

# **BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL**

## **[AS AMENDED AT STAGE 2]**

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### **REVISED EXPLANATORY NOTES**

#### **INTRODUCTION**

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Bankruptcy and Debt Advice (Scotland) Bill (introduced in the Scottish Parliament on 11 June 2013) as amended at Stage 2. Text has been added or amended as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

4. In these notes:

‘AiB’ means the Accountant in Bankruptcy<sup>1</sup>;

‘the 1985 Act’ means the Bankruptcy (Scotland) Act 1985 (c.66);

‘the 2002 Act’ means the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17);

‘the BAD Act’ means the Bankruptcy & Diligence etc. (Scotland) Act 2007 (asp 3);

‘DAS’ means the Debt Arrangement Scheme;

‘DAS regulations’ means the Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141); and

‘PTD’ means Protected Trust Deed.

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<sup>1</sup> The Accountant in Bankruptcy is an officer of court established under sections 1 to 1C of the 1985 Act, also with ministerial executive agency functions.

## **THE BILL**

### **Overview**

5. The Bill comprises of 55 sections and 4 schedules. Sections are arranged under the following headings:

- Advice and education
- Payments by debtor following sequestration
- Sequestration where debtor has few assets
- Moratorium on diligence
- Application for sequestration
- Administration of estate
- Discharge following sequestration
- Records
- Functions of sheriff and Accountant in Bankruptcy in sequestration
- Review of decisions made by Accountant in Bankruptcy
- Miscellaneous amendments
- General
- Schedules

## **COMMENTARY ON SECTIONS**

### *Advice and education*

6. Sections under this heading make provisions for debtors to receive mandatory advice from an approved money adviser before making an application to enter into sequestration and for a specific group of vulnerable debtors to receive targeted financial education, to help improve their awareness of the underlying causes of financial difficulty and improve their ability to better manage their finances and reduce the burden of debt.

### **Section 1 – Sequestration of estate of living debtor: money advice**

7. This section amends the 1985 Act to add a new section 5C ('Money advice'), a new section 5(4BA) and a new section 5(2B)(ba). These changes provide that an application for sequestration by a debtor can only be made if the debtor has been given advice on their financial circumstances, the effect of the proposed sequestration and the process of application for sequestration by a 'money adviser'. The application must now include a declaration by the adviser that advice has been given. Section 5C(2) also provides for a definition of who can act as a money adviser to be prescribed by regulations. A similar process is in place for money advice under the Debt Arrangement Scheme under the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17).

## **Section 2 – Financial education for debtor**

8. This section inserts a new section 43B ('Financial education') into the 1985 Act which, when implemented by regulations about the appropriate courses, will provide for debtors whose financial history and circumstances identify them as being particularly vulnerable to problems arising as a result of recurring debts (according to the criteria in section 43B(2) and (3)), to be required to receive a course of targeted financial education. The content, format and delivery of the targeted financial education will be set out in regulations.

### *Payments by debtor following sequestration*

## **Section 3 – Debtor's contribution: common financial tool**

9. This section inserts a new section 5D into the 1985 Act which gives the Scottish Ministers the power to provide in regulations for a common financial tool for calculating the method used to assess the debtor's income, the amount allowed to the debtor for expenditure and the amount of the debtor's contribution (if any). An individual debtor is required to undertake to pay the contribution determined by the common financial tool in applying for sequestration or where the debtor did not apply for sequestration in the assessment following sequestration by a creditor. The 2002 Act is also amended to allow the tool to work with the DAS scheme.

## **Section 4 – Debtor contribution order**

10. This section inserts 8 new sections to create a 'debtor contribution order', a single method for fixing the payments of a debtor's contribution. A debtor contribution will be set in each case, even if the contribution payable is assessed at nil. This will allow the trustee to make a variation to the contribution if the debtor's circumstances change within the 48 month period. Section 32B introduces a standard period of 48 months for most contributions taken from a debtor's income following sequestration, subject to the ability to seek a variation to reduce or increase the amount of contributions in section 32E ('variation and removal of debtor contribution order by trustee'). As at present, contributions from income can continue past the discharge of the debtor. There is provision for the contribution period to be shortened or ended if the debtor is able to pay all creditors, fees and statutory interest or if assets are sold to add funds to the sequestration bank account.

11. Section 32BA provides for direct review and appeal of a debtor contribution order including timescales and expiry periods in relation to this process. The debtor, trustee or any interested party can request that the Accountant in Bankruptcy review its decision. If dissatisfied with the result of the review then a trustee or the debtor can appeal to the sheriff. Section 32C orders the debtor to pay to the trustee any contribution which is more than zero and has been fixed by the Accountant in Bankruptcy or varied by the trustee.

12. Section 32D makes provision for a mechanism as in the DAS scheme for contributions to be deducted directly from earnings by way of employers and third parties, by the debtor giving the employer or third party an instruction, or by the trustee giving a direct instruction to the employer or third party if the debtor fails to pay contributions in respect of 2 payment intervals. Under section 32D(7), Scottish Ministers may by regulations make provision for the form to be used, how that instruction affects the recipient and the consequences of failing to comply with the instruction.

13. As at present, a review of the contribution amount can be sought at any time, under the Bill from the trustee, with provision for review where AiB is the trustee and appeal to the sheriff. Provisions on application, variation and the consequences of a debtor contribution order are set out here. This replaces income payment orders under section 32(2) of the 1985 Act. As at present for income payment orders, a debtor contribution order can be made irrespective of the statutory protection on bankruptcy for pension rights under sections 11 and 12 of the Welfare Reform and Pensions Act 1999.

14. The new section 32F (payment break), introduces the possibility of a debtor paying income in sequestration to seek a payment break of up to 6 months. Regulation 37(1)(h), (3) and (4) of the DAS Regulations provide for a payment break for debtors who have a debt payment programme in place. The Bill will provide for a similar payment break which could be for up to 6 months, with the period of the contribution extended accordingly.

#### *Sequestration where debtor has few assets*

#### **Section 5 – Debtor application**

15. This section amends section 5 of the 1985 Act ('Sequestration of estate of living or deceased debtor'), in order to provide for the replacement of the current low income, low asset route in to bankruptcy (as set out in sections 5(2B)(c)(ia) and 5A of the 1985 Act and the Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008 (SSI 2008/81)) with a new 'minimal asset process' ('MAP') for debtor applications under the 1985 Act, which is intended to provide debt relief to debtors who have limited assets. It allows discharge of the debtor after 6 months, but is subject to eligibility criteria and restrictions on the debtor.

16. This section also inserts, before Schedule 1 to the 1985 Act, a new Schedule A1 to provide for the application of the Act to 'minimal asset' debtors, AiB's duty to consider whether it ceases to apply, the debtor's right of appeal against such a decision and modification of certain provisions of the Act in order to provide for the operation of the MAP.

#### **Section 6 – Circumstances where Accountant in Bankruptcy appointed as trustee**

17. This section amends section 2 of the 1985 Act ('appointment and functions of trustee in sequestration') in order to provide for AiB to be deemed the trustee in sequestration in all cases where the debtor meets the eligibility criteria for the 'minimal asset' process and where AiB awards sequestration of the debtor's estate, as at present for low income, low asset debtors.

#### **Section 7 – Discharge, conditions etc.**

18. This section inserts 3 new sections, section 54C disapplying the discharge procedures for 'minimal asset' cases (which are discharged automatically subject only to being transferred into ordinary sequestration under the arrangements in new Schedule A1), section 55A ('Discharge under section 54A: conditions') and section 55B ('Section 55A: sanctions'). These sections provide that a debtor awarded sequestration on a 'minimal asset' basis is subject to a post-bankruptcy restriction. The restriction will last for a period of 6 months from the date of the debtor's discharge and will impose the following obligations on the debtor:

- a. The debtor (either alone or jointly with another person) must not obtain credit either of £2,000 or more; or of any amount, where at the time of obtaining credit, they have debts of £1,000 (or such other sum as may be prescribed) or more – unless they inform the person from who they are obtaining credit that they are subject to a post-bankruptcy restriction; and
- b. The debtor must disclose to those they wish to do business with, the name (or trading style) under which the debtor was sequestrated.

19. The effect of a breach of the restriction during the 12 month period is that AiB will extend the restriction for a further 12 months and any further breach during the extended period (from 12 to 24 months following the date of discharge) will amount to an offence.

### *Moratorium on diligence*

#### **Section 8 – Moratorium on diligence**

20. This section inserts into the 1985 Act provisions for a moratorium on diligence to apply on giving notice of intention to apply in relation to sequestration, a protected trust deed or a debt payment programme. It also applies to other bodies, such as trusts and partnerships, that can be sequestrated under the 1985 Act.

21. Section 4A provides that, on receipt of written notice of an individual's intention to apply for sequestration, the AiB must, without delay, enter the individual's name into the register of insolvencies and/or the DAS register (as appropriate).

22. Section 4C provides that, once the individual's name has been entered into either the register of insolvencies or the DAS register, then regardless of the debt relief or debt payment solution for which they intend to apply, they will be protected by a moratorium on diligence for a period initially of 6 weeks, where after this will extend to give time for the respective application to be processed. In this context, 'a moratorium on diligence' means that diligence, including arrestment, money attachment, interim attachment or attachment of the individual's estate cannot have effect during the period for which the moratorium is in place. Only one intimation can be given and, therefore, only one moratorium applied for within a 12 month period. In certain cases the moratorium does not protect the debtor from diligence which has already reached an advanced stage. In particular it is competent to auction an article which has been attached under the DAS scheme where notice has been given to the debtor under section 27(4) of the 2002 Act or the article has been removed, or notice has been given under section 53 of that Act. Furthermore it is competent to implement a decree of forthcoming or implement a decree or order for sale of a ship (or share of it) or cargo.

23. Section 4D sets out the detailed provision for the period during which the moratorium will be in place, in different circumstances, for example when an individual has requested a review of a decision by AiB.

### *Application for sequestration*

24. Sections under this heading make provisions in relation to the process by which a debtor may apply for sequestration, in order to ensure that the debtor is fully aware of the requirement

for them to cooperate with their trustee during the bankruptcy process. They also make changes to the administration of debtor applications to improve the overall efficiency of the process.

### **Section 9 – Statement of undertakings**

25. Subsection (1) of this section inserts a new section 2(8) of the 1985 Act. It imposes an obligation on the trustee to provide to a debtor sequestrated on a court petition with a ‘statement of undertakings’, to be signed by the debtor. The Scottish Government intends that the statement of undertakings will make clear to the debtor that failure to sign or comply with the requirements in place under the 1985 Act as set out in the terms of the statement of undertakings could mean a delay in the debtor’s discharge from bankruptcy.

26. Subsection (2) provides that the debtor in a debtor application must give a statement of undertakings including an undertaking to pay any contribution the debtor might be required to make after a determination using the common financial tool to be provided for under new section 5D of the 1985 Act added by section 3 of the Bill. This undertaking must be submitted with the application, in a form to be prescribed by regulations (under the power added by section 34 of the Bill).

### **Section 10 – Debtor application: incomplete or inappropriate application**

27. This section amends the 1985 Act by inserting 2 new sections, section 11A (‘Debtor application: incomplete application’) and section 11B (‘Refusal of debtor application: inappropriate application’). They apply where AiB either find that a debtor’s application has not been fully completed or consider that an award of sequestration may not be appropriate in the circumstances of the case. They effectively restate provision currently in regulation 14 of the Bankruptcy (Scotland) Regulations 2008—the opportunity is being taken to put these provisions on the face of the primary legislation. They require AiB either to notify the debtor of any further information which may be required or of any fee not submitted within 21 days (or such longer period as may be specified) or to notify the debtor of the reason why AiB considers the application to be inappropriate.

### **Section 11 – Sequestration: application by executor**

28. This section amends sections 5, 6B, 8A, and 12 of the 1985 Act to remove from the sheriff court the process whereby an executor of a debtor’s estate, aware that the debtor was insolvent, would petition to make the deceased debtor’s estate bankrupt. It transfers that process to AiB, with the effect that the process will be altered to a debtor application to AiB.

29. A new subsection 8A(2B) clarifies that the period of time, by the end of which the executor will become liable for the deceased debtor’s debts, should be 12 months from the day on which the executor knew or ought to have known that the estate was absolutely insolvent and likely to remain so.

### **Section 12 – Concurrent proceedings for sequestration: recall**

30. This section amends section 10A of the 1985 Act to insert, after subsection (3), three new subsections in order to create a power, in the narrow circumstances where a sheriff has directed AiB to dismiss a debtor application under section 10A(3) of the 1985 Act, for AiB to recall that debtor application (i.e. where sequestration has been awarded on the debtor application). This section also makes provision for the consequences of such a recall.

### **Section 12A – Debtor’s bank account**

31. Section 12A provides for when the trustee knows, or becomes aware, of any estate vested in the trustee which comprises funds held by an “appropriate bank or institution” (i.e. defined in the 1985 Act as able to take deposits). The trustee must serve a notice on the appropriate bank or institution and provide sufficient information to them to identify the debtor and the relevant account/s. The effect is to inform the bank or institution of the sequestration. The trustee is not however entitled to a remedy against transactions made on relevant funds in those accounts before receipt of the notice.

### *Administration of estate*

### **Section 13 – Submission of claims to trustee**

32. This section amends section 48 of the 1985 Act (‘Submission of claims’) in order to introduce a requirement that creditors should submit claims within a period of not more than 120 days after the trustee has given notice to creditors inviting them to submit claims, unless there is a reasonable explanation. If a creditor does not submit their claim before this deadline, they will be expected to explain why this was not possible or risk losing a dividend. This is additional to the current time limits in respect of meetings and accounting periods.

### **Section 14 – First accounting period**

33. Section 52 (‘Estate to be distributed in respect of accounting periods’) of the 1985 Act provides for the payment of interim dividends on the basis of accounting periods – essentially 12 month periods, subject to variation in various circumstances. This section amends that provision in order to allow the trustee to make a dividend payment to creditors at an earlier stage in the administration, should sufficient funds be ingathered. This would be done by shortening accordingly the first accounting period under the 1985 Act for the administration of the estate.

### **Section 15 – Vesting of estate after sequestration**

34. This section amends section 31(5A) (about the reinvestment of non-vested contingent interests, such as an expectation to inherit under a will) and section 32(10) (the meaning of ‘relevant date’ for purposes of vesting etc.) of the 1985 Act. It extends the period for which *acquirenda*, i.e. property or rights acquired or received by the debtor after the date of bankruptcy, at present up to the debtor’s discharge, which would have vested in the trustee had it been part of the estate on the date of sequestration, transfers to the trustee for the benefit of creditors. It will under the Bill fall to the trustee for up to 4 years from the date of sequestration. The same will apply to non-vested contingent interests, such as legacies under a will, the right to which will reinvest in the debtor at the end of a similar 4 year period.

*Discharge following sequestration*

**Section 16 – Discharge of debtor**

35. This section replaces section 54 of the 1985 Act ('Automatic discharge of the debtor') with 3 new sections to replace the existing process whereby a trustee is required to apply to the sheriff to defer an automatic discharge, with a new process whereby the trustee (for cases where AiB is not the trustee) must prepare and send a report to AiB without delay after 10 months from when sequestration was awarded. The report will include information on the debtor's assets, liabilities, financial and business affairs. It will also contain information on the conduct of the debtor and whether they have cooperated with their trustee, and complied with the statement of undertaking. Section 64 of the 1985 Act sets out the debtor's responsibilities in cooperating generally in sequestration—failure to take every practicable step necessary to enable the trustee to perform the trustee's functions under the Act can result in the debtor having to appear before the sheriff to explain non-compliance resulting in a fine or imprisonment.

36. The trustee must also send a copy of the report to the debtor and all known creditors to allow them to make representations within 14 days to AiB. Any decision by AiB to grant discharge will be able to be reviewed by AiB and then appealed by the trustee or any creditor to the sheriff. Equally, any decision by AiB to refuse to grant discharge will be able to be reviewed by AiB and then appealed to the sheriff (see section 54B).

37. For cases where AiB is the trustee, the new section 54A ('Discharge where Accountant in Bankruptcy the trustee') provides that AiB should, instead of applying, intimate a report to the debtor and any creditor, together with a proposal for whether discharge is to be granted. The parties will be able to make representations to AiB within 14 days, as above, after which AiB must award or refuse discharge. That award or refusal is to be appealable to the sheriff as with a decision on an application. The decision will not take effect until the 14 day period has elapsed. Further provision is also made in section 54B for reviews and appeals under these sections.

**Section 17 – Repeal of discharge on composition**

38. This section repeals section 56 ('discharge on composition'), section 56K ('effect of discharge on approval of offer of composition') and schedule 4 of the 1985 Act. Changes made by this section provide for the removal from sequestration of the option for the debtor to propose a composition settlement (a debt relief settlement where debtors must offer partial repayment of no less than 25 pence in the pound) with the creditors in return for a final discharge of their claims.

**Section 18 – Deferral of discharge where debtor cannot be traced**

39. This section inserts 4 new sections after section 54C of the 1985 Act (inserted by section 7 as noted above), in order to create a requirement on trustees to act in a prescribed way, in circumstances where the debtor's whereabouts cannot be ascertained and the trustee is, therefore, unable to carry out their usual functions.

40. The new section 54D provides that, if the trustee is unable to ascertain the debtor's whereabouts, the trustee must submit to AiB, no sooner than 8 months and no later than 10

months after the date of award of sequestration, a notice to the effect that, despite investigation into the debtor's whereabouts, the trustee has been unable to locate the debtor. If AiB is satisfied that it would not be reasonably practicable for the trustee to continue to search for the debtor, then AiB will issue a certificate deferring the debtor's discharge indefinitely.

41. If AiB issues such a certificate then section 54E allows the trustee to apply to AiB to resign from office, no later than 6 months after the indefinite discharge has been agreed. However, should the debtor be traced before this application is made, the trustee should continue to administer the case as nominated. Where a trustee wishes to resign under the above circumstances, and the trustee has satisfied AiB that the trustee has attempted to trace the debtor and that it is not practical or cost effective to continue the search, AiB must agree to the resignation of the trustee and AiB becomes trustee. The costs incurred in the administration of the case, prior to the case being transferred to AiB, are to lie with the original trustee. Thereafter, should the debtor be traced, the trustee will be able to submit a claim in the sequestration.

42. Section 54F provides for where the debtor subsequently makes contact and is cooperating with the administration of the estate. In such cases, the trustee, being satisfied that the debtor has made a full and fair surrender of the debtor's estate, including a full disclosure of financial and business affairs and the provision of any relevant account or other documentation related thereto, must send a report in accordance with section 54(5) to the AiB, no later than 10 months after the debtor makes contact or is traced by the trustee. This means that the report must include information about the debtor's assets, liabilities, financial affairs and business affairs as well as their conduct in relation to the sequestration. The trustee will consider the report and any representations made before deciding on whether to grant discharge or not.

43. Section 54G provides for the debtor or any creditor to be able to apply for a review of any decision by AiB to refuse to discharge a debtor under section 54F and for onward appeal to the sheriff. If a sequestration has been granted wholly inappropriately, the debtor may retain their usual rights to recall the sequestration (now exercisable at any time).

### **Section 19 – Unclaimed dividends and unapplied balances**

44. This section amends section 57 ('Discharge of trustee') of the 1985 Act in order to simplify the process and specify that all unclaimed funds should be paid to AiB who will then consign or otherwise manage the funds and return the funds to the public purse on expiry of the specified 7 year period as at present.

### **Section 20 – Assets discovered after trustee discharge: appointment of trustee**

45. This section inserts 3 new sections. The new section 58B enables AiB to reappoint the previous trustee in a sequestration where after the *trustee's* discharge, but before the expiry of 5 years from the date of sequestration, assets valued at £1,000 or more are identified that would have vested in the trustee prior to the debtor's discharge. Some assets which come to light are reclaimable by the trustee for creditors after the discharge of the debtor. To ensure cases are not reopened without good cause under this procedure, section 58B provides that the value of the newly identified estate should be greater than the costs for seeking re-appointment as trustee, and the potential costs for realising the identified new asset. In order to reopen the sequestration, the trustee (including AiB) would have to demonstrate:

- the estimated value of the newly identified estate;
- the reason why the newly identified estate forms part of the debtor's estate;
- the reason why the asset was not recovered;
- the estimated outlays and remuneration of the trustee following their appointment or reappointment; and
- the likely distribution to creditors following an appointment or reappointment.

46. Section 58C creates a requirement that the debtor and any other relevant parties should be informed that the trustee (or AiB) intends to seek reappointment as soon as practicable after reappointment, and reminded of their requirement to cooperate with the trustee in any investigation or realisation of assets.

47. Section 58D enables the debtor or other relevant parties to apply to the sheriff to appeal against the reappointment, within 14 days of notification if they disagree with AiB's decision to reappoint his or herself or another trustee. Should assets be identified more than 12 months after discharge, the trustee will only be able to be reappointed with agreement of the sheriff, as per the current process.

### *Records*

#### **Section 21 – Register of insolvencies**

48. Section 21 amends subsection (1)(b) of section 1A to the 1985 Act ('Supervisory functions of the Accountant in Bankruptcy'), in order to provide that the form of the register of insolvencies will, in future, be governed by regulations made by the Scottish Ministers, instead of the Court of Session by act of sederunt.

49. This section also inserts a new subsection (5), in order to allow certain details to be withheld from the register of insolvencies where, in the opinion of AiB, inclusion of any information would be likely to jeopardise the safety or welfare of any person. The Scottish Government expects that there would be a reference generally on the RoI which will explain that: 'information may be withheld from the register to protect individuals'.

#### **Section 22 – Sederunt book**

50. This section amends section 57 ('Discharge of trustee'), section 58A ('Discharge of Accountant in Bankruptcy'), section 62 ('sederunt book and other documents'), as well as inserting a new Schedule 3A ('Information to be included in the sederunt book').

51. These changes to the 'sederunt book' or formal records required to be kept by the trustee provide that a sederunt book must be sent as an electronic version 'in such format as the Accountant in Bankruptcy may from time to time direct.' The intention is that this will allow AiB to enable electronic transmission and receipt of documents although trustees may continue to hold the sederunt book in any format that they choose, before sending it to AiB, in accordance with section 57(1)(b) of the 1985 Act. Whilst the sederunt book will no longer be in a paper

‘book’ format at the time that it is sent to the AiB, the Scottish Government still intends to retain the name ‘sederunt book’ used in the 1985 Act.

### **Section 23 – Abolition of certain requirements in relation to Edinburgh Gazette**

52. This section amends section 16 (‘Petitions for recall of sequestration’) and section 45 (‘Public examination’) and repeals section 71 (‘Edinburgh Gazette’) in order to remove the requirement to advertise the award of bankruptcy or appointment of replacement trustees in the Edinburgh Gazette. In future, AiB will arrange for the award of bankruptcy or appointment of replacement trustees to be advertised in the register of insolvencies.

#### *Functions of sheriff and Accountant in Bankruptcy in sequestration*

53. These sections make provision for certain miscellaneous bankruptcy notes, currently presented to the sheriff court, to be presented to and decided on by AiB instead.

### **Section 24 – Application by trustee for direction on matters in sequestration**

54. This section amends section 3(6) of the 1985 Act in order to provide for trustees (except for AiB) to be able to apply directly to AiB for directions. If a decision cannot be made, or matters are more complex than anticipated or for any other reason, subsection 3A(3) provides for AiB to also be able to refer the matter to the sheriff for the sheriff’s directions. As with the sheriff’s directions, this can be on the handling of the bankruptcy generally and not only on a point of law. The trustee, debtor, creditor or anyone having an interest would have the right to be heard at the hearing before the sheriff.

55. Subsection 3A(4) provides that the trustee may apply to AiB for a review of any direction under this section. An application for a review must be made within 14 days of the decision being made and subsection 3A(7) confirms that a right of onward appeal to the sheriff remains, once AiB has reviewed its decision.

### **Section 25 – Recall of sequestration by sheriff**

56. This section amends sections 16 (‘Petitions for recall of sequestration’) and 17 (to be re-titled, ‘Recall of sequestration by sheriff’) of the 1985 Act in order to modify the process for the recall of bankruptcy. Where the only ground for recall is that the debtor can pay the debtor’s debt in full (except where the debtor is claiming that the debtor was not apparently insolvent at the date of sequestration) application must be made to AiB and not the sheriff—see the new provisions made by section 26 of the Bill. Where appropriate, the final order will be withheld until all funds have been distributed to creditors.

### **Section 26 – Recall of sequestration by Accountant in Bankruptcy**

57. This section inserts 8 new sections after section 17 of the 1985 Act:

- section 17A (‘Application to Accountant in Bankruptcy for recall of sequestration’)
- section 17B (‘Application under section 17A: further procedure’)
- section 17C (‘Interim recall of sequestration by Accountant in Bankruptcy’)

- section 17D ('Procedure following grant of interim recall of sequestration')
- section 17E ('Recall of sequestration by Accountant in Bankruptcy')
- section 17F ('Recall where Accountant in Bankruptcy the trustee')
- section 17G ('Reference to sheriff')
- section 17H ('Recall of sequestration by Accountant in Bankruptcy: review and appeal')

58. The new section 17A enables AiB to deal with applications for recall on the ground of payment of debts in full (after the date of sequestration), and are generally straightforward and non-contentious.

59. Section 17B sets out the procedure and requirement for such an application. The basis for a grant of recall by AiB in these circumstances should include payment of the remuneration of, and outlays reasonably incurred by, the interim trustee and/or trustee. Payment of all other costs, including the expenses of the creditor, should also be made before recall can be granted. The new section 17B, therefore, stipulates that the following conditions should be met before an award of recall of sequestration will be granted:

- within 21 days of service of the notice of application, the trustee (if not AiB, nor the applicant) will be required to submit to AiB a current statement of the debtor's assets and liabilities and a statement of the debtor's affairs;
- the trustee will be required to submit to AiB a statement stating whether in the trustee's opinion the debtor can pay his or her debts in full, including the payment of any remuneration, outlays and expenses;
- the trustee will be required to notify all known creditors of the application before the end of a 7 day period beginning with the day on which the application for recall was made;
- the trustee will be required to submit any claim for payment of outlays (reasonably incurred) and remuneration along with the statement of the debtor's assets and liabilities;
- where the trustee is the applicant, the statement of the debtor's assets and liabilities and the statement of the debtor's affairs, together with the statement as to whether the debtor can pay his or her debts in full should be submitted with the application; and
- if any claims are made by a creditor during the 14 day period the trustee should submit an updated statement of assets and liabilities to AiB.

60. Section 17C makes provision for AiB to be able to grant an interim award of recall from sequestration on the basis that AiB is satisfied that the debtor has sufficient funds to pay the debts in full. Subsection (2) stipulates that the decision to grant an interim award of recall should be made on the basis of the information provided in the application and by the trustee, representations made by those upon which a copy application has been served and any other interested party. The effect of interim recall is not the same as that of recall; in particular, the estate of the debtor will remain sequestrated.

61. Following the granting of an interim award of recall, section 17D places a requirement on the trustee to distribute the sums due to creditors, make payment of remuneration and outlays of the trustee, pay relevant expenses and reinvest appropriate sums in the debtor within 6 weeks or other period (which may be prescribed by regulations) of the date of the interim order. Within 6 weeks of the granting of the interim order, the trustee should confirm to AiB if all debts and other relevant payments have been made. AiB should then decide whether recall should be granted. The trustee should also be able to seek an extension of 4 weeks (or such other period as may be prescribed).

62. Section 17E makes provision for AiB to be able to grant an award of recall. This must be on the basis that all the debts have been paid and that all other payments have been made including payment of outlays, remuneration and expenses. The effect of recall granted by AiB is the same as that provided for in section 17(4) and (5) of the 1985 Act. If an application has been made but the trustee has not confirmed that there has been payment of all the sums due within the relevant period (6 weeks, or extended) the sequestration will continue.

63. Section 17F makes provision for applications to be made to AiB for recall in cases where AiB is the trustee where the grounds are that the debts have been paid in full. Once an application is made under this section AiB will thereafter have similar functions to the trustee (where not AiB) in relation to ascertaining whether or not there are sufficient funds and ensuring that payment is made.

64. Subsection 17F(2) creates a requirement for AiB to notify known creditors.

65. Subsection 17F(5) requires AiB to make a determination of the fees and outlays which should be calculated in accordance with section 69A of the 1985 Act, which determination must be made at or prior to the determination as to whether to grant an award of recall and should be subject to appeal to the sheriff, whose decision will be final.

66. Subsection 17F(6)(a) specifies that AiB must be satisfied that the debtor can pay his or her debts in full before granting an award of recall.

67. If an order for interim recall is granted, then subsection 17F(7) requires AiB (as trustee) to then make payment to creditors and make all other relevant payments within 6 weeks of that decision and be required to recall the award of sequestration as soon as payment is made, or at the latest within 6 weeks of the date of the decision to grant interim recall.

68. Section 17G enables AiB to refer the application to a sheriff for consideration under section 17 of the 1985 Act in cases where the AiB considers it appropriate at any time until recall is granted.

69. Section 17H provides that either the debtor, a creditor, the trustee or any person with an interest may apply to AiB for a review of certain decisions related to the grant or refusal to grant recall. An application for a review must be made within 14 days of the decision being made.

70. Section 17H(5) makes provision to enable determinations made by AiB in relation to recall, including decisions whether to grant or refuse an order for interim recall and recall, to be appealed to the sheriff, including once AiB has reviewed its decision. Appeals must be made within 14 days of the date of the review decision. The debtor, trustee and any creditor or other person having an interest may appeal. In the case of an appeal against the decision of AiB in relation to interim recall, subsection 17H(7) enables the sheriff to remit the case to AiB, who should then continue to deal with the application.

71. The sheriff retains the general power to consider recall in all other cases, and there remains a right of appeal to the sheriff where AiB has determined whether the award of sequestration should be recalled.

### **Section 27 – Appointment of replacement trustee**

72. This section provides that the existing section 25 of the 1985 Act should be replaced by 3 new sections, a new section 25 ('Appointment of replacement trustee'), section 25A ('Applications to Accountant in Bankruptcy: procedure') and section 25B ('Applications and appeals to sheriff: procedure').

73. The new section 25 provides that, on the election of a replacement trustee, the original trustee should immediately make a report of the proceedings at the statutory meeting to AiB instead of to the sheriff. If AiB was the original trustee, the report is made to the sheriff. If there are no objections, which must state the grounds for objection, then AiB is required to declare the elected person appointed.

74. Section 25A provides that any person who wishes to object to the election of the replacement trustee under this procedure should submit their objections to AiB, at which point AiB is to make clear to the other parties that they have the right to make written representations, and then to make a decision. If there is an objection to AiB's decision then the trustee, the objector or any other interested person may apply to AiB for a review of its decision. An application for a review must be made within 14 days of the decision being made. Section 25A(8) confirms that the right of onward appeal to the sheriff remains, once AiB has reviewed its decision.

75. Section 25B places similar duties on the sheriff as at present under section 25, i.e. it sets out the procedure for hearing objections. This section only applies in cases where a person is appealing a decision by AiB, under the new subsection 25A(8) or where AiB itself has an objection under the new subsection 25(3)(b). The sheriff must make clear to other parties that they have the right to make written representations (in the same way as AiB must under section 25A).

76. This section also at subsection (2) amends section 28 of the 1985 Act (resignation and death of trustee) to substitute the current application to the sheriff where there is no election of a new trustee following the resignation or death of the trustee, with an application to AiB. An application by an eligible person to be appointed trustee can be made to AiB within 14 days, failing which AiB will become trustee. This section is not relevant where AiB was originally trustee as the role will not fall vacant for these reasons.

## **Section 28 – Replacement of trustee acting in more than one sequestration**

77. This section provides that the existing section 28A of the 1985 Act should be replaced by two new sections, a new section 28A ('Replacement of trustee acting in more than one sequestration') and section 28B ('Determination etc. under section 28A: review'). This section is not relevant where AiB is the trustee as the role will not fall vacant.

78. Section 28A removes the requirement to petition the Court of Session for removal of the trustee from office and instead enables AiB to appoint someone to be trustee directly. Subsection 28A(6) places a duty on AiB to notify its decision to the former trustee, the debtor, any creditor known to AiB and each sheriff who awarded sequestration.

79. The new section 28B provides that any person listed under subsection 28A(6) (i.e. the former trustee, the debtor etc.) will be able to ask AiB to review its decision within 14 days of making and notifying the decision and, if they are not satisfied with the result of AiB's review, to appeal the result by a single petition to the Court of Session, if the appeal relates to two or more sequestrations that were awarded in different sheriffdoms or, otherwise, to the sheriff with jurisdiction.

## **Section 29 – Removal of trustee and trustee not acting**

80. This section amends section 29 of the 1985 Act in order to provide for AiB to be able to deal with the removal of a trustee. AiB will look at the application to remove the trustee and will make the necessary order required under revised section 29(1)(b) of the 1985 Act and, if subsequently required, revised section 29(3).

81. New section 29(3A) provides that the trustee, the commissioners or any creditor may apply to AiB for a review of any decision of AiB to raise an order to remove a trustee from office. An application for a review must be made within 14 days of the decision being made. New section 29(3C)(a) and (b) provides that AiB must on receipt of an application for review take into account any representations made by an interested person within 21 days of the application being made. Thereafter AiB must confirm, amend or revoke their decision within 28 days of the application being made. Section 29(4) confirms that the right of onward appeal to the sheriff remains, once AiB has reviewed its decision. AiB can also refer a case to the sheriff for direction before making any order or declaration. An application for review of a decision cannot be made if the matter has been referred to the sheriff for direction.

## **Section 30 – Contractual powers of trustee**

82. This section amends section 42 ('Contractual powers of trustee') of the 1985 Act in order to provide that applications to request a longer period in which to adopt or refuse a contract entered into by the debtor should be submitted to AiB for a decision instead of the sheriff (unless AiB is the trustee), with recourse to the sheriff on appeal. AiB can also refer a case to the sheriff for direction before making any order or declaration. An application for review of a decision cannot be made if the matter has been referred to the sheriff for direction.

### **Section 31 – Bankruptcy restrictions order**

83. This section replaces the existing section 56A with a new section (‘Bankruptcy restrictions order’) in order to give AiB, instead of the sheriff, the power, upon conclusion of an investigation, to make a bankruptcy restrictions order. Bankruptcy restrictions orders impose certain restrictions on a debtor where there has been a level of misconduct by the debtor either before or after the date of bankruptcy, as described in section 56B of the 1985 Act. The restrictions remain in force after the date of discharge for periods varying between 2 and 15 years, depending upon the severity of the misconduct. The new sections 56A(3) and 56A(4) will enable representations to be made by the debtor to AiB.

84. Section 56E(3) provides that if the debtor wishes to object to a bankruptcy restrictions order, they should apply to AiB to annul its decision. Section 56E(7) confirms that the right of onward appeal to the sheriff remains, once AiB has taken its decision. A sheriff may make an order providing that a debtor is unable to make another annulment application under subsection (3) for a period specified in the order.

### **Section 32 – Conversion of a protected trust deed into sequestration**

85. This section amends section 59A of the 1985 Act, in order to transfer, from the sheriff courts to AiB, powers in relation to such orders to convert protected trust deeds<sup>2</sup> into sequestrations as are required to be made under that section. ‘Member State liquidator’ for these purposes includes trustees in bankruptcy or the equivalent in personal insolvency in other EU Member States.

### **Section 33 – Power to cure defects in procedure**

86. This section modifies section 63 of the 1985 Act, in order to allow applications to AiB to cure certain, but not all, defects which could previously be remedied under section 63 of the 1985 Act by the sheriff. Section 63A(4) specifies that the process involves notifying any interested parties and giving them the opportunity to make representations. The sheriff’s power is restricted accordingly, save in relation to documents lodged with or issued by, or time limits in relation to proceedings before the sheriff, but an order of AiB under section 63B(4) is subject to appeal to the sheriff, which will be final. The defects which can be remedied are as follows:

- any clerical or incidental error in any document
- to waive any failure to comply with any time limit in the 1985 Act, where there is no specific provision in or made under the Act about how failure to adhere to the timescale should be dealt with.

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<sup>2</sup> **Protected trust deed** - A trust deed is a form of insolvency by which a debtor transfers estate to a trustee to be realised for the benefit of creditors. A trust deed may be protected as long as a majority in number or a third in value of creditors do not object to its terms. Once protected, the terms of the trust deed becoming binding on all the creditors.

### **Section 34 – Regulations: applications to Accountant in Bankruptcy etc.**

87. This section inserts a new section 71C (‘Regulations: applications to Accountant in Bankruptcy etc.’) after section 71B in the 1985 Act in order to provide, for the Scottish Ministers, a power to make, by regulations, provision in relation to the procedure to be followed in relation to an application to or decision by AiB (insofar as this is not provided for in the 1985 Act). Regulations made under this section will make provision for such matters as the format and content of documents required for an application, including for instance the form of the debtor application and the statement of undertakings to be provided by the debtor or the discharge report to be provided by the trustee (certain specific powers in the 1985 Act have also been repealed). This partly also replaces the inherent powers of the courts to make rules of court for the disposal of cases.

### **Section 35 – Valuation of debts depending on contingency**

88. This section amends paragraph 3 of Schedule 1 to the 1985 Act to enable creditors to apply to AiB, instead of the sheriff, to place a value on a contingent debt in order that the creditor may be able to claim that value in the sequestration. Paragraph 3(6) makes provision for appeal to the sheriff. AiB can also seek direction from the sheriff. A decision cannot be appealed if the matter has been referred to the sheriff for direction.

#### *Review of decisions made by Accountant in Bankruptcy*

89. These sections provide that prior to any opportunity to appeal to the sheriff from certain decisions of AiB, the party who wishes to appeal must ask AiB to review the matter in question. The new review process extends to decisions AiB makes which are currently appealable to the sheriff, with certain exceptions. Those entitled to appeal may do so after AiB reviews a decision, even if that person did not ask for the original determination to be reviewed (i.e. a creditor may ask for an appeal of AiB’s reviewed decision even if the debtor asked for the review).

### **Section 36 – Review of decisions about interim trustee**

90. This section modifies sections 13A (‘Termination of interim trustee’s functions when interim trustee is not appointed as trustee’), 13B (‘Termination of Accountant in Bankruptcy’s functions where not appointed as trustee’) and 18 (‘Interim preservation of estate’). An interim trustee is usually (although not always) appointed on the basis of a creditor petition, for example when the creditor believes that action needs to be taken quickly in order to safeguard the debtor’s estate. Later in the process, AiB may decide to appoint the interim trustee as trustee or to terminate the interim trustee’s functions and appoint a different trustee. This section enables an interim trustee who has not been appointed as trustee to apply to AiB for a review of its decision.

### **Section 37 – Review of decision not to award sequestration**

91. This section modifies section 15 of the 1985 Act (‘further provisions relating to award of sequestration’) in order to make provision for the debtor and concurring creditor to apply to AiB for a review of its decision not to award bankruptcy on a debtor application within 14 days.

### **Section 38 – Review of decisions about replacement trustee**

92. This section modifies section 26A of the 1985 Act (‘Accountant in Bankruptcy to account for intromissions’) in order to enable a party to apply to AiB for a review of its decisions about discharging AiB in relation to AiB acting as trustee.

### **Section 39 – Review of decisions about adjudication of creditor’s claims**

93. This section modifies section 49 of the 1985 Act (‘adjudication of claims’). Under section 49, where AiB is the trustee, then AiB will consider creditors’ claims, on the basis of the information provided, and make an adjudication about the amount of debt which is due to each creditor, either agreeing each claim in whole or in part or rejecting it if they do not consider that it is valid. This section makes provision for creditors and debtors to apply to AiB for a review of its decision as trustee regarding its adjudication of creditors’ claims under section 49(1) or (2). Section 49(6E) provides that only a debtor with a pecuniary interest in the outcome can appeal.

### **Section 40 – Review of decision about discharge of trustee**

94. This section amends section 57 of the 1985 Act (‘Discharge of trustee’) in order to make provision for interested parties to apply to AiB for a review of its decision to grant, or refuse, discharge of the trustee. The interested party (i.e. the trustee, the debtor and any creditor who has made representations) can ask AiB to review the decision within 14 days of the decision being made. Where there has been a review, the date of the review decision is to be the date the discharge decision is effective from and the initial discharge will be postponed until the 14 day review request period has elapsed.

### *Miscellaneous amendments*

95. Sections 41 to 48 make miscellaneous amendments to the 1985 Act, some of which give effect to points raised by the Scottish Law Commission in their consultation on consolidation of the 1985 Act.

96. The changes include removing the criminal offence for failure to return a statement of assets and liabilities (section 41(2)(a)(i)); clarifying the date of renewal of the effect of sequestration as an inhibition or freezing diligence (section 44); making clear an action for division and sale or vacant possession can provide for a decision of the sheriff on whether a trustee in sequestration is entitled to dispose of the family home (section 45); purely declaratory provision to make clear in the scheme of the 1985 Act that student loans are not written off in sequestration (section 46); increasing from £500 to £2000 the amount of credit which can be obtained by an undischarged bankrupt before they are required to disclose that status on obtaining that credit (section 47); and repealing provision for Bankruptcy Restriction Undertakings (section 48).

### **Debt arrangement schemes: extension to non-natural persons and fees**

97. Section 48A makes provision so the DAS scheme under the 2002 Act is available to a wider group, specifically legal persons (other than companies, limited liability partnerships and certain other bodies). It allows regulations to be made in respect of a Business DAS solution,

and makes clearer provision to allow controls on the remuneration of money advisers and payment distributors acting in relation to DAS.

### *General*

#### **Section 50 – Ancillary provision**

98. This section has the effect of creating a power to make supplementary, incidental, consequential, transition, transitory or savings provisions by order made by the Scottish Ministers for the purposes of or in connection with provisions made in or under the Bill. The order is subject to the negative resolution procedure of the Scottish Parliament, unless the instrument modifies another enactment such as an Act (including this Bill) in which case it is subject to the affirmative resolution procedure.

### *Schedules*

#### **Schedule 1 ('minimal asset' debtors with few assets)**

99. Schedule 1 is introduced by section 5(2) and introduces a new Schedule A1 ('Debtors to whom section 5(2ZA) applies: application of Act') to provide for the application of the Act to 'minimal asset' debtors. It includes provision for how that 'minimal asset' status modifies sequestration for the operation of the MAP, AiB's duty to consider whether that status ceases to apply, the debtor's right of appeal against such a decision and the modification of certain provisions of the Act where that status has ceased to apply.

#### **Schedule 2 (Sederunt book)**

100. Schedule 2 is introduced by section 22(5) and sets out information to be included in the sederunt book.

#### **Schedule 3 (minor and consequential amendments)**

101. Schedule 3, introduced by section 51(1), sets out minor and consequential amendments. It includes certain provisions to implement in the 1985 Act a number of recommendations from the Scottish Law Commission as part of its project in working towards a full consolidation of the 1985 Act<sup>3</sup>. The amendments are technical amendments which can be reviewed and incorporated in a consolidation Bill in due course.

102. They include paragraph 28(a) and consequential repeals amending section 72(1) of the 1985 Act to clarify that the general power to make different provision for different cases or classes of case extends to all of the subordinate powers in the 1985 Act. The effect is to confirm it extends to the affirmative Parliamentary procedure regulation-making powers in the Act<sup>4</sup>.

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<sup>3</sup> Link to Scottish Law Commission *Report on the Consolidation of Bankruptcy Legislation in Scotland*, [http://www.scotlawcom.gov.uk/files/7113/6853/1202/Report\\_on\\_the\\_Consolidation\\_of\\_Bankruptcy\\_Legislation\\_in\\_Scotland.pdf](http://www.scotlawcom.gov.uk/files/7113/6853/1202/Report_on_the_Consolidation_of_Bankruptcy_Legislation_in_Scotland.pdf)

<sup>4</sup> The Scottish Law Commission discussed this issue in their Report, *ibid*, p.12.

103. Paragraph 31A provides for the affirmative Parliamentary procedure to apply to the use of the DAS scheme regulation-making powers added by sections 3(2) and 48A of the Bill.

**Schedule 4 (repeals)**

104. Schedule 4 details repeals in consequence of the changes made by the Bill.

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*This document relates to the Bankruptcy and Debt Advice (Scotland) Bill as amended at Stage 2  
(SP Bill 34A)*

# **BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL**

## **[AS AMENDED AT STAGE 2]**

### **REVISED EXPLANATORY NOTES**

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group  
Scotland.

ISBN 978-1-78457-001-9