RESPONSE TO CALL FOR EVIDENCE ON BANKRUPTCY (SCOTLAND) ACT 2016
DELEGATED POWERS AND LAW REFORM COMMITTEE
Introduction

1 The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents over 21,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK. We have an in-depth knowledge and expertise of insolvency law and procedure.

2 ICAS’s Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members’ views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.

3 ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all of the implications and that alleged failings within the process are supported by evidence.

4 ICAS is pleased to have the opportunity to submit its views in response to the call for evidence issued by the Delegated Powers and Law Reform Committee of the Scottish Parliament (DPLR Committee) on the Bankruptcy (Scotland) Act 2016 Subordinate Legislation. We shall be pleased to discuss in further detail with the DPLR Committee any of the matters raised within this response.

5 In responding to the call for evidence the following abbreviations are used:

the 2016 Bankruptcy Regulations - Bankruptcy (Scotland) Regulations 2016 [draft];
the 2016 PTD Regulations - Protected Trust Deeds (Scotland) Amendment Regulations 2016 [draft];
the 2016 PTD Forms Regulations - Protected Trust Deeds (Forms) (Scotland) Regulations 2016 [draft];
the 2016 BAD Regulations - Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 (SSI 2016/295);
the 2016 Bankruptcy Commencement Regulations - Bankruptcy (Scotland) Act 2016 (Commencement) Regulations 2016 (SSI 2016/294 (C.27))

the Regulations – together the above

Response

6 We are pleased to note that drafts of the Regulations were issued for informal consultation by the Accountant in Bankruptcy (AiB) prior to laying in the Scottish Parliament. We have previously highlighted that Regulations have been laid before Parliament without the opportunity to comment on the Regulations and to identify any practical issues or to consider whether any unintended consequences may exist. This is particularly important where legislation is dealing with highly technical areas such as bankruptcy. While the risk of issues with practical implementation and unintended consequences is less likely in consolidating existing regulations, we warmly welcome the inclusive approach which the AiB has taken in bringing forward the Regulations and hope that such an approach will become standard practice where new legislation is being brought forward.

7 We are pleased to note that a number of comments and suggested amendments made in our response to the AiB’s informal consultation have been reflected within the Regulations laid before Parliament. The AiB have provided a full response where our comments or suggested amendments have not been taken up. While in some instances we may not agree with the conclusions reached, we would wish to formally record our gratitude to this approach being taken. We consider that such an approach represents best practice and can assist the Parliament to scrutinise legislation brought forward and ensure that legislation introduced is ‘fit for purpose’.

8 The subordinate legislation being considered by the Committee is in support of the 2016 Act which consolidates over 30 years of bankruptcy legislation into a new Act. The subordinate legislation laid largely restates the existing subordinate legislation, although as noted below
does include some amendments which provide clarification or more practical working over regulations supporting the Bankruptcy (Scotland) Act 1985.

9 We welcome the approach taken to the Regulations which has resulted in a reduced set of subordinate legislation. We consider that this makes accessing the legislation easier for all stakeholders who require to use the legislation either periodically or on a day to day basis.

10 We support the amendment to the approach on how claims in a foreign currency are to be converted in Regulation 22 of the 2016 Bankruptcy Regulations. The provisions will allow a more practical and flexible approach to be taken by trustees in a modern world where information on currency exchange rates is more readily accessible than solely by reference to rates published in national newspapers.

11 There are however areas where the Regulations give some cause for concern. Many of these we raised previously in our response to the regulations laid in Parliament in support of the Bankruptcy and Debt Advice (Scotland) Act 2014 (BADAS).

12 While welcoming the changes which have been made in the Regulations, we consider that there are additional valuable amendments which could have been made to the Regulations at this time. These address what we consider to be practical deficiencies in the existing regulations and which have now been brought forward into the Regulations. The matters do not affect legislative policy. The areas in which further amendment would have been desirable include the rate of statutory interest, addressing the conflict of interest in AiB roles and functions and inappropriate regulation of money advisers. This is expanded on further in Appendix 1.

13 Responding to our submission on the informal consultation, the AiB have acknowledged these issues although considered these to be significant changes to the Regulations and beyond the scope of the current consolidation. They have indicated that these matters can be considered further in a future review.

14 Overall, and taking into account the comments we have received back from the AiB in response to the informal consultation carried out, we would support the Regulations coming into effect.

20 October 2016
Appendix 1

Statutory interest rate

1 Regulation 26 of the 2016 Bankruptcy Regulations (Interest on claims in sequestration) has retained the interest rate at 8% per annum. In view of the current economic climate and bank base rates we would suggest that such an interest rate is overly penal. This is especially evident in situations where recall of sequestration applies and the burden of the interest is borne by a solvent debtor. The Scottish Law Commission recommended in their report on Interest on Debt and damages that interest should fluctuate at a statutory rate above Bank of England base rate. They suggested that the statutory rate should be 1.5% above Bank of England base rate.

2 If the above approach were adopted, it would also be necessary to clarify whether or not the interest rate applicable was the interest rate at the date of sequestration or whether this would be variable dependant on any movements in Bank of England base rate during the course of the sequestration. We would suggest that it would be more appropriate for interest to be fixed in relation to the Bank of England base rate at the date of sequestration. Any variation in Bank of England base rate during the sequestration would be ignored making the calculation much more straightforward.

3 The AiB have indicated in their response to the informal consultation that there is merit in the above but have chosen not to amend the 2016 Bankruptcy Regulations at this time as they consider that such a change would be beyond the scope of the current consolidation of legislation.

4 The AiB also indicated that it would be appropriate to await the outcome of a review of the judicial rate of interest in England and Wales which is due to be the subject of consultation shortly prior to making any amendment. We do not agree that this is necessary or indeed desirable as the statutory interest in Scottish bankruptcy should be appropriate to the circumstances of Scottish bankruptcy and not dependent or related to other areas of law.

AiB conflict of interest

5 ICAS remains concerned about the conflicting roles and responsibilities of the AiB as Scottish Government policy advisor, supervisor of debt management/debt relief services and supplier of debt management/debt relief services. This concern was raised previously with the Economy Energy and Tourism Committee of the Scottish Parliament by ICAS (and others) when the BADAS Bill was being considered. During the Committee’s consideration of that Bill our concerns were taken on board and Government assurances were given that these would be addressed through the Regulations. It is our view that the concerns raised by the Committee, ourselves and others were not addressed adequately in the Regulations introduced in support of BADAS.

6 Our concerns were also raised when the Economy Energy and Tourism Committee considered the Protected Trust Deeds (Scotland) Regulations 2013 (“the 2013 PTD Regulations”) at which time the AiB proposed to establish a Protected Trust Deed Review Board when the Regulations were commenced. At that time, we noted that this group would not address any of the conflict of interest issues as it would have no statutory basis of operation.

7 Provisions within the 2016 BAD Regulations relating to the carrying out of reviews provide little in the way of safeguards against conflicts of interest. The only safeguard is that the Accountant himself or a staff member involved in an original decision shall be prevented from being involved in a review decision (Regulation 22). This does not adequately address threats such as independence, confidentiality, familiarity, and adequate knowledge amongst others.

8 While the 2016 Act provides for the review to be further appealed to the sheriff and this acts as a safeguard against overall injustice, this is a costly route to be taken and a significant barrier to justice to those already in financial difficulty. It therefore has to be hoped that appeals to the court should be rare, but this will only happen if there is trust and confidence in the decision making and review process.
9 We acknowledge that the AiB have taken steps to form a Review Committee which met for the first time at the end of September 2016. The Review Committee however has no statutory backing and is entirely at the discretion of the AiB both in formation and operational ability. It is our view that the Review Committee should be established within the BAD Regulations providing it with a statutory basis of operation. The Review Committee should be comprised of persons entirely independent of AiB (or as a minimum as a majority independent of AiB) and who are suitably experienced persons with a knowledge and understanding of bankruptcy or legal matters.

Inappropriate regulation of money advisers and loss of control over Scottish debt procedures

10 The 2016 Bankruptcy Regulations transfer control on a practical level over who may operate as a Money Adviser in Scotland to the Money Advice Trust ("MAT"), a charity established in England and Wales, rather than retaining this within the realm of the AiB and its supervisory functions or the regulatory regime of recognised professional bodies under the Insolvency Act 1986.

11 The 2016 Bankruptcy Regulations require all Money Advisers to have a licence to use the Common Financial Statement from MAT. There are no safeguards that MAT is required to provide a licence to approved Money Advisors. In addition, the licensing for the Common Financial Statement is provided at an organisation level, but Money Advisor is an individual status. We understand that there are no intentions for MAT to change their licensing at this time and therefore there is a significant disconnect between the legislative requirements and the legal licensing position.

12 We remain concerned that without appropriate safeguards being written into the Regulations there is the possibility of the loss of a licence through one individual’s actions within an organisation could result in implications for many individuals.

13 We are concerned about the lack of adequate safeguards to ensure appropriate regulation of approved money advisers. In particular, where the draconian measure of withdrawing approved money advisor status is to be taken by the AiB (Regulation 5(2) of the 2016 Bankruptcy Regulations) there is no provision for either notification of the proposed decision or for the right to make representations before the decision is made.

14 We acknowledge and are grateful that following our comments to the informal consultation that the 2016 Bankruptcy Regulations have been amended to ensure that the AiB notify the Money Adviser of their revoked or suspended status and are also required to provide a reason for the revocation or suspension to the Money Adviser. We do not agree with the view expressed by the AiB in their response to the informal consultation that an implied ability to appeal such a decision or seek a judicial review is appropriate. This should be explicit in legislation.

15 Our concerns are amplified at this time due to the current ongoing discussion regarding the proposed withdrawal of the CFS and the commencement of a replacement Standard Financial Statement (SFS) where it is unclear whether the SFS can or will be suitable for use as the CFT in Scotland. We are left with the undesirable position in legislation where an unelected and unaccountable body is dictating elements of the Scottish debt management and debt relief framework.

16 In our view, the arrangements between MAT and the Scottish Government for the use of the CFS offer inadequate protection to the Scottish debt management and relief legislative framework.