THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS’ (R3) SCOTTISH TECHNICAL COMMITTEE

RESPONSE TO THE CALL FOR EVIDENCE ON THE BANKRUPTCY (SCOTLAND) REGULATIONS 2016 BY THE SCOTTISH PARLIAMENT DELEGATED POWERS AND LAW REFORM COMMITTEE
COMMENTS FROM THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS’ (R3) SCOTTISH TECHNICAL COMMITTEE

INTRODUCTION

1. R3, the Association of Business Recovery Professionals, is the leading professional association for insolvency, business recovery and turnaround specialists in the UK. It promotes best practice for professionals working with financially troubled individuals and businesses. The association’s membership is made up of insolvency practitioner (IPs), insolvency lawyers and other professionals who work in the field of insolvency and corporate recovery. It has UK-wide representation and debates key issues facing the profession. Most insolvency practitioners (IPs) and a number of insolvency lawyers operating in Scotland are members.

2. The Association’s Scottish Technical Committee (“STC”) welcomes the opportunity to respond to the request by the Scottish Parliament’s Delegated Powers and Legal Reform Committee for views on the Bankruptcy (Scotland) Regulations 2016. Engagement with stakeholders in advance of the Regulations being laid before the Scottish Parliament is a positive step towards ensuring Scottish legislation is fit for purpose.

GENERAL COMMENTS

3. Bankruptcy legislation had become extremely unwieldy over the past 30 years. The consolidation into the new Bankruptcy (Scotland) Act 2016 and the accompanying secondary bankruptcy legislation are wholly welcomed. Those who deal with bankruptcy legislation on a regular basis as well as those who access it less frequently will find the updated format more intuitive to use.

4. The issue of the draft consolidated regulations for informal consultation provided a useful opportunity to work with the Accountant in Bankruptcy. Advice was sought from us on certain of the more technical provisions which assisted with the drafting. This we applaud and hope this engagement with stakeholders will continue going forward.

5. We commented previously on the 8% statutory rate of interest which has been retained. We maintain the view that an opportunity has been missed to reconsider the statutory rate given the level of current rates of interest which have been low for some considerable length of time and are set to do so for the foreseeable future. The AiB has responded they are in agreement with us however as this is due to be subject to review by the UK Ministry of Justice they will await the outcome before making any change in Scotland.

6. We again raise our concerns over the conflicting roles and responsibilities of the Accountant in Bankruptcy. Government has previously provided assurances that these would be taken on board and addressed through regulations however this appears not to be the case. Although we acknowledge and welcome the appointment of the AiB Advisory Board it is not the PTD Review Board which we understood would be established by Regulations and have statutory powers.

7. Money advice which is one of the cornerstone policy requirements of the Scottish bankruptcy regime is to be provided by a money adviser prior to a debtor entering a debt solution. The regulations set out who is qualified to act as a money adviser in Scotland. It is somewhat of an anomaly that a money adviser has to be licensed by the Money Advice Trust which is registered in England and Wales. The anomaly extends even further as the Common Financial Tool
specified by Scottish Ministers to assess a debtor's contribution is the Common Financial Statement (CFS). In order to use the CFS one has to be a licensed Money Adviser. It would be more coherent if control and licensing of money advisers was retained under the AiB.

**TYPOGRAPHICAL ERRORS AND INCONSISTENCIES**

8. **General observations**
   A review of spelling, lack or inappropriate use of apostrophes and overall presentation is required. There are instances where boxes for inserting information are not aligned with their respective headings. Email details should be requested consistently wherever contact details are sought.

9. Whereas sequential numbering has been used for all the Bankruptcy (Scotland) Regulations 2016 forms, Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 forms, this is not the case with the forms for the PTD (Forms) (Scotland) Regulations 2016 where lettering has been added for Forms 1A, 1B, 2A, 4A, 4B and 4C. We would suggest the same approach be adopted for the PTD forms as has been adopted for the other forms throughout the consolidation exercise.

10. **Bankruptcy Regulations 2016**

   Regulation 5(2), 5(3) These deal with the revocation or suspension of the approval of a money adviser however there does not appear to be any provision for the appeal of the AiB’s decision.

   Regulation 5(4) This provides for notification of revocation or suspension to any debtor known to the AiB that the money adviser is acting as a money adviser. It is unclear when notification is to be made particularly as there is no appeal process, and whether all debtors the money adviser has worked with are to be notified.

   Regulation 14 (……AiB’s duty to consider ……)

   Regulation 22 “……..is to be at a single exchange rate of for that currency…..”

   Regulation 28 To reflect s.221 “…is elected or appointed may be taken into account” – suggest this be amended to must.

Incorrect use of “dependant” and ‘dependent’
Use of Employer’s needs to be checked throughout
Mixed use of “bankruptcy” and “sequestration”. Suggest should reflect wording in Act.

Form 1

Section 6.2 (self-employed) details – The headings “Pay Period” and “Gross Pay” are unclear. If gross pay is requested “net pay” should also be detailed.

Section 3 (Qualifying Criteria) – Penultimate paragraph under MAP says “…refer to criteria overleaf for Full Administration bankruptcy”. Suggest remove overleaf.

Section 7 and Section 8 – It would be more ordered for the second column to be “frequency” and the third column to be “Amount (£)”

Section 12 (Assets) - The last heading under 12.1 should be “Hire Purchase/Finance company name”
Section 12.7 refers to “possessions”. For consistency we suggest use “assets”. (The Statement of Undertakings and Statement of Truth refer to “assets”).
Section 13 (Debts) – this section which asks for information on creditors is followed by Section 14 (Bank/Building Society accounts) and Section 15 (Other accounts). It would be more logical for Section 14 and Section 15 which both refer to assets to come after section 12 (which deals with assets). The creditor information (Section 13 – Debts) will then follow at the end. All assets including book debts should be included in the asset section.

Statement of Undertaking – at no.2 the debtor’s disclosure is of all assets on the bankruptcy award date. At the time of making the undertaking the award date is not known. No. 15 is unclear. Ongoing liabilities and debts at the date of sequestration have been conflated.

Form 3 The need for a fax number is unclear
Form 7 Table and size of font is not legible
Form 13 para 11 unclear wording
Form 23 Details of ‘net’ income should be included

11. Protected Trust Deed Regulations 2016

Form 2 last paragraph (in bold) of notes on first page – ‘Failure to do so….’
Note 6 – a useful addition would be including in bold that the details provided will be used for the payment of any dividend unless the creditor notifies the trustee otherwise. This would make clear to the creditor how the details will be used.

Form 3 Reference to B(S)A 2016 s.170(1)(e) and (i) – there is no s.170(1)(i) and wonder whether this should be s.170(1)(g)?
Form 4 last page – ‘……my recommended course of action’
Form 5 In the table suggest re-order of columns:

| Expected Totals (Form 3) | Actual totals | Actual | Expected | Final Totals |


Form 6 Application for conversion of a protected trust deed into Bankruptcy. Suggest this should be sequestration to reflect the wording in Regulation 17(1)
Form 7 Conversion of protected trust deed into bankruptcy – suggest this should be sequestration to reflect the wording in Regulation 17(2)

Chair
R3 Scottish Technical Committee

21 October 2016