Delegated Powers and Law Reform Committee

Bankruptcy (Scotland) Act 2016: Secondary Legislation and other Subordinate Legislation
Contents

Bankruptcy (Scotland) Act 2016: Secondary legislation 1

Introduction 1

Bankruptcy (Scotland) Act 2016: Instruments subject to affirmative procedure 2

Bankruptcy (Scotland) Act 2016: Instrument subject to negative procedure 12

Bankruptcy (Scotland) Act 2016: Instrument not subject to any parliamentary procedure 14

Other matters arising in relation to this package of instruments 15

Other subordinate legislation 18

Points raised: Instruments not subject to any parliamentary procedure 19

Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 (SSI 2016/313) (Delegated Powers and Law Reform) 19

No points raised 20

Annexe A 22

Annexe B 24

Annexe C 26
Delegated Powers and Law Reform Committee

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;

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;

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.
Committee Membership

Convener
John Scott
Scottish Conservative and Unionist Party

Deputy Convener
Stuart McMillan
Scottish National Party

Rachael Hamilton
Scottish Conservative and Unionist Party

Monica Lennon
Scottish Labour

David Torrance
Scottish National Party
Introduction

1. At its meeting on 1 November 2016, the Committee considered the following instruments associated with the implementation of the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”)—

   Bankruptcy (Scotland) Regulations 2016 [draft];

   Protected Trust Deeds (Forms) (Scotland) Regulations 2016 [draft];

   Protected Trust Deeds (Scotland) Amendment Regulations 2016 [draft];

   Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 (SSI 2016/295);

   Bankruptcy (Scotland) Act 2016 (Commencement) Regulations 2016 (SSI 2016/294 (C.27)).

2. This package of instruments is concerned with furthering the process of consolidating bankruptcy law in Scotland begun by the 2016 Act.

3. The instruments were referred to the Delegated Powers and Law Reform Committee as lead committee given the scrutiny undertaken on the Bankruptcy (Scotland) Bill by its predecessor committee during session 4 and because the instruments are primarily about consolidation rather than providing new policy.

4. As lead committee, there is in this case the requirement for the Committee to scrutinise the instruments from both a technical and a policy perspective.

5. To inform its consideration of these instruments the Committee issued a call for evidence, receiving responses from the Institute of Chartered Accountants for Scotland (“ICAS”) and R3, the Association of Business Recovery Professionals (“R3”).

6. The Minister for Business, Innovation and Energy, Paul Wheelhouse, attended the meeting on 1 November to give evidence on the instruments and also to move the relevant motions recommending approval of the three affirmative instruments.

7. The Committee’s recommendation on each of the instruments is set out below.

8. The Committee’s recommendations on the instruments considered at the meeting which are not connected to the Bankruptcy (Scotland) Act 2016 are set out at the end of this report.
Bankruptcy (Scotland) Act 2016: Instruments subject to affirmative procedure

Bankruptcy (Scotland) Regulations 2016 [draft] (Delegated Powers and Law Reform)

9. This instrument forms part of the package of instruments laid before the Parliament in connection with the commencement of the 2016 Act.

10. The 2016 Act consolidates the legislation relating to bankruptcy law in Scotland by bringing together enactments on bankruptcy into one statute. Specifically, the 2016 Act consolidates the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”) and subsequent amending legislation, and also the substantive provisions of the Protected Trust Deeds (Scotland) Regulations 2013.

11. The 2016 Act will come into force on 30 November 2016, and will apply to bankruptcies petitioned or applied for (or trust deeds entered into) on or after that date. The 1985 Act will be repealed when the 2016 Act comes into force, but it will continue to apply to older bankruptcies petitioned or applied for before that date.

12. The policy objective of the draft Regulations is to consolidate and replace the main secondary legislation under the 1985 Act, as part of the replacement of that Act by the 2016 Act. The draft Regulations consolidate provisions currently set out in four separate instruments. These are: the Bankruptcy (Scotland) Regulations 2014; the Common Financial Tool etc. (Scotland) Regulations 2014; the Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014; and the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010. The overall aim of the consolidation exercise is to aid the accessibility and understanding of bankruptcy law for practitioners and those affected by it. In the same way as for the 2016 Act, the draft Regulations will apply to bankruptcies petitioned or applied for (or trust deeds entered into) on or after 30 November 2016. The various instruments which are being replaced will continue to apply to older bankruptcies.

13. Since this is chiefly a consolidation exercise, the bulk of the provisions in the draft Regulations merely re-enact the provisions of the existing secondary legislation which is being consolidated, sometimes with minor modifications which are required in order to produce a satisfactory consolidation.

14. The draft Regulations do however make some limited policy changes. These are detailed below.

15. If approved by the Parliament, the draft Regulations will come into force on 30 November 2016.
16. In considering the instrument, as well as taking oral evidence from the Minister and his officials, the Committee sought written clarification from the Scottish Government regarding apparent drafting errors as well as on the clarity of the instrument. The correspondence is reproduced at Annexe A.

Technical Scrutiny

17. The Committee draws the instrument to the attention of the Parliament under reporting ground (h), as the meaning of regulation 22 of the instrument could be clearer.

18. Regulation 22 makes provision in respect of the conversion into sterling of a creditor’s claim stated in a foreign currency. The regulation provides that the manner of conversion is to be at “a single exchange rate of for that currency” as determined by the trustee with reference to prevailing exchange rates on the date of sequestration.

19. The Scottish Government has confirmed that regulation 22 should refer to “..a single exchange rate for that currency.”.

20. The Scottish Government initially proposed to remove the word “of” as a printing point in the Minister’s signing copy.

21. The Committee did not accept that it was appropriate for this error to be corrected as a printing change as in its view the error did not appear to be self-evident in nature, since a doubt may arise as to the intended meaning of the provision.

22. The Committee explored this point with the Minister for Business, Innovation and Energy in oral evidence and the Minister committed to making this change by way of an amending instrument in due course.

23. The Committee welcomes the Minister's commitment.

24. The Committee also draws the instrument to the attention of the Parliament under the general reporting ground as it contains minor drafting errors as follows:

(a) the definition of “common financial tool” in regulation 2 refers incorrectly to regulations 14 to 16. The reference should instead be to regulations 15 to 17. The Committee accepts the Scottish Government’s proposal to correct this error as a printing point in the Minister's signing copy, since the error is minor and highly self-evident;

(b) Form 27 in schedule 1 of the Regulations refers incorrectly to section 140(1) of the Bankruptcy (Scotland) Act 1985 (as amended). The reference should instead be to section 140(1) of the Bankruptcy (Scotland) Act 2016. The Committee welcomes the Scottish Government’s intention to correct this error at the next legislative opportunity;
(c) in the notes to Form 26, the third bullet should refer to a fine imposed in a justice of the peace court or a district court, rather than to a fine imposed in a district court only. The Committee welcomes the Scottish Government’s intention to correct this error at the next legislative opportunity.

Policy changes

Minimal Asset Process

25. Regulation 14 of the draft Regulations makes a policy change in respect of the Minimal Asset Process (“MAP”), which was introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014.

26. MAP provides for a simplified bankruptcy process for debtors who have few assets and who meet the qualifying criteria set out in the 2016 Act.

27. The key requirements of that qualifying criteria are that:

- they must not owe more than £17,000;
- they must not own assets worth more than £2,000; and
- they must have no disposable income available to pay creditors (or must be receiving certain means-tested social security benefits).

28. The 2016 Act requires the Accountant in Bankruptcy (“the AiB”) to consider whether a debtor should be moved out of MAP and into full bankruptcy, on the occurrence of certain triggers. One of these triggers is where the debtor’s assets exceed £5000 “or such other sum as may be prescribed” (schedule 1, paragraph 2(5)(a), 2016 Act). The Regulations change this figure, and prescribe instead a total asset value of £2000. The practical result is that the AiB must consider whether to move a debtor out of MAP when the debtor’s assets exceed £2000 (rather than £5000 at present).

29. The Policy Note which accompanies the draft Regulations gives the following explanation for the change (paragraph 6):

> This change is in order to address anomalies that have been identified in bankruptcy administration and a discrepancy in the way newly identified assets (predominantly PPI compensation) have been treated in Minimal Asset Process and Full Administration bankruptcy cases."

30. The AiB made the draft Regulations available on its website in advance of laying them before the Parliament, and carried out an informal consultation with stakeholders. The Committee is not aware that any concerns have been raised by stakeholders in response to this change.
The Committee explored with the Minister and his officials what the expected effect would be in terms of the number of people transferring out of MAP into full bankruptcy.

The Committee was advised that while it was not possible to offer precise projections, the expectation was that the number of people transferring out of MAP into full bankruptcy as a consequence of this change would be relatively low.

Alex Reid, Head of Policy Development, the AiB, explained that this change is intended to address the situation where a debtor in MAP receives a PPI compensation payment. For a debtor in the full administration bankruptcy process, such a payment would vest in the debtor's estate and with the trustee, but because of the threshold limits it has thus far not been possible to administer such payments within MAP. This change is designed to address that anomaly and to introduce greater fairness to the process. Alex Reid further noted that, so far as the AiB is aware, there have only so far been two instances where people had received PPI compensation payments within the period of a MAP.¹

The Committee also explored with the Minister whether he considered there to be a risk of this change impacting negatively on those in receipt of the lowest incomes.

The Minister committed to paying close regard to the impact of this change. Furthermore, he advised the Committee that the Scottish Government will be undertaking a review in which it will pick up on issues that were raised in the AiB’s informal consultation on the draft Regulations but which were felt to be outwith the scope of this exercise and in so doing could consider any difficulties that might have arisen out of this change.²

The Committee notes the evidence provided by the Minister on this point. In particular the Committee notes the Scottish Government’s intention to undertake a review of matters arising out of the AiB’s informal consultation on the draft Regulations, but which were considered to be out-with the scope of this exercise.

The Committee was designated as lead committee for consideration of these instruments because the instruments are principally concerned with the consolidation of bankruptcy law. Bankruptcy law more generally, however, is a matter for the Economy, Jobs and Fair Work Committee.

With that in mind, the Committee draws the evidence provided to the Committee on this matter and in particular the commitment to undertake a review, to the attention of the Economy, Jobs and Fair Work Committee.
Claims in a foreign currency

39. Regulation 22 prescribes the manner in which the trustee is to convert a creditor’s claim made in a foreign currency into sterling. Regulation 22 re-enacts regulation 11 of the existing Bankruptcy (Scotland) Regulations 2014.

40. Regulation 11 of the 2014 Regulations provides that the manner of conversion is to be at the rate of exchange for that currency prevailing on the date of sequestration, as published in any national newspaper. Regulation 22 modifies this requirement, and provides that the manner of conversion is to be at a single exchange rate for that currency determined by the trustee with reference to the prevailing exchange rates on the date of sequestration. The practical result is that the trustee may use other sources to determine the prevailing exchange rate, not only a national newspaper.

41. In its response to the Committee’s call for evidence, ICAS expressed support of this amendment, noting that 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”.

42. The Committee notes this change.

Money Adviser approval – notification of revocation

43. Under the 2016 Act, no application for bankruptcy may be made unless the debtor has obtained financial advice from an approved Money Adviser. Regulations 3 and 4 of the Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014 prescribe persons who may, and may not, be approved Money Advisers. Regulation 4 also provides that the AiB may revoke or suspend the approval of a Money Adviser in certain circumstances, and the AiB must provide written notice to a debtor of the revocation or suspension of the approval of a Money Adviser to the debtor.

44. The Regulations re-enact these provisions with two small modifications. The AiB is required to also provide written notice of the revocation or suspension, together with reasons, to the Money Adviser in question; and the AiB is only required to provide written notice to a debtor of the revocation or suspension where the AiB knows the Money Adviser is acting for that debtor (see regulation 5(3) and (4)).

45. In its response to the Committee’s call for evidence, ICAS noted—

“We acknowledge and are grateful that following our comments to the informal consultation the 2016 Regulations have been amended to ensure that the AiB notify the Money Adviser of their revoked or suspended status and is also required to provide a reason for the revocation or suspension to the Money Adviser.”
46. **The Committee notes these changes.**

**Minor Changes to Forms**

47. There are various minor changes made to the Forms set out in the schedule to the instrument. The Policy Note explains that these changes have been made in order to address existing errors and anomalies in the current forms, to bring the forms into line with existing practice and to make the forms covering income and expenditure consistent with the Common Financial Tool and the Common Financial Statement in assessing income and expenditure.

48. **The Committee notes these changes.**

**Interest rates**

49. Regulation 26 of the draft Regulations has retained the statutory interest rate for bankruptcy debts, which is currently set out in the existing Bankruptcy (Scotland) Regulations 2014, at 8% per annum.

50. Where sufficient money can be raised from their estate, debtors are required to pay interest at this rate on their debts from the date of bankruptcy to the date the debt was finally repaid (unless a higher contractual rate of interest applies).

51. The 8% figure is in line with the judicial rate of interest (charged on money awarded in court orders from the date of the award). It is also in line with the figure used in England and Wales. The purpose of charging interest in this context is to compensate the creditor for the fact that they have not been able to use their money over the time period in question.

52. However, ICAS and R3 argue that a figure of 8% is punitive in the current financial climate and should be reduced. They highlight a Scottish Law Commission report which recommended the statutory interest rate should fluctuate at 1.5% above the Bank of England base rate (currently 0.25%).

53. The Committee explored the concerns expressed by ICAS and R3 with the Minister and his officials.

54. The Minister expressed his sympathy with these concerns and accepted that a rate of 8% seems punitive.

55. The Minister advised the Committee that a consultation is currently being undertaken in England and Wales on this matter and that the Scottish Government would consider how to proceed in the light of the outcomes of that consultation. The Committee was advised that the consultation is due to conclude shortly.

56. **The Committee draws the concerns expressed by ICAS and R3 about the interest rate for bankruptcy debts to the attention of the Economy, Jobs and Fair Work Committee.**
57. Moreover, the Committee draws to the Economy, Jobs and Fair Work Committee’s attention the Scottish Government’s intention to review the current interest rate in light of the findings of the consultation being undertaken in England and Wales.

Motion

58. The Minister for Business, Innovation and Energy moved the following motion in his name—

S5M-02136—That the Delegated Powers and Law Reform Committee recommends that the Bankruptcy (Scotland) Regulations 2016 [draft] be approved.

59. The motion was agreed to.
This instrument also forms part of the package of instruments in connection with the commencement of the 2016 Act.

The draft Regulations set out the forms to be used in relation to protected voluntary trust deeds entered into by debtors for the benefit of their creditors. Protected trust deeds are regulated by Part 14 of the 2016 Act.

Part 14 of the 2016 Act makes provision about how trust deeds become protected from action by creditors, the consequences of a trust deed being granted that status, the rights of creditors, the discharge of the debtor and trustee from the trust deed, and the administration of trust deeds.

Together with these draft Regulations, Part 14 consolidates with modifications the Protected Trust Deeds (Scotland) Regulations 2013 (S.S.I. 2013/318, as amended). The numbering of the forms used in those Regulations has been retained.

If approved by the Parliament, the draft Regulations will come into force on 30th November 2016. They will apply to those trust deeds which are executed on or after that date (in accordance with sections 162 and 234(3) of the Act).

In considering the instrument, as well as taking oral evidence from the Minister and his officials, the Committee sought written clarification from the Scottish Government regarding two apparent drafting errors. The correspondence is reproduced at Annexe B.

Technical Scrutiny

The Committee draws the Regulations to the attention of the Parliament on the general reporting ground, as they contain two minor drafting errors.

The references to section 170(1)(i) of the Bankruptcy (Scotland) Act 2016 in the entry for Form 3 in the list of forms used in connection with protected trust deeds contained in the schedule, and in the heading to Form 3 in the schedule, should be references to section 171(1)(i).

The Committee welcomes the Scottish Government's intention to correct the errors at the next legislative opportunity.

Policy changes

The Policy Note for the instrument explains that the opportunity has been taken to improve and clarify regulations where appropriate, and taking on views expressed in the public consultation on the draft Regulations.
70. The policy changes made by these draft Regulations are relatively minor in their effects:

(a) Regulation 2(2) and (4) amends the forms to be sent to give creditors notice of a proposal to protect a trust deed, to require a Form 2A to be used (as at present), instead of the “Common Financial Statement” used in the industry. Form 2A lists various types of income and expenditure which may be received or incurred in the debtor’s household. This change has required an amendment of sections 170 and 171 of the Act (which can be done under a power in section 194.) The Policy Note explains that this amendment has restored the provision for the form that was contained in the Protected Trust Deeds (Scotland) Regulations 2013.

(b) Regulation 2(4) adds an express requirement for a Part 2 of the Form 3, which was previously omitted from the Regulations— the trustee’s proposal to the AiB to protect a trust deed, including a declaration by the trustee. Unlike the other amendment, this was not legally required in the 2013 Regulations, before the 2016 Act. It requires a declaration from trustees, which again is currently complied with in practice.

(c) The numbering of the forms remains the same as in the 2013 Regulations. There have been a few minor amendments to some of the forms. In particular extra fields have been added to the tables in Forms 4, 6 and 7, for miscellaneous payments and statutory interest. This has necessitated other minor amendments in the notes to the Forms, and the calculation formulae detailed in the Forms.

71. **The Committee notes these changes.**

**Motion**

72. The Minister for Business, Innovation and Energy moved the following motion in his name—

S5M-02137—That the Delegated Powers and Law Reform Committee recommends that the Protected Trust Deeds (Forms) (Scotland) Regulations 2016 [draft] be approved.

73. The motion was agreed to.
74. These draft Regulations also form part of the package of instruments in connection with the commencement of the 2016 Act but are made under powers contained in the Bankruptcy (Scotland) Act 1985 (as amended).

75. The draft Regulations amend the Protected Trust Deeds (Scotland) Regulations 2013, with a view to ensuring consistency and ease of administration for trustees and the AiB.

76. The draft Regulations replicate the structure and content of certain forms (4, 5, 6 and 7) in the Protected Trust Deeds (Scotland) (Forms) Regulations 2016, with the primary purpose of applying these in the administration of protected trust deeds granted on or after 28 November 2013, but before 30 November 2016.

77. In particular, extra fields have been added to the tables in forms 4, 6 and 7 for miscellaneous payments and statutory interest. This has required other minor amendments in the Notes to Forms, and in the calculation formulae in the Forms.

78. If approved by the Parliament, the draft Regulations will come into force on 30 November 2016. However due to provision in the 2016 Act, the amendments of the forms apply to trust deeds which are granted on or after 28 November 2013, but before 30 November 2016.

Technical Scrutiny

79. The Committee does not draw the Regulations to the attention of the Parliament.

Policy changes

80. The Regulations make no changes to policy on bankruptcy.

Motion

81. The Minister for Business, Innovation and Energy moved the following motion in his name—

S5M-02138—That the Delegated Powers and Law Reform Committee recommends that the Protected Trust Deeds (Scotland) Amendment Regulations 2016 [draft] be approved.

82. The motion was agreed to.
Bankruptcy (Scotland) Act 2016: Instrument subject to negative procedure

Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 (SSI 2016/295) (Delegated Powers and Law Reform)

83. These Regulations also form part of the package of instruments in connection with the commencement of the 2016 Act.

84. The Regulations set out the procedure for the making of applications to, and decisions by, the AiB under the Act and prescribe the forms to be used when applying to the AiB.

85. The Regulations apply to sequestrations for which a petition is presented, or a debtor application made, on or after 30th November 2016. They replace and update the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014 for those sequestrations.

86. The Regulations also provide further detail around the process for applications for review by the AiB of a decision under the 2016 Act, together with forms to be used when making an application for review.

87. The Regulations are subject to the negative procedure and come into force on 30th November 2016.

88. In considering the instrument, the Committee wrote to the Scottish Government seeking an explanation for the delay of 6 days between making the instrument and laying it before Parliament. Following receipt of the Scottish Government’s response, the Committee accepted that the instrument was laid as soon as practicable after making.

Technical Scrutiny

89. The Committee makes no recommendation in relation to this instrument.
Policy changes

90. The Regulations restate the existing Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014, with the following two minor exceptions:

(i) Regulation 6 sets out the procedure for first instance applications to the AiB. Following consultation, a minor change has been introduced at regulation 6(12)(b), to allow copies of first instance applications to AiB to be sent to “any place of business” of a partnership where it appears service will be effective, instead of to “the principal address” of the partnership.

The Policy Note explains that stakeholders highlighted that the existing provision could be problematic for practitioners and the ability to issue notices to any place of business will assist with case administration.

(ii) Regulation 11 prescribes that a report to the AiB of the statutory meeting appointing a replacement trustee must be made in Form 4, and states who must be notified of the opportunity to make an objection to the appointment and the timescale for doing so.

91. Following consultation, a minor change has been introduced at regulation 11(4)(b) to provide that where the AiB decides to sustain an objection to the appointment of a replacement trustee and order a further statutory meeting to be held, it must notify the original and replacement trustees, the objector and any other interested parties of that order “without delay”. (The existing regulations require notification but do not specify that notification must be “without delay”).

92. The Committee notes these changes and makes no recommendation in relation to this instrument.
Bankruptcy (Scotland) Act 2016: Instrument not subject to any parliamentary procedure

Bankruptcy (Scotland) Act 2016 (Commencement) Regulations 2016 (SSI 2016/294 (C.27)) (Delegated Powers and Law Reform)

93. These Regulations also form part of the package of instruments in connection with the commencement of the 2016 Act.

94. The Bill for the 2016 Act received Royal Assent on 28 April 2016. Sections 225, 226, 228 to 230, 237 and 238 came into force on the following day. The Regulations bring the remainder of the Act into force on 30 November 2016.

95. The Regulations are laid before the Parliament but are not subject to any further procedure. They contain nothing in relation to policy and will come into force on 30 November 2016.

96. In considering the instrument, the Committee wrote to the Scottish Government seeking an explanation for the delay of 6 days between making the instrument and laying it before Parliament. Following receipt of the Scottish Government’s response, the Committee accepted that the instrument was laid as soon as practicable after making.

Technical Scrutiny

97. The Committee makes no recommendation in relation to this instrument.
Other matters arising in relation to this package of instruments

98. As noted earlier, the Committee issued a call for evidence on this package of instruments and received two submissions. These submissions highlighted two matters the respondents considered could have been addressed in this package of instruments.

99. Firstly, both ICAS and R3 highlighted potential conflicts of interest in the roles played by the AiB.

100. The AiB currently has responsibility for taking a number of decisions which used to be the responsibility of the courts. For example, a debtor now applies to the AiB if they wish to be declared bankrupt, rather than petitioning the court.

101. The Bankruptcy and Debt Advice (Scotland) Act 2014 ("the 2014 Act") transferred a number of additional decision-making responsibilities to the AiB. These included:

- the power to grant a debtor contribution order, setting how much of a debtor’s income should be contributed to the bankruptcy;
- the power to deal with applications from trustees for directions on how to deal with a particular case; and
- the power to make bankruptcy restrictions orders, which extend the restrictions imposed by bankruptcy where a debtor has behaved dishonestly or unco-operatively.

102. In addition, the 2014 Act created a review process, whereby the AiB would be responsible for reviewing its own decisions before the matter could be brought before the courts.

103. A number of stakeholders noted that the AiB would, in a number of situations, be responsible for gathering evidence, making a decision and reviewing that decision. They argued that appropriate procedures should be put in place to prevent conflicts of interest.

104. In their submissions ICAS and R3 contended that the opportunity afforded by these instruments to put more effective procedures in place had been missed.\(^7\)

105. The Committee asked the Minister why the Scottish Government had not taken the opportunity afforded by these Regulations to put more effective procedures in place.

106. While noting that there had no suggestion of any impropriety on the part of the AiB, the Minister indicated that—

> It would be in the AiB’s interest, as well as in the wider interests of transparency, to have the matter addressed.\(^8\)
107. He advised the Committee that this matter would be addressed as part of the aforementioned forthcoming review.

108. Secondly, the responses to the Committee’s call for evidence raised concerns about the regulation of money advisers.

109. Those applying for bankruptcy, a protected trust deed or the Debt Arrangement Scheme (a way of paying debts over a longer time period) must get money advice from an approved money adviser. The draft Bankruptcy (Scotland) Regulations 2016 set out the requirements for approval.

110. In addition, the draft Bankruptcy (Scotland) Regulations 2016 (regulation 5(1)g)) require that a money adviser must be licensed to use the Common Financial Statement by the Money Advice Trust.

111. The Common Financial Statement is a tool used to facilitate negotiations between creditors and money advisers over the level of a debtor’s disposable income. It has been adapted in Scottish legislation to provide the framework for the “Common Financial Tool”. This is used to calculate a debtor’s disposable income in bankruptcy and other statutory debt options.

112. The Money Advice Trust is a debt charity. It developed the Common Financial Statement. Licence requirements include restrictions on the inappropriate use of the Money Advice Trust name and logo and a requirement to keep the underlying figures used in the calculations confidential.

113. ICAS and R3 suggested that money advisers will, in effect, be regulated by the Money Advice Trust as a result of this requirement. They suggest that it is inappropriate for this matter to be in the control of an unaccountable third party. No organisations representing money advisers responded to the Committee on this issue.

114. The Committee was advised that the Common Financial Statement had been adopted to provide—

> a level of consistency and transparency into the process and ensure that debtors would, where possible, be treated fairly.”

115. It was noted that as of yet, the Money Advice Trust has not revoked a license.

116. The Minister indicated that this would be another matter that could be considered as part of the review.

117. In addition, ICAS raised concerns about the absence of an appeal process against a decision by the AiB to withdraw a money adviser’s approved status. It argues that this is unnecessarily draconian.

118. The Minister recognised that there was no such appeal process. However, he indicated that there would be an opportunity for redress in the form of a judicial
review. At the same time, however, he indicated that this matter could be explored in the context of the review.\textsuperscript{12}

119. The Committee draws these two matters to the attention of the Economy, Jobs and Fair Work Committee.
Other subordinate legislation

120. At its meeting on 1 November 2016, the Committee agreed to draw the attention of the Parliament to the following instrument—

   Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 (SSI 2016/313)

121. The Committee’s recommendation in relation to the above instrument is set out below.

122. The Committee determined that it did not need to draw the Parliament’s attention to the instruments that are set out at the end of this report.
Points raised: Instruments not subject to any parliamentary procedure

**Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 (SSI 2016/313)**
*(Delegated Powers and Law Reform)*

123. This Act of Sederunt makes provision about the procedure to be followed in petitions for sequestration, and in certain applications and appeals to the sheriff relating to sequestration.

124. The rules set out in the instrument apply when the sequestration concerned is one to which the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) applies (that is, sequestrations petitioned or applied for on or after 30 November 2016).

125. The instrument prescribes certain forms, which are set out in schedule 1, in connection with petitions for sequestration, and in connection with certain applications and appeals to the sheriff relating to sequestrations. Schedule 2 also prescribes certain forms, for use in the Register of Inhibitions, in relation to sequestrations and trust deeds.

126. The instrument is laid before the Parliament but is not subject to any further Parliamentary procedure. It will come into force on 30 November 2016. The instrument is made in connection with the commencement of the Bankruptcy (Scotland) Act 2016 but is separate to the instruments referred to earlier in this report as it was laid by the Lord President’s Private Office and not by the Scottish Government.

127. In considering the instrument, the Committee sought written clarification from the Lord President’s Private Office regarding issues with drafting and cross-referencing. The correspondence is reproduced at Annexe C.

128. The Committee draws the instrument to the attention of the Parliament on the general reporting ground. Form 6.1-A in schedule 1 of the instrument contains the following minor drafting errors:

(1) Some text is missing from the second and alternative sub-paragraph (b) of paragraph 3 *(where petitioner is a trustee under a trust deed)* of the Statement of Facts. The paragraph should read “It would be in the best interests of the creditors that an award of sequestration be made..”; and

(2) The first sub-paragraph (b) of paragraph 3 *(where petitioner is a trustee under a trust deed)* of the Statement of Facts should refer, in the italicised note, to the debtor rather than to the respondent.

129. The Committee notes that the Lord President’s Private Office plans to correct these errors before the instrument comes into force on 30 November 2016 and welcomes this.
No points raised

130. At its meeting on 1 November 2016, the Committee also considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit.

**Delegated Powers and Law Reform**

- Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Bankruptcy (Scotland) Act 2016 (SSI 2016/312)

**Finance and Constitution**

- Scottish Fiscal Commission Act 2016 (Commencement and Transitory Provision) Regulations 2016 (SSI 2016/326 (C.30)

**Health and Sport**


**Justice**

- Air Weapons Licensing (Exemptions) (Scotland) Regulations 2016 [draft]
- Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No. 4) (Simple Procedure) 2016 (SSI 2016/315)
- Act of Sederunt (Fees of Solicitors and Shorthand Writers in the Court of Session, Sheriff Appeal Court and Sheriff Court Amendment) 2016 (SSI 2016/316)
- Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Postal Administration) 2016 (SSI 2016/318)
- Act of Sederunt (Rules of the Court of Session 1994 and Summary Application Rules 1999 Amendment) (Serious Crime Prevention Orders etc.) 2016 (SSI 2016/319)

**Rural Economy and Connectivity**

- Crofting Commission (Elections) (Scotland) Amendment Regulations 2016 [draft]
3 ICAS written submission to the Committee’s call for evidence
4 ICAS written submission to the Committee’s call for evidence
5 Written submissions from ICAS and R3 to the Committee’s call for evidence
7 Written submissions from ICAS and R3 to the Committee’s call for evidence
9 Written submissions from ICAS and R3 to the Committee’s call for evidence
10 Delegated Powers and Law Reform Committee, Official Report, 1 November 2016, col. 10
11 ICAS written submission to the Committee’s call for evidence
On 13 October 2016, the Scottish Government was asked:

1. The instrument cites section 8(3)(a) of the 2016 Act as one of the enabling powers in exercise of which the Regulations are made. However, section 8(3)(a) does not appear to confer a power on the Scottish Ministers. Please can you provide an explanation as to why section 8(3)(a) is cited.

2. The definition of “common financial tool” in regulation 2 appears to include an incorrect cross-reference. It appears that the cross-reference should be to regulations 15 to 17 (rather than to regulations 14 to 16). Do you agree that this is an error? If so, is any corrective action proposed?

3. Regulation 22 appears to contain a typographical error, in that it refers to “..a single exchange rate of for that currency..”. If it is agreed that this is an error, please can you provide an explanation of what is intended and confirm whether any corrective action is proposed.

4. In section 11 (Other property) of Form 1 (page 34) the fifth box requires information on “Date from and to”, but does not indicated what these dates are in respect of. Given that this box comes directly under the box requiring information about the date the property was sold, is it considered that this element of the form is sufficiently clear in indicating what information is required? If not, is any corrective action proposed?

5. Form 27 (page 141) appears to refer in error to “section 140(1) of the Bankruptcy (Scotland) Act 1985 (as amended).” It appears that this reference should instead be to section 140(1) of the Bankruptcy (Scotland) Act 2016. Do you agree that this is an error? If so, is any corrective action proposed?

6. In the notes to Form 26 (page 140):

   (a) it appears that the title to the notes should read “Debtor certificate of discharge (where the Accountant in Bankruptcy is the Trustee)” rather than “Debtor certificate of discharge” only; and

   (b) it appears that the third bullet point in note (1) should refer (per section 145(3)(b) of the 2016 Act) to a fine imposed in a justice of the peace court (or a district court), rather than to a fine imposed in a district court only.

Do you agree that these words should also be included? If so, is any corrective action proposed?
The Scottish Government responded as follows:

1. Section 8(3)(a) is cited because it is the operative use in the 2016 Act of the term “statement of assets and liabilities” the definition of which in section 228(1) (interpretation) mentions prescribing the form of a statement of assets and liabilities (by regulations). It is considered helpful to the reader to identify the operative provision of the 2016 Act which together with the definition confers power to prescribe Forms 1, 3 and 4.

2. The cross-reference should be to regulations 15 to 17 - the Government thanks the Committee’s advisers for drawing this to its attention. It is proposed to correct this as a printing point as a self-evident minor error which can only be interpreted one way. The correct reference is clear from regulation 3(1) of the Common Financial Tool etc. (Scotland) Regulations 2014 (S.S.I. 2014/290 as amended) as part of the consolidation.

3. The typographical error in regulation 22 should refer to “..a single exchange rate for that currency..”, as in regulation 11 of the Bankruptcy (Scotland) Regulations 2014 (S.S.I. 2014/225) which is consolidated and updated. The Government thanks the Committee and proposes to remove “of” as a printing point as a self-evident minor error which can only be interpreted one way.

4. Question 11.1 of Form 1 is whether the debtor currently owns property/land, or has owned property, in the last 5 years which is not the debtor’s current residence. The Government considers it is sufficiently clear in this context that it is the dates of legal ownership which are required in the “Date from and to” boxes. Although they follow immediately under the box on the date the property was sold, the date of sale could provide additional information (e.g. conclusion of a bargain to sell the property).

5. The reference in Form 27 should be to section 140(1) of the 2016 Act. The Government apologises for the oversight and will correct this at the next legislative opportunity. Section 235(4) of the 2016 Act and section 21 of the Interpretation and Legislative Reform (Scotland) Act 2010 allow the form as corrected to be used meantime. The Accountant in Bankruptcy will make the position clear on the Accountant’s website.

6. In the notes to Form 26—
   (a) for consistency the title to should include “(where the Accountant in Bankruptcy is the Trustee)”, though no confusion is caused to the recipient or other reader of the form by that omission.
   (b) the third bullet should also refer, in accordance with section 145(3)(b) of the 2016 Act, to liability to pay a fine imposed in a justice of the peace court. The Government will correct this at the next legislative opportunity. Paragraph 33(1) of the schedule of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 and section 21 of the Interpretation and Legislative Reform (Scotland) Act 2010 allow the form as corrected to be used meantime. The Accountant in Bankruptcy will make the position clear on the Accountant’s website.
Annexe B

Protected Trust Deeds (Forms) (Scotland) Regulations 2016 [draft]

On 13 October 2016, the Scottish Government was asked:

1. Regulation 2(1) provides that the forms set out in the schedule are prescribed for the purposes of the provisions of the Bankruptcy (Scotland) Act 2016 (“the Act”) referred to in the third column of the table in the schedule. Regulation 2(4) inserts section 171(1)(i) into the Act, to enable the prescription of a form (statement by trustee-trust deed presented for protection).

   (a) Is there an omission in the third column of the Schedule at the entry for Form 3 in the list of forms, as that Form does not appear to be prescribed for the purposes of section 171(1)(i)?

   (b) In that respect is there an error in that column at that entry, and in the heading to Form 3, as section 170(1)(e) and (i) are referred to, but it appears there is no subparagraph (i) of that subsection?

2. Regulation 2(2) and (3) repeal the definition of “the Common Financial Statement” (CFS) in section 193 of the Act, and remove the reference to the CFS in section 170(1)(d)(ii) of the Act.

Please explain therefore why it is appropriate that Form 2A in the Schedule (income and expenditure) on page 15 of the instrument refers in two places to the “Common Financial Statement (CFS) trigger figures” and in one place to the “Common Financial Statement (CFS) allowances”. Or is there any error in the Form?

3. Would corrective action be proposed?

The Scottish Government responded as follows:

1. The reference to “Section 170(1)…(i)” should be to “171(1)…(i)” in the entry for Form 3 in the schedule and the Form heading. The Government thanks the Committee for drawing the error to its attention.

2. It remains apt to refer in Form 2A to the “Common Financial Statement (CFS) trigger figures” and the “Common Financial Statement (“CFS”) allowances” notwithstanding the repeal by regulation 2(2) and (3) of the references to the CFS in Part 14 of the Act on trust deeds for the benefit of creditors.

   This is because the “common financial tool” which must be used under Part 14 is defined in section 228(1) of the Act (general interpretation) by reference to section 89(1) of the Act, under which the CFS is specified as the common financial tool in regulation 15 of the Bankruptcy (Scotland) Regulations 2016 (draft) laid with this instrument. The CFS trigger figures and allowances remain relevant. It is the common financial tool which must be used under Part 14, as made clear in sections 168(1) and 171(1)(h) of the Act. Restoring bespoke Form 2A, consistent with the
current Protected Trust Deeds (Scotland) Regulations 2013 (S.S.I. 2013/318 as amended) which are consolidated in this instrument, as set out in the Policy Note, means that the repealed references to the CFS in Part 14 become unnecessary.

3. The Government will correct the references concerning Form 3 at the next legislative opportunity. Part 2 of Form 3 is provided for under section 194 rather than section 171(1)(i), but the Government accepts use of Part 2 of the form would not be required meantime, although section 21 of the Interpretation and Legislative Reform (Scotland) Act 2010 would allow it to be used meantime in practice, as at present; Part 2 of Form 3 is not currently prescribed in the current Protected Trust Deeds (Scotland) Regulations 2013 as explained in the Policy Note. The Accountant in Bankruptcy will make the position clear on the Accountant’s website.
Annexe C

Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016 (SSI 2016/313)

On 13 October 2016, the Lord President’s Private Office was asked:

1. Rule 1.1(3) provides that the Act of Sederunt applies to sequestrations as regards which the petition is presented, or the debtor application is made, on or after the date on which the Act of Sederunt comes into force (30 November 2016). Similar provision is not made limiting the application of the Act of Sederunt to trust deeds executed on or after that date.

Schedule 2 to the Act of Sederunt prescribes forms for use in relation to the registration of notices of inhibition in the Register of Inhibitions. Form C is to be used by the trustee under a trust deed when recording notice of the trust deed in the Register of Inhibitions, under paragraph 3(1) of schedule 4 to the 2016 Act. Form D is to be used by the trustee under the trust deed when recording a notice of recall under paragraph 3(3) of schedule 4 to the 2016 Act.

Schedule 4 to the 2016 Act is introduced by section 162, which provides that sections 163 to 193 and schedule 4 of that Act have effect in relation to voluntary trust deeds executed on or after the date on which those provisions come into force (30 November 2016).

In light of the above, please explain why it is considered appropriate not to limit the application of the Act of Sederunt to trust deeds executed on or after the date on which the Act of Sederunt comes into force.

2. In Form 6.1-A, in the Statement of Facts:

(a) it appears that there may be an error in the cross-reference in paragraph 2(b) of the Statement to section 12 of the 2016 Act. Section 12 makes no reference to the basis of compatibility of the court’s jurisdiction with the EC insolvency proceedings regulation;
(b) it appears that sub-paragraph (b) of paragraph 3 (where petitioner is a trustee under a trust deed) of the Statement should refer, in the italicised note, to the debtor rather than to the respondent; and
(c) there appears to be some text missing in the second and alternative sub-paragraph (b) of paragraph 3 (where petitioner is a trustee under a trust deed) of the Statement. It appears that this should read (per section 2(7) of the 2016 Act) “...it would be in the best interests of the creditors that an award of sequestration be made.”.

In respect of each of (a) to (c) above, is it agreed that there is an error? If so, is any corrective action proposed?

3. Schedule 3 to the Act of Sederunt specifies that a document may be served by consular service in an EU member state (including Denmark) under the Service Regulation (schedule 3, paragraph 4), and in a Hague Convention country (other than an EU member state) (schedule 3, paragraph 5). Paragraph 8(2) of schedule 3
(Consular service) provides that consular service may be effected only if (a) the law of the member state where the document is to be served permits it or (b) the document is being served on a British national.

It is noted that “EU member state” and “Hague Convention country” are defined in schedule 3, but that “member state” is not. Please confirm whether the reference in paragraph 8(2) of schedule 3 to “member state” is intended to refer both to EU member states and to Hague Convention countries, or, alternatively, is intended to refer only to EU member states. Is it considered that the provision in paragraph 8(2) of schedule 3 is sufficiently clear in this regard?

The Lord President's Private Office responded as follows:

1. It is acknowledged that rule 1.1 might have explicitly addressed the issue of the application of the rules to trust deeds as well as to sequestrations. However, in terms of paragraphs 2(3) and (4) of schedule 2 of the rules, Forms C and D are forms prescribed for the purposes of paragraphs 3(1) and (3) of schedule 4 of the 2016 Act. As schedule 4 only has effect in relation to trust deeds executed on or after 30 November 2016, it follows that the forms only have effect in relation to trust deeds executed on or after that date.

2. (a) While section 12 of the Bankruptcy (Scotland) Act 2016 includes no overt reference to Article 3 of Council Regulation 1346/2000 (referred to in Form 6.1-A as the EC Insolvency Proceedings Regulation), the information that section 12 requires to be stated in the petition is the information that is required for the purpose of determining whether or not Scottish courts have jurisdiction in insolvency proceedings for the purposes of Article 3. Section 12 derives from section 6A of the Bankruptcy (Scotland) Act 1985, which was inserted by the Insolvency (Scotland) Regulations 2003 (SI 2003/2109). The explanatory notes to those regulations are referred to for their terms. In the circumstances it is not agreed that the reference to section 12 involves any error.

(b) It is agreed that the reference to the “respondent” is incorrect and that the reference should have been to the “debtor”. However, given the context of a note providing guidance for the completion of a form, and given that the note relates specifically to the completion of a Statement of Fact that commences with the words, “The debtor has failed to comply with…..”, it is considered that there is no risk of the note being misinterpreted. It is nevertheless anticipated, as noted below, that an early opportunity will present to correct the reference.

(c) It is agreed that the words “the creditors” have been omitted in error. It is therefore proposed to invite the Scottish Civil Justice Council to submit a corrective amendment to the Court of Session for approval, with a view to the correction taking effect before the rules come into force.

3. In paragraph 8(2)(a) of schedule 3 the condition that consular service is permitted under the law of the state in which it is being effected is intended to refer to both EU member states and Hague Convention countries. It is accepted that the drafting could have been made clearer by simply referring to “the state” rather than “the member state”. It is nevertheless submitted that the subparagraph in question does not
readily admit of any alternative interpretation. By virtue of paragraphs 4 and 5 of schedule 3, consular service is a permitted method of service in EU member states and in Hague Convention countries. By virtue of paragraph 1, both references to consular service fall to be construed in accordance with paragraph 8. In order for paragraph 8 to be capable of having effect in relation to Hague Convention countries, it is submitted that “member state” in paragraph 8(2)(a) has to be read as including references to states that are parties to the Hague Convention.