scottish Government officials to raise questions on the delegated powers. This correspondence is reproduced at the Annex.

8. The Committee’s comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

**Section 3: new section 5D of the 1985 Act – Debtor’s contribution: common financial tool: prescribing method used to assess debtor’s contribution and amending section 7(2) of the 2002 Act**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>affirmative procedure for 1985 Act; negative procedure for 2002 Act</b>

9. The Policy Memorandum explains that one of the key principles of the Bill is that those who can pay should pay their debts. Debtors should therefore make appropriate contributions to funds to be distributed by their trustee. At present there is no uniform method across the various schemes for regulating debtors which provides for the calculation of the amount of income a debtor requires to be allowed to retain to meet living expenses. Some schemes permit a higher level of debtor expenditure than others with a resulting reduction in the amount available to meet debts.

10. The power proposed in new section 5D of the 1985 Act allows the Scottish Ministers to make provision in regulations for a common financial tool. This tool would be used to assess an appropriate amount of debtor's income to be paid to the trustee. This power is subject to the affirmative procedure because the Scottish Government recognises the broad application of the common financial tool and because it will determine the liabilities and entitlement of debtors which the Government considers is a significant matter.

11. A similar power to prescribe the method of assessing the amount of a debtor's assets, income, liabilities and expenditure in relation to the Debt Arrangement Scheme ("DAS") is to be added to the power in section 7(2) of the Debt Arrangement and Attachment (Scotland) Act 2002 ("the 2002 Act"). That power is subject to the negative procedure. The Committee asked the Scottish Government to explain why this lower level of scrutiny was appropriate given the choice of affirmative procedure for the equivalent power in section 5D.

12. The Scottish Government's response indicates that the negative procedure was considered appropriate since the DAS currently provides that the level of contributions to be made by debtors must be approved by creditors or subject to a "fair and reasonable" test. There is therefore, in the Government's view, already a procedure for determining a contribution from income inherent in the DAS scheme.

13. The Committee notes that the new power permits the Scottish Ministers to provide specifically for the assessment of debtor's assets, income, liabilities and expenditure in considering applications for debt payment programmes. At present the determination of what is acceptable or fair and reasonable is left to a case by case assessment by the creditors or debt administrators respectively. It is the standardisation of approach to what is appropriate expenditure or allowances for debtors in all circumstances which the Committee considers attracts the practical significance and potential controversy which merits the affirmative procedure.

14. The Committee considers that the addition of this power to an existing scheme such as the DAS does not affect the assessment of the appropriate level of scrutiny which should apply and agrees with the Scottish Government's assessment of the matter as regards section 5D set out in the DPM.

15. The Scottish Government notes in its response that it would be prepared to consider making the new power in the 2002 Act subject to the affirmative procedure if the Committee considers this appropriate. It notes that it is possible to combine powers within section 7(2) which are subject to different procedures.

16. **The Committee finds the power acceptable in principle but recommends that, consistent with its approach to new section 5D of the 1985 Act, the proposed new power in section 7(2)(bd) of the 2002 Act should be subject to the affirmative procedure.**

**Section 4: new section 32D(5) of the 1985 Act – Debtor contribution order: provision about deduction from earnings**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>the negative procedure</b>

17. New sections 32A to 32G of the 1985 Act introduced by section 4 of the Bill make provision for debtor contribution orders which will be made by the Accountant in Bankruptcy fixing a debtor's contribution to their bankruptcy. This will be calculated using the common financial tool.

18. Section 32D(5) confers power on the Scottish Ministers to make provision about instructions to employers required to make deductions from a debtor's earnings under a debtor contribution order. The provision which can be made in regulations includes "the manner in which an instruction... affects an employer" and "the consequences of any failure of an employer to comply with the duty [to make the deduction]".

19. The power is subject to the negative procedure. The DPM explains this was chosen because "once the procedure to allow for the deduction of an assessed contribution directly from the debtor's wages is in place, modifying its operation will be an administrative matter". The Committee questioned whether the aspects of the power described above were properly administrative matters since they specify legal consequences for employers. Further, sections 32A to 32G do not make provision for the effect on employers on the face of the Bill. The power must be used to *create* those effects as well as being available to make any future changes to them over time. The Committee therefore asked the Scottish Government for further justification for the negative procedure as an appropriate level of scrutiny and to explain what consequences or sanctions could be imposed using this power.

20. In its response the Scottish Government accepts that the powers in section 32D(5)(b) and (c) enable a wide range of provision to be made. This is contrasted with the power in section 32D(5)(a) which the Government regards as administrative. Nevertheless, despite the distinction in nature of the different components of the power in section 32D(5), the Scottish Government considers that there is precedent for provision allowing significant aspects of deductions from earnings provision to be amended by negative procedure.

21. In its answer to the query as to what sort of consequences or sanctions could be imposed using this power, the Government referred the Committee to its policy intention as set out in the Policy Memorandum rather than advising the Committee as to the scope of the power. The Committee is therefore no clearer as to what the Government considers to be the limits to the power or why a power to set

provision is required rather than just making provision about the effects on employers on the face of the Bill.

22. The policy intention is to make the employer liable to the trustee in sequestration for any amounts not deducted. The employer would not be able to recover such amounts from the debtor. Such provision would therefore render the employer liable to contribute to the debtor's sequestration in the event of failing to deduct instructed payments due to an administrative error. It is not for the Committee to comment on whether or not this is appropriate as a matter of policy. Nevertheless, the Committee considers that the intended use of the power demonstrates that the power to make provision as to the consequences for employers raises significant policy issues distinguishable from the general administrative details of the scheme to which the Government refers in its DPM as justification for the power and its choice of procedure.

**23. The Committee accepts that the power to make provision about instructions to make deductions from debtors' earnings is acceptable in principle since flexibility may be required to make changes over time. However, the Committee considers that the power to make provision about the manner in which such an instruction affects an employer and the consequences for employers of failing to comply with instructions is not merely an administrative matter. Accordingly the Committee recommends that the power in section 32D(5) should be subject to the affirmative procedure in this respect.**

**Section 34: new section 71C of the 1985 Act – applications to the Accountant in Bankruptcy**

<b>Power conferred on:</b>	<b>the Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>regulations</b>
<b>Parliamentary procedure:</b>	<b>the negative procedure except where regulations textually amend any part of an Act when the affirmative procedure applies</b>

24. Section 34 of the Bill confers power on the Scottish Ministers to make provision in relation to the procedure to be followed in making various applications to the Accountant in Bankruptcy under the 1985 Act as amended by the Bill. The regulations may make ancillary provision and may modify any enactment.

25. The Scottish Government's intention is that if the power is used to modify the text of primary legislation then it is subject to the affirmative procedure. Otherwise it is subject to the negative procedure. The Committee is content with the power in principle and the proposed level of scrutiny.

26. However, the Committee observes that due to a drafting anomaly there may be doubt as to whether the affirmative procedure will apply to textual amendments to Acts of the Scottish Parliament ("ASPs") as well as textual amendments to Acts of the United Kingdom Parliament. This is because the expression "Act" in new section 72(3)(a)(iv) of the 1985 Act does not include ASPs.

**27. The Committee recommends that the 1985 Act is amended to expressly provide that the power in section 71C(1) is subject to the affirmative procedure when it is used to textually amend ASPs. The Committee notes that the Scottish Government has agreed to consider lodging an appropriate amendment.**

**ANNEX**

**Correspondence with the Scottish Government**

**On 17 September, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:**

**Section 3: new section 5D of the 1985 Act – Debtor’s contribution: common financial tool: prescribing method used to assess debtor’s contribution  
And amending section 7(2) of the 2002 Act**

**Power conferred on: the Scottish Ministers  
Power exercisable by: regulations  
Parliamentary procedure: affirmative  
procedure for 1985 Act; negative procedure  
for 2002 Act**

1. The power in new section 5D of the Bankruptcy (Scotland) Act 1985 to establish through regulations a Common Financial Tool (“CFT”) is to be subject to the affirmative procedure. However, a similar power in section 7(2) of the 2002 Act which relates to the Debt Arrangement Scheme is subject to the negative procedure as that is the current procedure that applies to regulations under that Act.

2. The Committee notes that the Scottish Government has conceded the principle that the power in section 7(2)(bd) of the 2002 Act is significant in its effect and that its subject matter could be controversial. The Committee also observes that the first time powers to make provision in relation to debt payment programmes was exercised under the 2002 Act it was subject to the affirmative procedure.

**3. The Committee therefore asks the Scottish Government for further justification for the choice of negative procedure for the new power conferred by section 7(2)(bd) of the 2002 Act?**

**Section 4: new section 32D(5) of the 1985 Act – Debtor contribution order: provision about deduction from earnings**

**Power conferred on: the Scottish Ministers  
Power exercisable by: regulations  
Parliamentary procedure: the negative procedure**

4. The power in section 32D(5) which allows the Scottish Ministers to make provision about the instructions to be provided to employers to deduct the debtor’s contribution from earnings is extremely broad, enabling any provision to be made relating to instructions to make deductions from earnings including the consequences for employers of failure to comply which need not be merely administrative.

**5. The Committee therefore asks the Scottish Government:**

- **for further justification for the selection of negative procedure as an appropriate level of scrutiny?**
- **to explain what consequences or sanctions could be imposed using this power?**

**On 24 September the Scottish Government responded as follows:**

**Section 3: new section 5D of the 1985 Act – Debtor’s contribution: common financial tool: prescribing method used to assess debtor’s contribution  
And amending section 7(2) of the 2002 Act**

**Power conferred on: the Scottish Ministers  
Power exercisable by: regulations  
Parliamentary procedure: affirmative procedure for 1985 Act; negative procedure for 2002 Act**

1. The power in new section 5D of the Bankruptcy (Scotland) Act 1985 to establish through regulations a Common Financial Tool (“CFT”) is to be subject to the affirmative procedure. However, a similar power in section 7(2) of the 2002 Act which relates to the Debt Arrangement Scheme is subject to the negative procedure as that is the current procedure that applies to regulations under that Act.

2. The Committee notes that the Scottish Government has conceded the principle that the power in section 7(2)(bd) of the 2002 Act is significant in its effect and that its subject matter could be controversial. The Committee also observes that the first time powers to make provision in relation to debt payment programmes was exercised under the 2002 Act it was subject to the affirmative procedure.

**3. The Committee therefore asks the Scottish Government for further justification for the choice of negative procedure for the new power conferred by section 7(2)(bd) of the 2002 Act?**

**The Scottish Government replies as follows.**

4. Generally, in enacting the power in section 7 of the Debt Arrangement and Attachment (Scotland) Act 2002, to establish a Debt Arrangement Scheme (“DAS”) by subordinate legislation, Parliament left a wide range of matters to the negative procedure on any second and subsequent exercise of that statutory power, though some aspects of the power – notably providing debt relief on interest, fees, penalties and other charges on debt - rather than debt management - remain subject to the affirmative procedure.

5. The DAS scheme involves assessment of a contribution from a debtor's income (and not other assets of a debtor), analogous to the contribution calculated by the Common Financial Tool, to be enacted by the power which section 3 of the Bill would create in section 5D of the 1985 Act for sequestration.

6. Currently, the contribution for a debt payment programme in the DAS scheme, under the 2002 Act, is subject to creditor consent, or a fair and reasonable test for approval of under regulation 25 of the Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141, as amended by SSI 2013/225). Accordingly, the 2011 Regulations already contain a procedure for determining a contribution from income.

7. In that light, it was considered appropriate to have negative procedure available in relation to the DAS scheme. The Scottish Government would, however, be prepared to consider making this power affirmative, if the Parliament considers that to be the best approach, as it is possible under section 33 of the Interpretation and Legislative Reform (Scotland) Act 2010 to combine the powers, subject to the affirmative procedure.

**Section 4: new section 32D(5) of the 1985 Act – Debtor contribution order: provision about deduction from earnings**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations  
**Parliamentary procedure:** the negative procedure

8. The power in section 32D(5) which allows the Scottish Ministers to make provision about the instructions to be provided to employers to deduct the debtor's contribution from earnings is extremely broad, enabling any provision to be made relating to instructions to make deductions from earnings including the consequences for employers of failure to comply which need not be merely administrative.

9. **The Committee therefore asks the Scottish Government:**

- **for further justification for the selection of negative procedure as an appropriate level of scrutiny?**
- **to explain what consequences or sanctions could be imposed using this power?**

**The Scottish Government replies as follows.**

10. The power to prescribe the form in section 32D(5)(a) is regarded as administrative, but it is accepted that the powers in section 32D(5)(b) and (c) would enable a wide range of provision to be made.

11. Some broadly comparable powers in this area, e.g. section 49(7) of the Debtors (Scotland) Act 1987, allow significant aspects of deductions of earnings provision to be amended by negative procedure (there the level of income to be

set as payable by a debtor under an earnings arrestment) under section 104 of that Act.

12. As outlined in paragraph 58 of the Policy Memorandum on the Bill, the provision that the Government envisages would be put in place for the consequences and sanctions imposed using this power in the Bill would closely follow regulation 32 of the Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141) – annexed for convenience. In particular, as provided for in regulation 32(5), it is envisaged that the employer would be liable to the trustee in sequestration for the sums deducted from earnings under section 32D, and would not be liable to recover that amount from the debtor.

13. As there is well-precedented provision in this area, in proposing the power to set out the detailed arrangements, within the framework of section 32D(1) to (4) in the Bill, it was considered sufficient to adopt the negative procedure.

**Appendix to Scottish Government response**  
**Regulation 32 of the Debt Arrangement (Scotland) Regulations 2011**

**Payment instruction to employer**

**32.—**(1) A payment instruction to an employer of a debtor in accordance with section 6(1) of the Act must be in form 3.

(2) On delivery of the instruction, the employer of a debtor must while the instruction is in effect deduct the sum specified in the instruction on every pay day, and pay the sum deducted to the payments distributor as soon as it is reasonably practical to do so.

(3) On delivery of an instruction, an employer must make the payments due under the instruction, until recall of the instruction by—

(a) the debtor, where any other payment method approved under regulation 31 is substituted; or

(b) notice from the DAS Administrator or the continuing money adviser under regulation 44 or 46(2).

(4) An employer may on making a payment due under an instruction charge a fee equivalent to the fee chargeable for the time being under section 71 (employer's fee for operating diligence against earnings) of the Debtor's (Scotland) Act 1987, and deduct that fee from the balance then due to the debtor.

(5) Subject to paragraph (7), where an employer fails without good cause to make a payment due under an instruction, the employer shall—

(a) be liable to pay on demand by a payments distributor the amount that should have been paid; and

(b) not be entitled to recover from a debtor the amount paid to the debtor in breach of the mandate.

(6) The obligation of an employer to make a payment due under an instruction shall be extinguished one year after the date that the liability to pay arose, unless court proceedings for payment are commenced within that period.

(7) This regulation applies to any payment instruction, whether made in accordance with a condition under regulation 28 or otherwise.

**Appendix**

**Regulation 32 of the Debt Arrangement (Scotland) Regulations 2011**

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(a) be liable to pay on demand by a payments distributor the amount that should have been paid; and

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(7) This regulation applies to any payment instruction, whether made in accordance with a condition under regulation 28 or otherwise.

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ISBN 978-1-78392-001-3

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