

BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Bankruptcy and Debt Advice (Scotland) Bill introduced in the Scottish Parliament on 11 June 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 34-EN.

KEY PRINCIPLES OF THE BILL

2. It is the responsibility of Government to ensure access to fair and just processes of debt relief and debt management for the people of Scotland, which takes account of the rights and interests of those involved. The Accountant in Bankruptcy (AiB) delivers this on behalf of the Scottish Government.

3. The Bill aims to ensure that appropriate, proportionate, debt management and debt relief mechanisms are available to the people of Scotland which are fit for the 21st Century. The Bill contains provisions to support AiB in improving its service underpinned by the following key principles:

- Ensuring that the people of Scotland have access to fair and just processes of debt advice, debt relief and debt management.
- Those individuals who can pay should pay their debts, whilst acknowledging the wide range of circumstances and events that contribute towards financial difficulty and insolvency for both individuals and businesses.
- Securing the best return for creditors by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses.

4. The provision of appropriate debt advice, management and relief should be seen as a 'Financial Health Service', providing rehabilitation to individuals and organisations in relation to their financial pressures. Within the 'Financial Health Service' there will be a focus on individual responsibilities with renewed emphasis on individual debtors' responsibilities to cooperate. There is also mandatory debt advice for all those entering a statutory debt management or debt relief product which will assist in the rehabilitation of individuals going through the bankruptcy process thereby helping them contribute to the economy.

BACKGROUND

5. Bankruptcy law in Scotland dates back to 1621, although it was the Bankruptcy (Scotland) Act 1856 that laid down the scheme that is largely retained in today's legislation. The Bankruptcy (Scotland) Act 1913 followed and this operated for over 70 years until the Bankruptcy (Scotland) Act 1985 (the 1985 Act) came into force. The 1985 Act has been amended on a number of occasions, including by the Bankruptcy (Scotland) Act 1993, the Bankruptcy and Diligence etc. (Scotland) Act 2007 and the Home Owner and Debtor Protection (Scotland) Act 2010.

The need for change

6. In today's world, with easy access to credit cards and payday lending, for example, it is quite different to that of 1985. Consumer debt has increased. The financial situation in recent years, including the credit crunch and recession has an increasing impact, not just in Scotland, but worldwide. The Scottish Government recognises that current legislation requires to be modernised to ensure that it can effectively address the challenges society faces today.

ALTERNATIVE APPROACHES

7. The first possible option is to 'do nothing'. That is to make no changes to the current bankruptcy legislation. However, in light of the recent economic crisis to do nothing would leave the people of Scotland with options for dealing with debt which are out of date and not fit for 21st Century living.

8. The second option is to modernise the current bankruptcy legislation providing the people of Scotland with access to fair and just processes of debt relief and debt management, by striking the right balance for both debtors and creditors.

9. The Scottish Government recognises the responsibility it has to take action where it can to help the people of Scotland, particularly in this time of economic difficulty, by ensuring that debt relief products are fit for purpose, support the people of Scotland and strengthen Scotland's economy. The Scottish Government has therefore decided to make changes to the bankruptcy legislation which it believes will better serve the interests of the people of Scotland.

10. Some of the provisions in the Bill will enhance measures contained in current legislation. In other areas, the Scottish Government has decided to introduce new provisions. In all policy decisions made either to introduce new provisions or enhance existing policy the decisions were based on available evidence and through consultation with stakeholders, reference to which will be made throughout this memorandum.

CONSULTATION

11. The discussion and debate on the modernisation and reform of bankruptcy, the basis of the provisions in the Bill, began with the publication of a comprehensive consultation paper, *Consultation on Bankruptcy Law Reform*¹. The consultation was a broad, inclusive and detailed

¹ Link to the Consultation on Bankruptcy Law Reform <http://www.scotland.gov.uk/Publications/2012/02/6283>

consultation containing 193 questions on bankruptcy reform. The consultation was published on the Scottish Government website and ran from 24 February 2012 until the 18 May 2012 inclusive.

12. An overwhelming total of 129 responses were received for a bankruptcy consultation, approximately three times the number of responses received in previous bankruptcy consultations in recent years. Respondents represented a wide range of individuals and organisations with knowledge and experience of, or an interest in insolvency matters. The Scottish Government's response to the consultation was published on 7 November 2012.² Some of the comments received from respondents are contained in the 'Report of the Summary of Responses'³ held on the AiB website. Copies of the non-confidential responses can be viewed on the Scottish Government website.⁴

13. In addition to the consultation, the Scottish Government held a rolling programme of stakeholder events in December 2012/January 2013. There were events in Edinburgh, Glasgow, Inverness and Aberdeen. These events provided stakeholders with the opportunity to communicate their views and contribute to the development of the proposals contained in the Bill. A further programme of stakeholder events was carried out in April and May 2013.

14. Following analysis of the responses and through ongoing engagement with stakeholders not all of the proposals in the consultation were taken forward. The consultation process was valuable and respondents helped to shape the content of the Bill. The Scottish Government is grateful to all who contributed their time, input and assistance in the development of debt solutions for the people of Scotland.

15. Issues raised during the consultation that are relevant to specific measures in the Bill are discussed under the relevant section headings in this paper, including where applicable the alternative approaches that were considered.

16. The development of the Bill goes hand in hand with the ongoing Scottish Law Commission project to modernise and consolidate the 1985 Act. The Commission has very recently finalized its report⁵. The Scottish Government intends to include further changes to the 1985 Act as part of the Bankruptcy and Debt Advice (Scotland) Bill in order to facilitate the consolidation project. The amendments made by the Bill can be reviewed and incorporated in a full consolidation of the 1985 Act. The Scottish Government has considered points that have arisen from the Scottish Law Commission consultations but would also welcome any technical comments from expert stakeholders on the changes proposed in the Bill.

² Link to the Scottish Government's response to the consultation <http://www.aib.gov.uk/publications/scottish-government%E2%80%99s-response-consultation-bankruptcy-law-reform>

³ Link to Report of the Summary of Responses to the consultation <http://www.aib.gov.uk/publications/bankruptcy-law-reform-consultation-report-2012>

⁴ Link to the Non confidential responses <http://www.scotland.gov.uk/Publications/2012/08/2539/downloads>

⁵ 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

17. An explanation of the terms used through out the policy memorandum can be found in the glossary at Annex B.

ADVICE AND EDUCATION

Bankruptcy of estate of living debtor: money advice

Policy objectives

18. The policy objective is to make money advice compulsory for all debtors prior to obtaining access to any form of statutory debt relief, in particular in the Bill, for sequestration. Separate to the Bill, the intention is also to extend this by regulations to Protected Trust Deeds (see glossary) in Scotland under existing powers in Schedule 5 to the 1985 Act.

Current Scottish model

19. In the current Scottish model, entry into bankruptcy does not require advice to be taken and an individual can apply directly to AiB without having received any form of advice. Given the significant consequences associated with bankruptcy, the provision of sound money advice should be an essential part of the process.

20. At present, advice is available from money advisers in the third sector, through advisers in local authorities, through Insolvency Practitioners and debt management companies. Advice is compulsory prior to entering bankruptcy through the Certificate for Sequestration route, the Scottish Government's debt management solution, the Debt Arrangement Scheme and before an individual can enter a trust deed which may become protected.

21. By introducing compulsory money advice, from an approved money adviser, across all debt relief and debt management solutions, this will ensure that individuals are aware of the range of options available to them, taking account of their individual circumstances.

Consultation

22. The Scottish Government consulted on whether or not money advice should be compulsory when debtors are considering any form of statutory debt relief and if so who should provide this money advice.

23. The majority of respondents, 93 of the 129 respondents, were in favour of money advice being compulsory for those considering any form of statutory debt relief. When asked who should provide this money advice respondents stated that money advice should continue to be provided by the current approved providers, as defined in the Debt Arrangement Scheme (Scotland) Regulations 2011 (DAS).

24. Research had shown that the uptake of DAS from 2004 was not as significant as first anticipated due to the lack of access to an approved money adviser. To address this, the 2011 DAS regulations extended the definition of those who were authorised to become approved money advisers, thereby increasing the access to money advice. This change in the legislation has achieved its aim as the number of people accessing DAS has increased significantly.

25. Through consultation with stakeholders it has been established that currently the majority of people considering a debt relief or debt management option will seek advice. Therefore, it is envisaged that the introduction of compulsory money advice will not have a major impact on the money advice sector. Based on research into existing cases, AiB estimate that between 6-8% of current applications, which take either the Apparent Insolvency or Low Income Low Asset routes into bankruptcy, are made without the debtor having accessed money advice prior to submitting their application.

Proposals

26. The Bill introduces the new provision of compulsory money advice from an approved money adviser for anyone considering accessing a statutory debt relief or debt management product. As proposed by respondents in the consultation, the money advice will continue to be provided by the current money advice providers.

Alternative approaches

27. The main alternative approach considered was to give AiB a role in the provision of money advice, as often those seeking to apply for bankruptcy look to AiB for such advice. However the majority of respondents did not support this proposal. Some respondents expressed concern that there would be a conflict of interest for AiB, given AiB's current function/roles.

28. Although AiB do not have a money advice giving role they do have a role in making advice accessible. In this regard a Citizens Advice Bureau adviser(s) is currently located with AiB and provides advice, where they can, to those struggling to access a money adviser. Where they are unable to assist the individual they will connect them to another money adviser within the money advice service.

Financial education for the debtor

Policy objectives

29. The policy objective is to introduce a financial education role, as part of the 'Financial Health Service' seeking to prevent individuals from repeated financial difficulties.

Current process

30. There is currently no requirement on an individual to seek help to ensure that when they come out of their debt management or debt relief solution, they have the skills to avoid ending up in financial difficulty in the future.

Consultation

31. Respondents were in favour of financial education being an integral part of any Scottish statutory debt relief option. However, they did not consider this should be mandatory in all cases. Instead respondents felt that it should be optional based on specific criteria. Furthermore respondents stated that discharge from debt should not be linked to receipt of financial education.

Proposals

32. Provisions in the Bill make it mandatory for the trustee to require individuals to participate in financial education, if the trustee considers that they meet one or more of the following criteria:

- a) the person has been made bankrupt (anywhere) in the previous 5 years;
- b) the person has signed a trust deed or Individual Voluntary Arrangement in England & Wales or Northern Ireland (whether completed or failed) within the last 5 years or similar arrangement;
- c) the person has been in a debt management programme (this should encompass a Debt Payment Programme under the DAS Scheme, any contractual scheme agreed with creditors, or any informal agreement where regular payments have been made) within the last 5 years;
- d) the person has been issued with a Bankruptcy Restrictions Order (BRO) (or Bankruptcy Restrictions Undertaking (BRU), though only for transitional purposes as they are being repealed) or are currently under investigation for a BRO. The trustee can check on the AiB website or the UK Insolvency Service website if there is a BRO or BRU, or ask the debtor if an investigation is ongoing;
- e) the trustee has identified a pattern of issues, or course of conduct, which would indicate that the individual would benefit from this education (i.e. insolvency is due to poor money management or reckless spending);
- f) the person believes they would benefit from financial education and volunteer to participate in the programme.

Alternative approaches

33. No alternative approaches were considered.

PAYMENTS BY DEBTOR FOLLOWING BANKRUPTCY

Common Financial Tool

Policy objectives

34. One of the key principles of the Bill is that those who can pay should pay. It is vital that where an individual can pay a contribution they do so as these funds together with asset realisation cover the cost of the administration of the debt relief and debt management processes and provide returns to creditors. By introducing the mandatory use of a common financial tool (CFT), when assessing whether or not an individual should make a contribution, this tool will ensure that all individuals are treated the same providing consistency, transparency and clarity for individuals across all debt relief and debt management solutions in Scotland. The Bill makes provision for sequestration and to extend the powers in relation to the DAS Scheme. Separate to the Bill, the intention is also to extend this by regulations to Protected Trust Deeds in Scotland under existing powers in the 1985 Act.

Current process

35. There has been much debate in recent years about the need for a single tool to be used across the sector to aid in the calculation of an appropriate contribution from individuals. The current arrangement means that the Consumer Credit Counselling Service (CCCS), now known

as ‘Step Change’, guidelines are used by some, including AiB for bankruptcy cases, while others use the British Banking Association (BBA) approved Common Financial Statement (CFS). Each model takes a different approach to calculating the amount of money on which an individual needs to live. An appropriate contribution is then calculated from the surplus income. It is generally accepted that the CFS is relatively generous in its allowances, meaning that contributions can be very modest. In using the CFS, money advisers also have a significant amount of discretion meaning that household expenditure can include what could reasonably be regarded as luxury items such as the most expensive entertainment package from satellite television providers. In agreeing any new tool, to arrive at a sustainable contribution level the Scottish Government expects to consider what is reasonable household expenditure.

Consultation

36. In the consultation there was overwhelming support for this proposal with 100 of the 129 respondents in favour of a single common financial tool to be used across all debt relief and debt management solutions.

Proposals

37. The Scottish Government in consultation with stakeholders will develop a common financial tool to be used to calculate the amount of contribution, if any, to be made by an individual from any surplus income they may have, across all debt relief and debt management solutions. The common financial tool is to be enshrined in regulations to be approved by the Parliament under the affirmative procedure (section 3). The power in the Debt Arrangement and Attachment (Scotland) Act 2002 to make the DAS Regulations is also modified to allow similar provision to be made. A working group has been set up to help in the development of a common financial tool. The group members represent a cross section of stakeholders with representatives from the money advice sector, insolvency sector and the financial sector. The group is chaired by AiB on behalf of the Scottish Government.

Alternative approaches

38. In considering whether a single tool is an appropriate mechanism, an alternative approach was also considered. This approach would see a percentage of income above a fixed level being made available as a contribution to pay what is owed.

39. Two different models were considered for this approach, a fixed percentage of net income and sliding scale percentage of net income. The fixed percentage of net income contribution model simply assumes that all debtors pay a fixed percentage of their earned income towards their bankruptcy. It makes no other differentiation between debtor’s circumstances and it does not attempt to ascertain whether the debtor has sufficient surplus to pay it. This would be similar to the model used for assessing deductions under an earnings arrestment.

40. There was little support for this proposal with only one stakeholder group favouring a contribution to be based on a sliding scale percentage of an individual’s income. It was highlighted by some respondents that this method did not acknowledge the fact that there are many different household compositions which will affect their reasonable domestic needs.

Debtor contribution order

Policy objective

41. Policy aim is to allow AiB to make an order fixing the debtor's contribution to be paid towards their bankruptcy.

Current process

42. Currently, where a debtor has been assessed as being able to make a contribution towards their bankruptcy, a trustee can apply to the sheriff and the sheriff having considered all the circumstances, taking into account an amount for the debtors aliment and relevant obligations, will determine the sum to be paid by the debtor and the period over which the payments must be made, pending any change in circumstances the debtor may have. This process is currently known as an Income Payment Order (IPO).

43. This is a common occurrence at present; however that will change with the introduction of the CFT, which will indicate, at least for debtor applications, at an early stage before sequestration the level of the contribution to be made by the debtor.

Consultation

44. In the consultation respondents were asked 'should AiB have the power to make orders for these mainly administrative processes, with disputed decisions being referred to a sheriff?' The majority of respondents who gave a yes or no answer to this question were in favour of AiB having the power to make these orders.

Proposal

45. The Bill provides for the transfer of this role from the sheriff to AiB, allowing AiB to determine any contribution arrangements when making a debtor contribution order. It will be determined in accordance with the CFT.

46. Immediately following the making of a debtor contribution order AiB must give written notice of the order to the debtor, the trustee and any third person, where applicable.

Debtor contribution order: payment period and intervals

Policy objectives

47. The policy aim is to standardise the returns required from debtors in the interests of a fair return to creditors.

Current process

48. There is currently no standard payment period over which a debtor must make a contribution towards their bankruptcy.

Consultation

49. In the consultation the majority of respondents were in favour of a standardised payment period. One stakeholder commented ‘Debtors and creditors require certainty. We would not wish to see a situation where a debtor could be required to contribute for an indefinite period. This would be a retrograde step.’

Proposal

50. Using the CFT, debtors who have been assessed as being able to make a contribution towards their bankruptcy, will be required to make payments throughout the ‘payment period’, the ‘payment period’ being 48 monthly payments or equivalent in weekly payments from the date of the first payment. However, this arrangement can be varied should the debtor’s circumstances change, or in certain circumstances to result in a shorter or longer repayment period.

Alternative approaches

51. Other repayment timescales were considered with respondents to the consultation initially favouring a 5 year minimum repayment period. The Scottish Government consulted further with stakeholders regarding the repayment period raising whether 5 years was an arbitrary timescale for a debtor to pay a contribution in bankruptcy. Stakeholders agreed that fixing the period to 4 years would balance the needs of both debtors and creditors.

Effect of debtor contribution order

52. This section relates to the proposal set out in paragraphs 41 to 46 above.

53. A debtor must pay to the trustee the sum determined by the contribution order even after the debtor’s discharge from liability for their debts at the date of sequestration, as is the position at present.

Deduction from debtor’s earnings

Policy objectives

54. The policy objective is to allow an assessed contribution to be deducted directly from the debtor’s wages.

Current process

55. In bankruptcy there is currently no provision to allow for the deduction of an assessed contribution directly from a debtor’s wages.

Consultation

56. In the consultation, respondents were asked ‘if having calculated the amount of contribution to be paid by the individual, using the common financial tool, should the legislation be changed to allow an assessed contribution to be deducted directly from an individual’s wages’. Respondents were broadly in favour of this proposal.

Proposal

57. New provisions introduced in this Bill will, where a debtor is subject to a debtor contribution order, allow an employer, as instructed by the debtor, or by the trustee where the debtor fails so to instruct his or her employer and fails to meet 2 payments, to make a deduction from the debtor's earnings, as specified by the debtor contribution order, and pay the sum directly to the debtor's trustee. The debtor's employer must comply with an instruction to make deductions directly from the debtor's earnings.

58. Scottish Ministers may make by regulations provisions relating to this section added to the Bill. In particular, Ministers may prescribe the form to be used when issuing an instruction to an employer to make a deduction from a debtor's earnings and also the consequence of any failure by an employer to comply with the instruction. A similar approach is used in the DAS scheme.

Alternative approach

59. No alternative approach was considered.

Variation and removal of debtor contribution order by trustee

60. This section relates to the proposal set out in paragraphs 41 to 46 above.

61. The trustee may, on application from the debtor, at any time following the making of a debtor contribution order, vary or quash the order where the debtor's circumstances have changed.

62. The trustee on deciding whether or not to vary or quash the order must notify the debtor, AiB (if not the trustee) and any third party making payments on the debtor's behalf.

Payment break

Policy objectives

63. Whilst it is acknowledged that those who can pay should pay their debts it is recognised that there are some circumstances where a debtor may not be able to continue making an assessed payment, for example, a period of unemployment or illness. To address this, the Bill introduces the facility for the debtor to apply to the trustee for a 'payment break' of up to 6 months.

Current process

64. There is currently no provision for payment breaks in bankruptcy. A debtor can only request a re-calculation of the amount they currently pay towards their bankruptcy.

Consultation

65. The majority of respondents agreed that payment breaks of up to 6 months should be available in all statutory debt relief products, with the period of the payment break added onto

the length of the payment period. They also agreed that the payment break eligibility criteria should be the same across all debt relief and debt management products.

Proposals

66. The Bill will provide a debtor, who is making a contribution towards their bankruptcy, the option of a payment break of up to 6 months where they meet the eligibility criteria, as follows:

- A reduction of at least 50% in their disposable income.
- A period of unemployment or change in employment.
- A period of leave from employment due to the birth or adoption of a child or the need to care for a dependant.
- A period of illness of the debtor.
- A divorce, dissolution of a civil partnership or separation from a person to whom the debtor is married or the civil partner.
- The death of a person with whom the debtor shared care, financial responsibilities or otherwise.

67. Having considered the request for a payment break the trustee if of the opinion that the request is fair and reasonable may grant a payment break, notify the debtor AiB (if not the trustee) and any third party making payments on the debtor's behalf.

68. Consequently, where a debtor applies for a payment break, the period over which the debtor is making a contribution will be extended by a period equal to the payment break.

69. It is understood at present payment breaks happen, to some extent in practice, albeit informally. This Bill will place this practice on a statutory basis. It is the intention to introduce the criteria for a payment break to all statutory debt solutions. This will align bankruptcy and Protected Trust Deeds (PTDs) with DAS, which will separately offer this facility.

Alternative approaches

70. No other approaches were considered.

Variation and removal of debtor contribution order: review and appeals

71. Where the debtor does not agree with the decision of the trustee the debtor may apply to AiB for a review of a decision by the trustee. The debtor must apply to AiB within 14 days of the trustee making the decision.

72. AiB having considered any representations made by any interested party must revert to the debtor with their decision within the statutory timescale set out in the Bill.

73. Should the debtor or the trustee disagree with any decision made by AiB they may appeal to the sheriff within 14 days of the decision being made by AiB.

BANKRUPTCY WHERE THE DEBTOR HAS FEW ASSETS

Debtor application

Policy objectives

74. The policy objective is to replace the current low income, low asset route into bankruptcy with a new 'minimum assets process' (MAP), a debtor application, which is intended to provide debt relief to debtors whose only income is derived from social security benefits or for those individuals who using the CFT has been assessed as being unable to make a contribution towards what is owed.

75. This process will require limited administration as the debtor will have minimum assets to be realised and therefore no dividends to be paid to creditors. Nor will the debtor be in a position to make a contribution towards his bankruptcy as social security benefits do not vest in any trustee in bankruptcy (on the basis of section 187(1) of the Social Security Administration Act 1992) or as a result of a CFT assessment.

Current position

76. The Scottish Government acknowledge that the criteria for the current Low Income Low Assets (LILA) route into bankruptcy are perhaps too broad and this has resulted in some stakeholders being confused or uncertain about what happens to an individual who is made bankrupt through this route.

77. The table below shows the number of cases transferred from LILA to full bankruptcy. As the table shows the number of cases transferred from LILA to full bankruptcy has fallen in 2012/13. As the criteria for MAP will be clearer it is anticipated that there will be a further reduction in the number of cases transferred as there will be more clarity for money advisers as to whether they should be using the MAP as opposed to the full bankruptcy route.

Transfer of LILA cases to full bankruptcy

Year	Number of LILA cases transferred to full bankruptcy
2009/10	1,024
2010/11	1,311
2011/12	1,076
2012/13	774

Consultation

78. The majority of respondents who provided a yes or no answer to this question were in favour of the introduction of a route into bankruptcy for those whose sole income is derived from welfare benefits.

79. When asked if a maximum debt level should be set for those accessing this process, respondents were in support of this proposal and that those who own heritable property should not be able to access this process.

80. It is the intention, as there will be minimal administration on these cases, that the debtor can apply for discharge after 6 months as opposed to the 12 month discharge period for full bankruptcy cases. Respondents were divided on whether a debtor should be discharged after 6 months in a MAP bankruptcy.

81. Several stakeholders were concerned that with a 6 months discharge some individuals would give up work to take advantage of having their debts written off and return to work once discharged. To alleviate this fear, it is proposed that the debtor will only be discharged after 6 months if AiB, as trustee, is satisfied that the debtor has co-operated throughout the bankruptcy process. In addition to this, where a debtor is discharged after 6 months from the date of award, a 6 months post discharge credit restriction will be placed on the debtor. The majority of respondents favoured the proposal to place a post discharge credit restriction on the debtor. For further details on the post discharge credit restriction see paragraph 86.

Proposal

82. Having analysed the consultation responses the Scottish Government proposes to introduce a new route into bankruptcy to be known as the 'Minimum Asset Process' (MAP). This route into bankruptcy will replace the current LILA route.

Circumstances where Accountant in Bankruptcy appointed as trustee

83. It is proposed that AiB will act as trustee in these cases on the basis that there are minimum assets to be realised and the debtor will not be in a position to make a contribution towards his or her bankruptcy. Consequently, there will be minimal administration on these cases with the debtor discharged 6 months after the date of award of bankruptcy. Following discharge the debtor may apply to AiB for a certificate of discharge. The administration costs of these cases will be met from the debtor application fee, in line with AiB's strategy towards full cost recovery and the introduction of automated systems which avoids the need for staff input where appropriate.

How to access the MAP route into bankruptcy.

84. To access this route into bankruptcy the debtor must fulfil the following criteria:

- The debtor must have been in receipt of prescribed welfare benefits for a period of 6 months or more up to and including the date of the application or where they meet the debt and assets limit have been assessed using the CFT as being unable to make a contribution towards their bankruptcy.
- The coming into force of the Welfare Reform Act 2012 brings major changes to the current benefit system. A new benefit to be called Universal Credit will replace Income support, job seeker's allowance, child tax credit, working tax credit, housing benefit, council tax benefit and disability living allowance. Due to the pending changes to the current benefits system it has not yet been determined which welfare

benefits (other than tax credits which are paid to earners and would therefore be excluded from eligibility for ‘no income’ debtors) will be relevant benefits, the receipt of which will mean that the debtor is eligible to apply for bankruptcy on a ‘no income’ basis. Partly in light of this, provision will be made as at present in the LILA Regulations in the delegated power, enabling relevant benefits for the purpose of eligibility to be prescribed in regulations, to be made by the Scottish Ministers.

- The debtor must obtain money advice from an approved money adviser.
- The approved money adviser having established that the debtor is unable to pay his debts as they become due or make a contribution to repay what is owed will provide the debtor with a Certificate for Sequestration, in accordance with section 5B of the 1985 Act.
- The debtor’s debts (including interest) must not be less than £1500, or such sum as may be prescribed and no more than £10,000 or such sum as may be prescribed by Scottish Ministers at the date of application.
- The debtor must not have been made bankrupt within 5 years of the date of application.
- The debtor must not have made and been granted an award of bankruptcy under the MAP route into bankruptcy within 10 years of the date of application. This is with a view to preventing an individual from seeing this debt relief solution as an ‘easy option’.
- The debtor must not own land.
- The total value of the debtor’s assets on the date of application must not exceed £5,000 or such other amount as may be prescribed.
- The value of a single asset of the debtor must not exceed £1,000 or such other amount as may be prescribed, except that the debtor may own a vehicle, the use of which is reasonably required by the debtor, valued at no more than £3,000, or such other amount as may be prescribed in regulations.

Discharge from bankruptcy on transfer from MAP to full bankruptcy

85. In the event that the trustee is not satisfied that the debtor has co-operated or the debtor is found to have deliberately misrepresented or failed to state a fact which results in the debtor no longer satisfying the relevant criteria for a MAP bankruptcy, the debtor will move to ordinary bankruptcy or full administration, attracting a minimal discharge period of 12 months. This period may be extended should the debtor fail to co-operate with the trustee. The trustee when satisfied that the debtor has complied with all statutory requirements of the bankruptcy process will make an application for the debtor’s discharge.

86. As previously mentioned, following the 6 month discharge a post discharge credit restriction will be placed on the debtor whereby the debtor must not obtain credit of £2000 or (such other sum as may be prescribed) or more. This restriction will be known as a ‘Post Bankruptcy Restriction’ (PBR). The PBR will restrict the debtor’s access to credit after their discharge from the MAP for a period of 6 months or longer should the debtor breach the post bankruptcy restriction.

87. If a debtor fails to comply with the terms of the PBR the debtor is committing a criminal offence and is liable on summary conviction to a fine, imprisonment or both.

Alternative approaches

88. In the consultation several new routes into bankruptcy were proposed. However, in general respondents were against the development of a variety of different products for bankruptcy, raising concerns regarding the potential complexity of such a system.

MORATORIUM ON DILIGENCE

Policy objectives

89. The policy is to introduce a single mechanism for written intimation from the debtor to AiB of their intention to apply for insolvency or debt management, which will result in an initial 6 weeks moratorium on diligence. The moratorium is a suspension or freezing of the debtor's creditors' ability to raise diligence, i.e. to enforce debts, against the debtor, initially for the period of 6 weeks. An example of diligence is arrestment of earnings or wages. The moratorium therefore protects an individual from any enforcement action being taken by creditors, allowing them to seek advice on which debt solution/s would be the best option for them.

Current process

90. At present for bankruptcy there is no moratorium. In DAS there is a moratorium on diligence for 6 weeks following an intimation period as stated in regulation 30(1)(a) of the DAS Regulations 2011. For Protected Trust Deeds, a trust deed does not cut down prior diligence and there is currently no moratorium in the PTD process.

Consultation

91. Respondents were in favour of a moratorium across all debt relief and debt management solutions. However, respondents were very clear that there should be only one moratorium in any 12 month period, and it should be displayed in a public register with universal access, to provide protection for creditors.

Proposals

92. The Bill introduces a single moratorium on diligence, for a period of 6 weeks, from intimation by the debtor to AiB of their intention to apply for debt relief in the form of DAS, a debtor application in bankruptcy or for protection of a trust deed for the benefit of creditors. The moratorium is in addition to the provisions currently provided in the 1985 Act and the DAS Regulations 2011, the latter of which would be revoked on the moratorium coming into force.

93. The moratorium period would protect an individual from enforcement action being taken by creditors and gives them breathing space to take action to deal with their debts. Similar to DAS, only one intimation period can be applied for within a 12 month period. This ensures that the restriction on creditors taking further action is not extended and repeated without limit. Once an application for sequestration, protection of a trust deed or for a debt payment programme is made, the moratorium extends to allow that application to be determined.

94. Due to the importance of the moratorium and the requirement for it to be observed, it is anticipated that the moratorium will be registered on a public register that can be accessed by interested parties, through, the Register of Insolvencies and the Debt Arrangement Scheme Register.

Alternative approaches

95. In the consultation respondents were asked what period the moratorium should be, 4 weeks, 6 weeks, 8 weeks or another period. The majority of respondent who answered this question supported a 6 week moratorium period.

APPLICATION FOR BANKRUPTCY

Statement of undertakings

Policy objectives

96. In order to ensure a debtor is aware of his or her duties and obligations during the bankruptcy process the debtor will be required to sign a ‘Statement of Undertaking’. This will apply to a debtor making a debtor application for bankruptcy, as part of the application, and where an individual is made bankrupt following a creditor petition.

Consultation

97. In the consultation respondents were asked whether the co-operation of a bankrupt individual should be linked to discharge. There was significant support for this proposal with 107 of the 129 respondents in favour of linking a debtor’s discharge to co-operation.

Proposals

98. A debtor already signs a ‘Statement of Undertaking’ at the beginning of the current bankruptcy process. However, this is not a statutory requirement.

99. New provisions in this Bill will allow the trustee to refuse to grant a debtor’s discharge from bankruptcy where the debtor has failed to comply with their duties and obligations, during the bankruptcy process. In light of this, it is important that a debtor understands what their duties and obligations are. It is therefore proposed to formalise this process by making it a statutory requirement for the debtor to sign a ‘Statement of Undertakings’, making it clear to the debtor that failure to sign or comply with the terms of the statement will mean that their discharge will not be granted.

100. A copy of the Statement of Undertakings, in draft form, is inserted at Annex A below. The form will be prescribed by regulations.

Alternative approaches

101. No alternative approaches were considered.

Debtor application: incomplete application

Policy objective

102. The policy intention is to strengthen this provision by removing it from the Bankruptcy (Scotland) Regulations 2008, placing the provision in 1985 Act, making it clearer that AiB already has the authority to request further information from a debtor where an incomplete debtor application has been received.

Current process

103. The authority to request further information from the debtor where an incomplete debtor application has been received is currently provided for in the Bankruptcy (Scotland) Regulations 2008.

Proposal

104. The Bill proposes removing the provision to request further information from a debtor, where an incomplete debtor application has been received, from the Bankruptcy (Scotland) Regulations 2008 placing the provision in the 1985 Act.

Refusal of debtor application: inappropriate application

Policy objective

105. The policy intention is to strengthen this provision by removing it from the Bankruptcy (Scotland) Regulations 2008, placing this provision in 1985 Act, making it clear that AiB already has the authority to refuse the award of bankruptcy in certain circumstances.

Current process

106. The authority to refuse the award of bankruptcy where AiB consider it inappropriate to do so is currently provided for in the Bankruptcy Scotland Regulations 2008.

Proposal

107. The Bill proposes removing the provision to refuse an award of bankruptcy where AiB consider that an award of bankruptcy may not be appropriate, from the Bankruptcy (Scotland) Regulations 2008 placing the provision in the 1985 Act.

Bankruptcy: application by executor

Policy objectives

108. Currently, a petition for sequestration by an executor is presented in court to allow the debtor the opportunity to give evidence as to why the petition should not be granted. As this is not the case where a debtor is deceased the process is mainly an administrative process. It is therefore the policy intent to remove bankruptcy applications presented by an executor from the Court to AiB and to introduce a timescale of 12 months, for the submission of an application for the bankruptcy of a deceased's estate from when the executor knew or ought to have known that the estate was absolutely insolvent.

Current process

109. At present an executor must petition for the bankruptcy of a deceased debtor's insolvent estate within a 'reasonable period' after the executor knew or ought to have known that the estate was absolutely insolvent. To clarify the timescale in which an executor must present a petition for the bankruptcy of the deceased estate, the term 'reasonable period' will be removed and replaced with a fixed period of 12 months.

Consultation

110. The majority of respondents agreed that AiB should deal with applications for bankruptcy from executors of the estate of insolvent deceased individuals.

Proposals

111. New provisions in the Bill amend the process by which an executor may apply for the bankruptcy of a deceased debtor's insolvent estate, as follows:

- The executor must make the application for bankruptcy 12 months after he or she knew or ought to have known that the estate was absolutely insolvent, and
- as this type of application is mainly an administrative process applications will now be made to AiB instead of the Courts.

112. Given the nature of these applications there will be no requirement for the executor to obtain money advice prior to the submission of the application for bankruptcy.

Alternative approaches

113. No alternative approaches were considered.

Concurrent proceedings for sequestration: recall

Policy objectives

114. The policy aim is to allow AiB, where a sheriff has directed AiB to dismiss an award of bankruptcy, granted following a debtor application, to recall the award. This new provision is as a result of a case where an award of bankruptcy had been granted by AiB, without knowledge of the award of a creditor petition by the sheriff, for the same period.

Current process

115. Under the current law the sheriff has the authority to direct AiB to dismiss an award of bankruptcy granted following receipt of a debtor application. However, the current legislation also states that an award of bankruptcy is only subject to review by way of recall (or an action of reduction). Recall of an award of bankruptcy puts the debtor so far as practicable back in the position they were in before bankruptcy was awarded.

Proposal

116. The introduction of this new provision will allow AiB to recall an award of bankruptcy on a debtor application where a sheriff has directed AiB to dismiss that award. As previously

stated a recall of an award of bankruptcy restores the debtor to the position they were in prior to the granting of the award of bankruptcy. However, in this situation the award of bankruptcy granted by the sheriff will still stand.

ADMINISTRATION OF ESTATE

Submission of claims to the trustee

Policy objectives

117. One of the key principles of this Bill is to ensure the best return for creditors. One way of achieving this would be to establish as soon as possible in the process the exact amount of debt that an individual owes in order for the trustee to calculate the dividend payment each creditor might expect to receive. The objective is therefore to introduce a time frame for creditor claims.

Current process

118. At present there are varying timescales for the submission of creditor claims dependent on the debt relief product. In bankruptcy if a creditor wishes to vote at the statutory meeting they must submit their claim prior to, or at, the meeting. If not submitted at the statutory meeting, in order to receive a dividend payment the creditor must submit a claim to the trustee at or before the meeting of creditors or not later than 8 weeks before the end of an accounting period.

119. As things stand at present creditors can release themselves from the burden of a debt owed by selling the debt on to a debt collection company. As a result the debt collection company would then be the creditor for this debt. It is common practice for some creditors to sell debt off after the individual has entered into a debt relief product.

120. Any delay in receiving a claim can impact on the calculation of dividends. If the evidence of debt claimed shows a different figure to that initially provided by the individual then a recalculation of a dividend would be required. This may mean that the trustee does not have the full information on which to base any decisions, such as whether to sell assets.

Consultation

121. There was substantial support for the proposal that creditors should have to submit a claim within 120 days of notification of an individual's bankruptcy.

Proposals

122. The Bill introduces a time frame for creditor claims. Creditors will have to submit their claims to the trustee within 120 days of notification by the trustee. Where a claim is not submitted within this time frame, creditors will be required to provide a relevant explanation as to why the claim was not submitted and may not be entitled to a dividend. The onus will be on the creditor to ensure that a claim is submitted complete with proof of debt, including their payment details, within the specified timescale.

Alternative approaches

123. In the consultation other timescales were considered. However, the majority of respondents favoured the 120 days time frame, stating that creditors must provide an explanation should they submit their claim outwith the 120 days of notification.

First accounting period - dividend to be paid to creditors more regularly

Policy objectives

124. One of the key principles of this Bill is, wherever fair and possible, to offer a better return for creditors. Whilst an interim dividend payment does not provide a greater return, it does ensure creditors access to funds they are entitled to claim from the estate at an earlier stage. This may be particularly useful where creditors are small businesses. The policy intention is therefore to amend the legislation on interim dividends to allow the trustee to make a dividend payment to creditors at an earlier stage in the administration, should sufficient funds be ingathered, to ensure funds are not held by trustees for longer than they need be.

Current process

125. The current legislation provides for the trustee to pay dividends to creditors in respect of each accounting period, that is 12 month periods, provided there are sufficient funds available having made provision for future contingencies. This is however subject to variation in certain circumstances.

Consultation

126. There was support from respondents for the earlier payment of dividends to creditors. One respondent stated:

- ‘Funds should be distributed to creditors as soon as it is practical to do so, taking into account the cost of so doing. It may not be cost effective to pay dividends at regular intervals. What can be considered is the timing of the first dividend.’

Proposal

127. Although currently there is provision for the trustee to make a dividend payment early in some circumstances this is not often done in practice. To ensure creditors have access to funds they are entitled to at an earlier stage in the bankruptcy process it is proposed to introduce the option to vary the length of the first accounting period to no less than 6 months.

128. This variation in the first accounting period would be by agreement between the trustee and commissioners or AiB, or where AiB is the trustee as AiB determines.

129. This earlier end to the first accounting period should only be allowed on the grounds that the trustee considers that he or she will be in a position to pay a dividend, that is, having ingathered sufficient funds and taken account of any future contingencies. Otherwise the first accounting period should default to the 12 month period.

130. Although there is no specific sanction for failure by the trustee to make an interim payment a trustee would consider this as part of their normal duties and there remains the provision for the debtor, a creditor or any other person with an interest in the bankruptcy to apply to the Sheriff where they are dissatisfied with the trustee's decision.

Alternative approaches

131. In the consultation respondents were asked what should the period of interim payments to creditors be, giving respondents several options to consider. There was support for creditors to receive regular dividend payments. The view was that this should be done as soon as it is practical to do so, but there was no consensus from respondents on the intervals of the payments.

Vesting of estate after sequestration

Policy objectives

132. In keeping with the principle of 'those who can pay should pay', it is proposed that the period in which aquirenda, (that is, any property or right acquired or received by a debtor after the date of bankruptcy, and at present, before the date of discharge), would vest in the trustee should be changed from the period of the debtor's bankruptcy to 4 years after the date of bankruptcy. The same would apply to non-vested contingent interests, such as legacies under a will, any right to which will reinvest in the debtor at the end of the 4 year period.

Current process

133. At present only assets acquired by the debtor during their bankruptcy vest in the trustee.

Consultation

134. This proposal was not consulted on however stakeholders were given the opportunity to discuss this proposal at subsequent stakeholder events.

Proposal

135. The current provisions in the 1985 Act relating to non-vested contingent interests and aquirenda would be amended by this Bill, extending the period in which aquirenda received by the debtor vests in the trustee, and for which non-vested contingent property is available, to a period of 4 years after the date of bankruptcy.

136. As a result of this change, where a creditor or the trustee becomes aware of the debtor acquiring assets, which would have vested in the trustee, in the 4 years after the date of bankruptcy, these assets will be realised for the benefit of creditors. Where the trustee is discharged, an application will be made to have the case re-opened, in accordance with the provisions introduced in this Bill.

Alternative approaches

137. No alternative approaches were considered.

DISCHARGE FOLLOWING BANKRUPTCY

Discharge of debtor

Policy objectives

138. The policy objective is to introduce a new process of discharge from bankruptcy linking a debtor's co-operation with their discharge from bankruptcy.

Current process

139. At present a debtor receives automatic discharge from bankruptcy at which point the debtor receives full debt relief. An exception to this is where the trustee has applied to the sheriff for deferral of the debtor's discharge. This can be a costly and time consuming process and is not often utilised.

Consultation

140. In the consultation respondents were asked if automatic discharge should be removed and replaced with a new process for discharge linking a debtor's co-operation with their discharge from bankruptcy and full debt relief. There was overwhelming support for this proposal, with 103 of the 129 respondents in favour of linking a debtor's co-operation with their discharge.

141. It was also proposed that under the new process for discharge a trustee would apply to AiB for the debtor's discharge as opposed to the sheriff. Respondents were in support of this proposal.

Application for discharge: where AiB is not the trustee

Proposal

142. As stated above the Bill removes the automatic discharge (other than in MAP cases) and introduces a new process whereby the trustee must apply to AiB for the debtor's discharge from bankruptcy only when the trustee is satisfied that the debtor has fully co-operated and all statutory issues and investigations have been completed.

143. The trustee may apply to AiB any time after 10 months from the date of award and no later than the date that the trustee applies for their own discharge. The trustee must submit to AiB an application for the debtor's discharge along with a report containing details of the bankruptcy, the debtor's co-operation throughout the bankruptcy process and a declaration signed by the trustee, confirming that the debtor has co-operated with the trustee and all necessary actions have been carried out. At this time, the trustee must also intimate the application for discharge to any creditors and the debtor, allowing them to make written representation to AiB with a timescale of 14 days.

144. The debtor may request the trustee to make an application for the debtor's discharge no earlier than 12 months after the date of award of bankruptcy. The trustee on receipt of a request for discharge from the debtor must consider whether to make the application to AiB. The debtor may only submit a request to the trustee at no less than 12 monthly intervals throughout their bankruptcy unless exceptional circumstances apply. The trustee must follow the same process as

if he or she had instigated the application, as above, but may instead of submitting a signed declaration submit a report on those matters. However, discharge cannot be granted until after 12 months from the date of award of bankruptcy.

145. AiB on receipt of the application for discharge if satisfied that the debtor has co-operated will grant a certificate of discharge, in the prescribed form.

Proposal for discharge: where AiB is the trustee

146. In cases where AiB is the trustee, AiB must as soon as it is practicable after the date which is 12 months after the date of award of bankruptcy decide whether to discharge the debtor by granting a certificate of discharge or refuse to discharge the debtor.

147. AiB on deciding to refuse to discharge the debtor must draft a report containing details of the bankruptcy and the debtor's co-operation throughout the bankruptcy process. At this time, AiB must also notify the refusal to grant the debtor's discharge to the debtor and every creditor. AiB must thereafter reconsider the decision to refuse discharge as soon as is practicable after the date which is 12 months after the date of the refusal.

148. AiB on granting a debtor's discharge must draft a report containing details of the bankruptcy and the debtor's co-operation throughout the bankruptcy process. At this time, AiB must also notify the debtor and every creditor of their decision.

Alternative approaches

149. No alternative approaches were considered.

Discharge of debtor: reviews and appeals

150. This section relates to the proposal set out in paragraphs 138 to 149.

151. The trustee or the debtor may, within the statutory timescale, apply to AiB for a review of their decision to refuse to grant a debtor's discharge from bankruptcy. Similarly, any creditor of the debtor may, within the statutory timescale, apply to AiB for a review of their decision to grant the debtor's discharge.

152. The debtor, the trustee or any creditor may, within the statutory timescale, appeal to the sheriff against any decision made by AiB on the granting or refusal to grant a debtor's discharge.

Repeal of discharge on composition

Policy objectives

153. The policy is that there should only be two routes out of bankruptcy that is recall with payment in full or discharge with full debt relief. It is considered that composition which offers only partial repayment of no less than 25 pence in the pound is a confusing option. Accordingly, the policy intention is to remove composition from the 1985 Act.

Current process

154. Currently, the debtor (or someone on behalf of the debtor) submits an offer of composition to the permanent trustee who then decides whether or not to refer the offer of composition to the commissioners (if any) or AiB. The commissioners (if any) or AiB must then decide whether to recommend or not that the offer is circulated to the creditors.

155. The trustee when recommended to do so must circulate the offer to the creditors. Where a majority in number and two-thirds of the value of the creditors accept the offer of composition the trustee must submit the offer to the sheriff who will decide whether or not to make an order approving the offer of composition. On receipt of the order approving the offer of composition the trustee must carry out the necessary accounting. Once this action has been completed the sheriff will discharge the trustee and the debtor.

156. Composition is not commonly used with there having been fewer than five applications for composition since 2008.

Proposal

157. In light of the above, it is proposed in the Bill to repeal an ‘Offer of Composition’.

Alternative approaches

158. No alternative approaches were considered.

Deferral of discharge where debtor cannot be traced

Policy objectives

159. The policy intention is that those who can pay should pay. A debtor should not receive debt relief purely on the basis that they are unaware of their bankruptcy or choose not to be traced. The policy objective is that where the trustee is unable to locate the debtor, the debtor’s discharge should be deferred indefinitely.

Current process

160. Currently, there are situations where the trustee, after carrying out all the necessary investigations, is unable to locate the debtor. Consequently, the trustee cannot complete his or her statutory duties and may not be in a position to establish what, if any, provisions the debtor can make to repay his creditors. The debtor then receives debt relief on their automatic discharge 1 year from the date of award of bankruptcy.

Consultation

161. Respondents indicated that where a debtor cannot be located their discharge should be deferred indefinitely. One stakeholder group stated ‘Just because an individual cannot be located does not indicate that he would not co-operate. Consideration has to be given to whether the trustee has been able to deal with the estate effectively for the benefit of the creditors. Each case has to be considered on its own merits.’

Proposal

162. New provisions in the Bill will allow the indefinite deferral of discharge from bankruptcy where the debtor cannot be located.

163. On taking the decision to defer the debtor's discharge indefinitely the trustee must issue a deferral notice to the debtor at his or her last known address and every creditor, advising that the trustee intends to submit a notice to defer the debtor's discharge indefinitely.

164. If the debtor thereafter does not make contact, or is not traced, the trustee, if not AiB, must submit to AiB, no sooner than 8 months and no later than 10 months after the date of award of bankruptcy, a notice to the effect that, despite investigation into the debtor's whereabouts, the trustee has been unable to locate the debtor.

165. The trustee should detail in the notice what steps have been taken to trace the debtor. Thereafter, AiB, taking into account any representations made by any interested party within the 14 days of the application being made, being satisfied that the trustee has attempted to trace the debtor and that it is not practical or cost effective to continue the search, must issue a certificate deferring the debtor's discharge indefinitely, and update the Register of Insolvencies to that effect. Where AiB is the trustee they too must take the aforementioned action.

Debtor not traced: new trustee

166. Where a debtor is untraceable and the trustee, who is not AiB, is unable to carry out their functions under the 1985 Act, after a period of investigation by the trustee, the trustee may, where a certificate for the indefinite deferral of the debtor's discharge has been awarded, choose to resign from office and AiB will become the trustee.

167. On taking the decision to resign the trustee may apply to AiB to resign from office, no later than 6 months after the indefinite discharge certificate has been awarded.

168. On receipt of the trustee's application to resign AiB if satisfied that the trustee has attempted to trace the debtor, must agree to the resignation of the trustee and AiB becomes trustee. The former trustee on resigning from office must advise every creditor known to him that AiB is now deemed to be trustee.

169. However, should the debtor be traced before the trustee applies to transfer the case to AiB, the trustee should continue to administer the case as nominated.

170. Any costs incurred in the administration of the case, prior to the case being transferred to AiB, will be incurred by the original trustee. However, should the debtor be subsequently traced, the original trustee can submit a claim in the bankruptcy.

Debtor not traced: subsequent debtor contact

171. Should the debtor subsequently make contact with the trustee or the trustee ascertains the debtor's whereabouts and the trustee is satisfied that the debtor has co-operated fully with the administration of the estate, the trustee must give the debtor a notice that allows the debtor to

apply to AiB for discharge from bankruptcy. To ensure the debtor does not achieve an advantage of an earlier discharge than other bankrupts, this notice should not be issued until 1 year from the date the debtor contacts the trustee. If the debtor decides not to apply to AiB for discharge the trustee may make the application to AiB for the debtor's discharge.

172. The debtor on submitting an application for discharge to AiB must, at the same time, give a notice to the trustee and every creditor, known to the debtor, informing them that the debtor has applied for discharge from bankruptcy, allowing the trustee and creditors to make representation to AiB in relation to the debtor's application for discharge.

173. On receipt of the debtor's application for discharge AiB must take into account any representation received from an interested party before making a decision on the debtor's application.

174. Where AiB is the trustee AiB may discharge the debtor, if they are satisfied that the debtor has co-operated fully with the administration of the estate, no earlier than 1 year from the date the debtor made contact with the trustee.

Alternative approaches

175. No alternative approaches were considered.

Subsequent debtor contact: review and appeal

176. Where AiB has refused to grant a debtor's discharge the debtor may apply, within the statutory timescale, to AiB for a review of AiB's decision to refuse their discharge from bankruptcy. Similarly, any creditor may apply, within the statutory timescale, to AiB for a review of AiB's decision to grant the debtor's discharge from bankruptcy.

177. Before making a decision on the outcome of the review AiB must take into account any representations made by an interested party.

178. Following the review, should the debtor, the trustee or any creditor disagree with AiB's decision they may, within the statutory timescale, appeal to the sheriff against AiB's decision. The debtor will retain the right through all of this to seek recall of the initial sequestration if sequestration was inappropriate.

Unclaimed dividends and unapplied balances

Policy objectives

179. The intention is to reduce the public funding required to cover the operating costs of AiB by streamlining the treatment of consigned funds. In taking this approach AiB will continue to contribute to the Scottish Government's economic strategy.

Current process

180. The 1985 Act requires trustees to consign unapplied balances and unclaimed dividends to ‘an appropriate bank or institution’, after the trustee has made a final division of the debtor’s estate.

181. On the expiry of 7 years from the date of deposit of any unclaimed dividends or unapplied balances, during which time those creditors who are entitled to claim dividends which have been consigned can apply to AiB for the sum due. Section 58(3) of the 1985 Act currently provides that AiB shall transfer such funds to the Secretary of State, now Scottish Ministers following devolution under the general transfer of functions.

182. Many trustees deposit these funds with AiB. Subsequently, they are transferred to the Scottish Ministers on expiry of the 7 year period from the date of consignment. For practical reasons, they are not physically transferred on that expiry. Instead, they are retained by AiB and the amount of funding allocated to AiB from the core Scottish Government budget reduced accordingly (as accruing resources in the annual Scottish Budget Acts).

183. Some trustees comply with section 57(1)(a) by depositing the funds to be consigned with AiB; however there is provision in the 1985 Act to deposit these directly in an appropriate bank or institution. Where funds are deposited elsewhere the receipts for these deposits are required to be passed to AiB, although AiB note that in practice they have not received any receipts for several years. This would suggest that all consigned funds come directly to AiB.

184. At present when consigned funds are uplifted any interest accrued is paid back to the creditors. The interest on consigned funds not uplifted is transferred to Scottish Ministers along with the consigned funds on which the interest accrues.

Consultation

185. This proposal was not consulted on as the policy objective is to streamline the process, bringing the legislation in line with current practice.

Proposal

186. Provisions in the Bill amend the legislation on consigned funds bringing current legislation into line with practice, amending section 57(1)(a) and (b) so all unclaimed dividends and unapplied balances, after the trustee has made a final division of the estate and inserted final audited accounts in the sederunt book must be paid to AiB. AiB 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.

Assets discovered after trustee discharge: appointment of trustee

Policy objectives

187. The policy intention is to provide a better return to creditors by reducing the cost of reopening cases and to reduce the requirement to put these matters before the sheriff.

Current process

188. In bankruptcy, assets which should have vested in the trustee can come to light after the trustee has been discharged. This has been prevalent in recent years with PPI mis-selling compensation claims repaid to a debtor after the trustee has applied for discharge.

189. Where such a discovery is made, and it is cost effective to do so, a trustee will normally apply to the sheriff under section 63 of the 1985 Act for the case to be reopened.

190. In practice, the legal costs for re-opening a bankruptcy case can be between £2,000 and £6,000, if the action is defended. AiB's legal agents have recently agreed with at least one sheriff that undefended actions may be heard in chambers, which reduces the costs to between £200-500. For such a hearing to take place in chambers, the debtor must send a letter to the Sheriff Clerk stating that they have no objection to the case being re-opened.

Consultation

191. This proposal was not consulted on however stakeholders were given the opportunity to discuss this proposal at subsequent stakeholder events.

Proposal

192. New provisions in the Bill allow AiB to reappoint the previous trustee in a bankruptcy where, within 5 years of the date of sequestration, assets are identified that would have vested in the trustee.

193. Where assets have been identified, possibly by a creditor or an ex-partner of the debtor, and the previous trustee, who is not AiB, does not wish to re-open the case, under the new provisions AiB may become the trustee.

194. To ensure cases are not reopened without good cause, there is a statutory 'worth it' test. That is, that the costs for seeking re-appointment as trustee, and the potential costs for realising the identified new asset/s, are likely to equal or exceed the value of the asset.

195. In order to reopen the bankruptcy using this process, the trustee, including AiB, would have to demonstrate:

- the value of the asset;
- that these assets would have vested in the trustee and they would have been realised had the trustee been aware of the assets;
- the anticipated cost to reopen the case;
- whether the funds are to cover the costs of the bankruptcy; and
- the anticipated return to the creditors.

196. The net value of the assets should be £1,000 or more after the costs of selling/realising the asset have been made.

197. The trustee must inform the debtor and any other relevant parties that the trustee, or AiB, intends to seek reappointment, allowing them 14 days from the date of notification to submit any representation they may wish to make in relation to the reopening of the case. Prior to reopening a case AiB must take into account any representation made by all relevant parties.

198. Where a debtor or other relevant parties disagree with AiB's decision to reappoint herself or another trustee they may apply to the sheriff to appeal against the reappointment, within 14 days of such a notification.

199. The trustee must, as soon as practicable after reappointment, notify the debtor of the reappointment of the trustee, reminding the debtor of their requirement to co-operate with the trustee in any investigation or realisation of assets.

200. In cases where assets are identified more than 12 months after the discharge of the trustee, the trustee can only be reappointed with agreement of the sheriff, as in accordance with the current process.

RECORDS

Register of insolvencies (ROI)

Policy objectives

201. The policy objective is to remove the power to prescribe the form of the Register of Insolvencies (ROI) from the Act of Sederunt (Sheriff Court Rules) 2008 to regulations made by Scottish Ministers, subject to the negative procedure in the Scottish Parliament under the 1985 Act.

Current process

202. The ROI is a statutory register about the insolvency of individuals and businesses in Scotland. The register is updated each working day. It is in 2 parts, the first part holds details of bankruptcies awarded by AiB and the Scottish courts together with Protected Trust Deeds for the benefit of creditors. The second part holds details of limited companies which are in receivership or liquidation. The register is held in an electronic format and is maintained by the AiB.

203. Currently if the information to be held on the ROI needs to be updated or amended the changes will also be put before the Sheriff Rules Council for their consideration.

Consultation

204. The majority of respondents who answered this question were in support of the proposal to remove the power to prescribe the form of the Register of Insolvencies (ROI) from the Act of Sederunt (Sheriff Court Rules) 2008 to regulations made by the Scottish Ministers.

Proposal

205. Provisions in the Bill amend the legislation by removing the power to prescribe the form of the ROI from the Act of Sederunt to regulation made by the Scottish Ministers under the 1985 Act.

206. As the ROI is a public register which can be searched by anyone this may be a barrier for some individuals requiring debt relief, even where it may be their best option, as their details will be publicly available.

207. It is therefore proposed to amend in regulation the current form of the ROI to allow for the exclusion from the register of certain information which may jeopardise the safety or welfare of any individual.

208. The ROI is primarily used by creditors who wish to find out if their customer is insolvent. It is acknowledged that withholding, for example, a debtor's address may be problematic for creditors and also individuals who may be applying for credit or who are mis-identified, due to the lack of information. It is therefore proposed that with safeguards in place, for example, with the debtor's permission, creditors may be provided with this information on contacting AiB.

Alternative approaches

209. No alternative approaches were considered.

Sederunt book

Policy objectives

210. Traditionally physical copies of documents relating to the administration of a bankruptcy have been held on paper files forming what is known as the sederunt book, for the purpose of providing an accurate record of the bankruptcy process.

211. In keeping with the theme of modernisation, it is the policy intention that trustees will be required to submit the sederunt book to AiB in an electronic format. Thereafter, the information contained in the sederunt book will be available to view on the ROI.

Current process

212. Prior to their discharge the trustee must notify the debtor and all known creditors that the sederunt book is available for inspection, for a period of at least 6 months, 'at the office of the Accountant in Bankruptcy' or at 'such address as the Accountant in Bankruptcy' may determine.

213. Thereafter, the sederunt book was forwarded to the National Archives where it was stored indefinitely, making it available for public inspection during office hours. The National Records of Scotland (formerly the National Archives of Scotland) however stated that storage space was no longer available for sederunt books. As a result of this, AiB have been maintaining the information electronically on their case management system and when requested printing off copies of the documents for inspection.

Consultation

214. The consensus of respondents was that the requirement to maintain a hard copy of a sederunt book was an outdated concept. Nevertheless, the level of accessibility to the contents of the sederunt book should be maintained.

215. When asked what documents should be held in the sederunt book respondents suggested that the existing documents should be retained, including the Award, court interlocutors and any legal documents.

Proposal

216. As one of the key principles of this Bill is to ensure that the people of Scotland have access to debt relief and debt management processes which are fit for the 21st Century, it is proposed to modernise the sederunt book process. To this end, the Bill amends the legislation to:

- Require the trustee to submit the sederunt book to AiB in an electronic format;
- Direct AiB to record the information contained in the sederunt book on the ROI, which is a public register and can, therefore, be accessed by anyone at any time, improving the current level of accessibility;
- Simplify the process by listing all the documents that have to be placed in the sederunt book in the one place, as opposed to noted throughout the 1985 Act, as is at present. This will be in the format of a new Schedule 3A to be inserted in the 1985 Act;
- Allow the Scottish Ministers by regulation to modify the new Schedule 3A to be inserted in the 1985 Act; and
- Allow the Scottish Ministers by regulation, instead of the Court of Session, to prescribe the timescale and the conditions in which the sederunt book must be available for inspection.

Alternative approaches

217. No alternative approaches were considered.

Abolition of certain requirements in relation to Edinburgh Gazette

Policy objectives

218. The changes introduced by the Home Owner and Debtor Protection (Scotland) Act 2010⁶ began the reform of the ROI to comply with the European e-Justice initiative⁷ to provide access to information about insolvencies through a single European portal.

219. To continue working towards this initiative, particularly as cross-border actions are becoming more common, it is the policy intent to remove from the 1985 Act the requirement to

⁶ Insert link to HODOP <http://www.legislation.gov.uk/asp/2010/6/contents>

⁷ Insert link to e justice initiative <https://e-justice.europa.eu/home.do?action=home>

publish all the remaining personal insolvency notices in the Edinburgh Gazette and instead AiB will arrange for these notices to be included on the ROI.

Current process

220. The current legislation prescribes that, in relation to personal insolvencies, the trustee must publish in the Edinburgh Gazette notices of:

- A petition for recall of a bankruptcy;
- The removal of a trustee; and
- A public examination.

Consultation

221. As this is an ongoing reform of the ROI this did not form part of the consultation on Bankruptcy Law Reform.

Proposal

222. Aligned to the theme of modernisation the Scottish Government proposes to continue the reform of the ROI by removing the requirement to publish the remaining personal insolvency notices in the Edinburgh Gazette and incorporating this information on the ROI.

Alternative Approaches

223. No alternative approaches were considered.

FUNCTIONS OF SHERIFF AND ACCOUNTANT IN BANKRUPTCY IN BANKRUPTCY

Policy objectives

224. AiB estimate around half of the decisions made by sheriffs on miscellaneous bankruptcy notes are of an administrative nature and are made in chambers. The rest go to a court hearing, following arguments from parties prior to a judicial decision.

225. It is considered that the courts are under increasing pressure from civil and criminal business. As a result of this, access to justice may take longer than previously anticipated, with sheriffs spending more time dealing with chambers work than with courtroom business.

226. The policy intention is therefore to reduce the burden on the courts in respect of dealing with bankruptcy procedures that could be categorised as ‘administrative’ in nature by transferring these procedures to AiB. This could potentially result in swifter access to decision making and avoid duplication that currently occurs between two public bodies, AiB and the Court Service.

Current process

227. Currently, there is provision throughout the 1985 Act for specific applications to the sheriff.

228. Historically, the Court of Session and the Sheriff Court both had functions in bankruptcy, which traditionally is a judicial process. That is reflected in some of the general arrangements in the 1985 Act one being that AiB is an officer of court (i.e. of the Court of Session or of the Sheriff Court) and that the Scottish Ministers must consult the Lord President before giving AiB a general direction under section 1C of the 1985 Act.

Consultation

229. There was support from respondents to remove from the courts the mainly administrative bankruptcy processes and transfer the authority to make the decisions on these matters to AiB, with disputed decisions being referred to a sheriff.

Proposals

230. The Bankruptcy and Diligence etc. (Scotland) Act 2007 (BAD Act) made significant changes in transferring debtor petitions to AiB to become debtor applications. It is proposed to transfer further bankruptcy processes from the courts to lessen the burden on the court system.

231. Provisions in the Bill allow for the transfer of the following bankruptcy processes from the Court to AiB, as noted in paragraphs 232 to 289:

Application by trustee for direction on matters in bankruptcy

232. The policy here is for trustees to be able to apply directly to AiB for directions in bankruptcy cases. For the avoidance of doubt, the ability to apply to the sheriff without going to AiB should be removed, except for AiB where they are the trustee.

233. If a decision cannot be made by AiB, or matters are more complex than anticipated or for any other reason AiB should refer the matter to the sheriff for the sheriff's directions. The sheriff can give direction on the handling of the bankruptcy generally and not only on a point of law.

234. Any trustee (other than an interim trustee) may apply to AiB requesting a review of the direction made by AiB. At this time, the trustee or any other interested party may make representation to AiB in relation to the review. AiB must, when reviewing their direction, take into account any representations made by interested parties. Following the review process the trustee may appeal to the sheriff for directions where he or she does not agree with AiB's direction within 14 days from notification of the decision, but not where AiB has referred the matter to the sheriff.

235. Where AiB is trustee, AiB's power to make directions does not apply. AiB as trustee can decide to act without seeking the direction of the sheriff. However, as at present, AiB's decision to proceed without direction from the sheriff may be challenged by any interested parties. AiB as trustee may, as at present go to the sheriff for directions under section 3(6) of the 1985 Act.

E-application process for debtor applications

Policy objectives

236. In keeping with the theme of modernisation and in line with the Scottish Government's strategy for Scotland's Digital Future⁸, to provide the online delivery of public services, the policy objective is to introduce a new web based electronic application process. Applications will be made via an authorised money adviser who must be consulted under the compulsory advice provision. However, the facility for paper based debtor applications will continue to be available, via a money adviser, provided there is a declaration that money advice has been given.

Current application process

237. At present all debtor applications for bankruptcy are completed in paper form and sent by post to the AiB. This can in some instances cause some delay in the award of bankruptcy being made, especially in the few cases where a form goes missing or is delayed. It is also envisaged that the introduction of an electronic application will remove the need to revert to the debtor for further information where an incomplete application has been received.

Consultation

238. In the consultation respondents were asked, with the introduction of compulsory money advice via a money adviser, whether all debtor applications should be made electronically via the money adviser. The majority of respondents however were not in favour of an electronic only application process.

Proposals

239. The power added by section 25 of the Bill will also allow the Scottish Ministers to prescribe the procedure to be followed when making a bankruptcy application such as the introduction of an electronic application process, similar to the application process currently used in the Scottish Government's Debt Arrangement Scheme. This will provide a service which is easier, quicker and more convenient for people to use and at a lower cost than other methods. In light of comments from respondents to the consultation, the option to submit paper based applications will remain.

Alternative approaches

240. No other approaches were considered.

Recall of bankruptcy

241. In addition to moving this process from the Court to AiB the Bill provides for the amendment of the recall process.

⁸ Link to Scottish Government's Digital Ambition for Scotland.
<http://www.scotland.gov.uk/Resource/Doc/981/0114237.pdf>

242. Decisions in relation to awards of bankruptcy are not generally capable of review other than by limited appeal, the recall procedure or the general right to seek reduction of an award of bankruptcy.

243. Recall of an award of bankruptcy can be granted in a wider range of circumstances than in an appeal and the right to seek recall is not limited to those parties who were directly involved in the application for bankruptcy. It can also recognise acts done subsequent to the award of bankruptcy and does not necessarily place the parties in the same position they would have been had bankruptcy not been awarded.

244. Changes to the legislation, introduced in 2008, requires an application for recall of an award of bankruptcy to be made to the Sheriff Court rather than the Court of Session. This change has led to some inconsistencies in the way the recall process is dealt with in the courts, with a lack of clarity as to who is responsible for distributing funds. For example, there have been cases where bankruptcy administration costs have not been recovered when recall was granted and funds distributed.

Policy objectives

245. The policy intent is to introduce a process which clarifies the recall of bankruptcy, to ensure the final interlocutor or order disposing of the case is withheld until all funds have been distributed to creditors, where appropriate.

Consultation

246. In the consultation 96 of the 129 respondents were in favour of the proposal to clarify the current recall process. One stakeholder stated ‘there are inconsistencies of approach at present. We are supportive of mechanisms to increase consistency in all cases’.

Current process

247. Under the current legislation there is confusion as to who should be responsible for ensuring that debts have been paid, along with outlays and expenses.

Proposal

248. In light of the above, it is proposed in this Bill that the trustee should be responsible for ensuring all such debts are paid before recall is granted. Where all payments have not been made an order for recall will not be granted.

249. In the 1985 Act, section 17(1) states that recall may be granted where a debtor has given ‘sufficient security’ for the payment of their debts. This has also caused confusion as it is not clear what constitutes ‘sufficient security’. In this regard, the Bill prescribes that giving ‘sufficient security’ for payment is no longer a ground upon which recall may be granted.

250. Recall is sought in a significant number of petitions on the basis that there has been an error in the original award of bankruptcy, a petition on these grounds must be presented within 10 weeks of the award of bankruptcy. However, an error can be noticed at any time until a debtor is discharged. In order to make the process clearer and fairer, provisions in the Bill

remove the time restriction, allowing the application for recall to take place at anytime throughout the bankruptcy process.

Alternative approaches

251. No alternative approaches were considered

Recall of bankruptcy by sheriff

252. The sheriff will continue to grant recall on all cases other than those where the debtor is able to repay all their debts in full along with any fees, outlays and expenses. Instead these applications will now be dealt with by AiB.

253. However, AiB may, following receipt of an application for interim recall or recall, at any time before making a decision on the application remit the application to the sheriff for consideration.

Recall of bankruptcy by AiB

254. It is also the general intention that there should be access to quicker and less expensive decision making in relation to the bankruptcy process, which should assist in reducing the overall burden on the courts. This would include AiB taking many decisions on awarding recall.

255. Provisions in the Bill allow for all applications for recall which are made on the basis that all debts have been paid in full, and are generally straightforward and non-contentious, will be dealt with by AiB.

256. Nevertheless, it was considered appropriate that the sheriff should retain the general power to consider recall in all other cases, and cases where it is argued that the debtor was not apparently insolvent at the date of sequestration, with a right of appeal to the sheriff where AiB has determined whether the award of bankruptcy should be recalled.

257. It should be noted that recall on the basis of payment of 'debts in full' includes payment of outlays and remuneration of the interim trustee, trustee, and the payment of the creditor's expenses.

Interim recall of bankruptcy by AiB

258. As stated above, the policy intention is that recall should not be granted on the basis that debts are paid in full, until all debts, and other liabilities, are paid. The Bill introduces a new provision which allows AiB to issue an interim recall order where the trustee is in a position to distribute the funds in the debtor's estate ensuring all debts, outlays and expenses of the bankruptcy have been paid.

259. On granting the interim recall order the trustee must distribute the funds within 6 weeks, or another period which may be prescribed. Thereafter, on receipt of confirmation from the

trustee that all funds have been distributed AiB will grant the order of recall. Until such times as the order of recall is granted the debtor will remain bankrupt.

260. In the event that a creditor refuses payment provision is made to consign these funds to AiB.

Application to AiB for recall of bankruptcy: reference to sheriff

261. The Bill also provides, where an application for recall has been submitted to AiB, the option for AiB, at anytime before deciding to grant or refuse an application, to remit the application to the sheriff in accordance with section 16 of the 1985 Act.

Recall where AiB is the trustee

262. Where AiB is the trustee applications for recall on the grounds that the debtor is able to pay all their debts in full, including all fees, outlays and expenses should be submitted to AiB. AiB as trustee must then establish whether or not the debtor is able to pay all that is owed before making a decision on the granting of an interim recall order.

263. Thereafter, following the distribution of all funds, where appropriate, AiB will grant an order of recall.

Appeal to the sheriff: determinations made by AiB in relation to recall

264. The debtor, trustee and any creditor or any other person having an interest may appeal to the sheriff any determination made by AiB in relation to recall, including the decision to grant or refuse an order of interim recall and recall.

Appointment of replacement trustee

265. Where a replacement trustee is appointed on a trustee vote new provisions in the Bill provide for the report, by the original trustee, on the proceedings at the statutory meeting to be submitted to AiB instead of the sheriff, only where AiB is not the original trustee. Where AiB was the original trustee the report should be submitted to the sheriff.

266. If there are no objections raised AiB or the sheriff, where AiB was the original trustee, will declare the elected person appointed.

267. Any objections should be submitted to AiB, or where AiB was the original trustee the sheriff, before the expiry of 4 days beginning with the day of the statutory meeting, stating the grounds for the objection. If there is no timeous objection raised AiB, or where AiB is the original trustee, the sheriff, must right away declare the elected person to be the trustee in the bankruptcy.

268. Should an objection be raised AiB must forthwith give the parties an opportunity to make written submissions in regard to the trustee application and give a decision on the objection raised. Should AiB reject the objection then the person who made the objection has the right of

appeal to the sheriff. The appeal must be lodged within 14 days of the notice of the decision on the objection. Where AiB was the original trustee objections must be submitted to the sheriff. No expense as a result of raising an objection under this section must fall to the debtor's estate.

269. Currently on the resignation or death of a trustee, where no new trustee is elected at the meeting held for that purpose, the sheriff appoints a new trustee, upon application by AiB, or a person nominated by AiB. This is normally an administrative function in chambers, unless objections occur. It is understood that both the process, and objections to the process, are uncommon. The Bill changes the legislation so that in these cases AiB is appointed automatically, unless another party applies to AiB to be appointed as trustee within 14 days of no new trustee being elected or if AiB nominates another trustee to office.

Replacement of trustee acting in more than one bankruptcy

270. At present, an application which deals with the replacement of a trustee acting in more than one bankruptcy, must be made by AiB to the Court of Session and the court will rule as prescribed in the Act of Sederunt, normally after a hearing.

271. The Bill makes provision for this process to be changed by removing the requirement to petition the Court of Session for the removal of the trustee from office and subsequent hearing and instead for AiB to deal with these types of application administratively, without a hearing. The Bill retains the option to submit the application to the appropriate sheriff for consideration should objections be raised in relation to the appointment of the replacement trustee.

272. A new provision is introduced which allows for certain interested parties, as stated in section 28A(6) of the Bill, to request a review of any determination or appointment made by AiB under section 28A. Should AiB uphold their original decision the person who requested the review may appeal to the Court of Session where appropriate.

Removal of trustee and trustee not acting

273. Section 29 of the 1985 Act, as amended, deals with the removal of a trustee and trustee not acting. This process is normally dealt with by a sheriff in chambers and is mainly an administrative process.

274. It is understood that this is not a common process and therefore the Bill provides that AiB will deal with this type of application. In doing so, AiB will, where satisfied of the reason for the removal of the trustee, make the order of 'intimation of the removal' and subsequent declaration that the office of trustee is vacant. Thereafter, making any order necessary to safeguard the bankruptcy pending the election of a new trustee.

275. AiB will also make the order to publish the intimation of the removal of the trustee in the Edinburgh Gazette, the reference to which will be amended to publication in the ROI, subject to the changes to the ROI.

276. In the event of an objection to any decision made by AiB interested parties may apply to AiB requesting a review of AiB's decision. Thereafter should the person raising the objection be dissatisfied with the outcome of the review they will have recourse to appeal to the sheriff.

Contractual powers of trustee

277. At present, section 42(2) of the 1985 Act deals with contractual powers of the trustee when considering whether or not to adopt any contract entered into by the debtor before the date of bankruptcy that may be beneficial to the debtor's estate. The trustee may apply to the sheriff to extend the time period in which a contract may be adopted or refused.

278. It is understood this process is a fairly straightforward application to the sheriff for an extension of time and does not appear to be a common occurrence. However, it is perhaps more prevalent for non-AiB trustees.

279. As this is a mainly administrative function, dealt with by the sheriff in chambers with an occasional chambers hearing provisions have been made in the Bill for applications of this nature to be submitted to AiB for a decision instead of the sheriff. The trustee may make an application for a review of the decision made by AiB. If following the review the trustee remains dissatisfied with the decision the trustee may appeal to the sheriff any decision made by AiB.

280. Where AiB is the trustee, AiB will continue to apply to the sheriff.

Bankruptcy Restrictions Order (BROs)

281. 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 two and 15 years, depending upon the severity of the misconduct.

282. At present, AiB assesses all applications for investigation and will either accept the application for investigation, or reject it. If the decision is made to investigate, AiB will gather evidence and may interview the debtor and third parties involved in the case, before determining the appropriate BRO period that should be imposed. If AiB considers that there is a sufficiency of evidence to make a BRO application to a sheriff, the debtor will be informed and an application submitted.

283. The Bill provides for the transfer of the power to make a BRO or interim BRO from the sheriff to AiB. The debtor may at any time make an application for a review of the decision made by AiB. If following the review the debtor remains dissatisfied with the decision the debtor may appeal to the sheriff in respect of any decision by AiB in relation to the making or annulment of an order.

Conversion of a Protected Trust Deed into bankruptcy on application by a member state liquidator

284. In the 1985 Act sections 59A to section 59C deals with the petitions for conversion of a PTD to a bankruptcy, under Article 37 of the EU Regulation on insolvency proceedings, Council Regulation (EC) No 1346/2000. The Bill makes provision for the transfer of this role from the sheriff to AiB.

Power to cure defects in procedure

285. Section 63 of the 1985 Act, as currently drafted, has wide ranging powers. Provisions in the Bill give AiB the power to cure defects in certain procedures which are currently carried out by the sheriff, including where AiB is trustee. These provisions allow AiB to cure defects in the following circumstances:

- where any clerical or incidental error in any document, other than documents issued by or lodged in the sheriff court, or in relation to proceedings in the court, is found; and
- where it is deemed necessary to extend or waive any time limit in the 1985 Act for lodging anything under any provision, except where a provision already exists to deal with the failure to adhere to the specified timescale.

286. Following any decision by AiB to cure a defect AiB must inform any interested parties of their decision giving them the opportunity to make representations.

287. Any interested party may apply to AiB for a review of their decision to make or refuse to make an order under section 63(A)(1). Following the review process any interested party has the right of appeal to the sheriff on any decisions made by AiB under section 63.

Valuation of debts depending on contingency

288. Schedule 1, paragraph 3(2)(b) of the 1985 Act provides that where there is no trustee the creditor can apply to the sheriff to value a contingent debt, at which point the creditor may claim that value of the contingent debt in the bankruptcy. New provisions in this Bill will allow AiB to value a contingent debt instead of the sheriff.

289. However, should any interested party disagree with the valuation they may apply to AiB for a review of the valuation and thereafter, if they remain dissatisfied with AiB's decision, they will have recourse to the sheriff to appeal the AiB's decision.

Regulations: applications to Accountant in Bankruptcy etc.

290. As a consequence of moving these processes out of the court, it will be essential to prescribe rules or regulations to set procedure for these processes of making applications to AiB, including for any necessary forms. Accordingly section 71C added to the 1985 Act allows the Scottish Ministers to make provision for the procedure to be followed when making or otherwise in relation to such applications, including applications for review or other decisions by AiB. It

also replaces and adapts existing powers to allow provision to be made for the form etc of, for example an electronic application for sequestration by a debtor, as detailed in paragraphs 236 to 240 above.

291. The Bill provides the Scottish Ministers with the power to make these provisions by regulations. Those regulations take the negative procedure unless they amend primary legislation (which can include the Bill), when they take the affirmative procedure.

REVIEW OF DECISIONS MADE BY ACCOUNTANT IN BANKRUPTCY

Policy objectives

292. The policy is to introduce new provisions to the 1985 Act which will require an appellant to seek an AiB review of certain decisions made by AiB, prior to appealing to the sheriff.

Current process

293. There is currently no provision in the 1985 Act to request a review of a decision made by AiB prior to submitting an appeal to the sheriff.

Consultation

294. In the consultation respondents were asked if an independent panel should be formed to consider matters that were potentially complex or contentious, should those matters be removed from court.

295. Whilst there was no support for removing ‘appeal’ type functions from the courts there was some interest in the creation of a panel that would support AiB decision making.

296. However, having considered the matter further and following discussions with stakeholders the decision was made to create a review process within the existing AiB internal compliance function rather than creating a decision making panel.

Proposal

297. The Bill contains new provisions which require any party, prior to submitting an appeal to the sheriff on certain decisions made by AiB, to ask AiB to review their decision. Where AiB is not trustee, AiB will continue to use their supervision powers and will issue directions where necessary if they believe the actions of a trustee need to be altered.

298. Any party, prior to submitting an appeal to the sheriff, must request a review on the following decisions made by AiB:

- a decision regarding an interim trustee;
- a decision not to award a debtor application;
- a decision regarding the replacement of a trustee;
- decisions regarding the adjudication of creditor’s claims; or

- a decision regarding the discharge of a trustee.

299. A request for a review must be submitted to AiB within 14 days of the decision being made. AiB must on receipt of a request for a review consider any representations made by any interested parties (interested parties will have 21 days to submit representations), prior to making a decision on the review and thereafter notify the appropriate person of the outcome of the review, within the statutory timescale (7 days from receipt of representations).

300. Anyone entitled to appeal may do so after AiB review 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).

Alternative approaches

301. As previously stated consideration was given to the setting up of an independent panel to consider matters that were potentially complex or contentious, should those matters be removed from court.

302. There was no support for removing 'appeal' type functions from the courts. However, there was some interest in the creation of a panel that would support AiB decision making.

303. In the end the decision was made to proceed with the introduction of a review process on certain decisions made by AiB.

MISCELLANEOUS AMENDMENTS

304. This section of the Bill relates to the following miscellaneous amendments to the 1985 Act:

- failure to send statements of assets and liabilities;
- time limits for sequestration of limited partnership;
- petition for sequestration by trustee under a trust deed;
- effect of sequestration: renewal of period of inhibition etc.;
- division and sale of debtor's family home;
- effect of discharge of debtor;
- bankruptcy restrictions undertaking: repeal; or
- offence of obtaining credit: increase in amount.

305. The Bill also includes certain minor amendments in schedule 3 to implement in the 1985 Act a number of recommendations from the Scottish Law Commission on the framing of the Act as part of its project in working towards its consolidation⁹.

⁹ Link to Scottish Law Commission *Report on the Consolidation of Bankruptcy Legislation in Scotland*

306. The intention is to modernise the legislative framework for bankruptcy, and to make these technical amendments which can be reviewed and incorporated as part of a consolidation Bill in due course.

EFFECTS ON EQUAL OPPORTUNITIES

307. An Equalities Impact Assessment document will be published separately by the Scottish Government in due course.

308. The Government considers that the Bill does not have an adverse impact on the basis of age, sex, race, gender reassignment, pregnancy and maternity, disability, marital or civil partnership status, religion or belief or sexual orientation.

HUMAN RIGHTS

309. Property rights under Article 1 of Protocol 1 (the right to the peaceful enjoyment of possessions) and the right to a fair hearing in the determination of civil rights and obligations under Article 6 of the European Convention on Human Rights ('ECHR') (right to a fair trial), are the main ECHR rights which can be engaged by the bankruptcy, Protected Trust Deed and debt measures in the Bill.

310. Regimes for personal insolvency are common across the Contracting States to the Convention and are generally ECHR compatible, provided creditors are treated fairly. There is generally held to be no right for a debtor to be made bankrupt, but where a debtor is made bankrupt at the instance of someone else, normally a creditor, there is likely to be an interference with the debtor's civil and property rights for the period of the debtor's insolvency which has to be justified under the Convention¹⁰.

311. The State has a margin of appreciation in designing provisions proportionate to meet social and economic needs. It is inherent in the nature of insolvency that it involves the cancellation of debts in whole or in part, and measures are partly aimed at the rehabilitation of debtors. Creditors have a range of measures they can take to protect their position, including not dealing with particular debtors. The valuation of any property rights at stake in the absence of any practical recovery is also relevant.

312. In relation to Article 6 ECHR, and the fair procedure requirements of Article 1 of Protocol 1, the Bill puts fair procedures in place. Firstly, in transferring certain largely administrative matters from the sheriff courts to AiB¹¹, it will generally remain the courts which impose bankruptcy on a debtor where the debtor is bankrupted at the instance of someone else (e.g. creditors). Creditor petitions for bankruptcy remain with the sheriff court, as do contentious applications to recall bankruptcy by the debtor. The civil rights of creditors and others may also be engaged by how bankruptcy procedures impact on claims, and as noted debtors retain rights in respect of the ongoing interference with their rights to deal with property. Where matters are

http://www.scotlawcom.gov.uk/files/7113/6853/1202/Report_on_the_Consolidation_of_Bankruptcy_Legislation_in_Scotland.pdf

¹⁰ *Luordo v Italy* 2005 41 EHRR 26

¹¹ AiB is an officer of court.

moved to AiB, appeals ultimately to the sheriff are retained, providing for access to court following fair procedures.

313. The Bill adds some provisions deferring appeal to the sheriff pending review by AiB of some of his or her own decisions. This is intended as a limited restriction on access to the courts for the purposes of legal certainty and an efficient bankruptcy process, which has to balance the competing rights of debtors and creditors. The Bill takes account of Article 6 by providing fair and appropriate procedures and retaining appeals to the sheriff following that review. Judicial review of AiB is also available in other circumstances.

314. The 1985 Act also contains certain specific provisions making appeal to the sheriff final, and the Bill adopts that approach in places in the interests of legal certainty where the matters concern the administration of the bankruptcy process, for the same reason.

315. The Bill makes provision for a procedure to designate debtors who are unable to be traced as subject to indefinite deferral of discharge. There are safeguards however, including the fact that the measures cannot be imposed until 8 months after bankruptcy and a process for recalling the restrictions in the event that the debtor is subsequently contacted, and for taking the matter to court by recall as necessary in the event of a dispute.

316. AiB acts as trustee in a range of bankruptcies, particularly low-value bankruptcies (such as those which will follow the ‘minimum asset process’), and in relation to which AiB has the requirement to be independent and impartial. Where appropriate and necessary, the Bill takes the approach in the 1985 Act - of AiB proposing or notifying the way forward to the parties, which can then be challenged and is subject to appeal to the courts.

ISLAND COMMUNITIES

317. The Bill has no disproportionate effect on island communities. In line with the Scottish Government’s strategy for Scotland’s Digital Future, the Scottish Government is keen to promote ‘digital first’ approach to the submission of bankruptcy applications by electronic means but is aware that some remote and island communities may not have sufficient broadband availability. The submission of bankruptcy applications by electronic means has, therefore, not been mandated.

LOCAL GOVERNMENT

318. The Bill has no disproportionate effect on local government in Scotland. The implications for Local Authorities relate primarily to money advice services operated by local authorities. The Bill makes provision to require that an individual must access money advice through an approved money adviser, prior to applying for any form of statutory debt relief.

319. It is estimated, based on research into existing cases that only between 6-8% of current applications are made without the debtor having had access to money advice. It is therefore considered that a proportionate increase of this scale will not have a material impact on money advisers’ capacity and caseload.

320. There are currently three routes into bankruptcy, as follows:

- The ‘Low Income/Low Asset’ (LILA) product;
- Apparent insolvency; and
- The Certificate for Sequestration.

321. Of these three routes into bankruptcy, there is already an existing requirement that a debtor should consult a money adviser before taking the Certificate for Sequestration route into bankruptcy, as the adviser has to sign the certificate before the application can proceed.

322. The Bill, therefore, effectively extends a requirement that already exists for the Certificate for Sequestration route into bankruptcy to the other two routes, to ensure consistency. It is considered that, in the vast majority of cases where debtors take either of the other two routes into bankruptcy, that these debtors are also already being given advice.

SUSTAINABLE DEVELOPMENT

323. The Bill will have no impact on sustainable development.

Annex A

STATEMENT OF UNDERTAKINGS

I confirm that:

1. I understand that I have a legal obligation to co-operate with my trustee and to provide my trustee with any financial information or documents which my trustee may lawfully require in order to administer my sequestration.
2. I understand that I have a legal obligation to pay any ongoing contribution from income which I have agreed to pay or been assessed as requiring to pay.
3. I understand that my ongoing liabilities, including council and other taxes are not included in the sequestration and that I have a duty to pay them.
4. I have made a full disclosure of all assets which I owned or in which I had an interest at the date of my sequestration. I undertake to notify my trustee if I inherit, win or otherwise acquire any further assets during the period of my sequestration.
5. I understand that my trustee will take steps to investigate and realise those assets which I have declared to her. I further understand that my trustee will investigate any assets which she has reasonable grounds to suspect vest in her, even if I have not declared my ownership of, or interest in, these assets up to this point in time.
6. I understand that I may not incur credit in excess of £500 for the duration of my sequestration without first notifying the lender of my sequestration.
7. I shall immediately inform my trustee of any change of address or change in my financial circumstances during the period of my sequestration.
8. I understand that for the duration of my sequestration, I may not be a Member of Parliament, a Justice of the Peace or a member of a school board.
9. I understand that for the duration of my sequestration, I may not act as a director of a limited company or be involved in the formation, promotion or day-to-day financial management of the same.
10. I understand that sequestration usually lasts for one year at which time my trustee can apply for my discharge. I further understand that my trustee may not apply for my discharge should she have reason to do so reasons for which may include failing to comply with the terms of this statement. My trustee may also place restrictions on me after I am discharged from sequestration.
11. I understand that any assets which vested in my trustee at the date of my sequestration, and which have not been sold, realised or ingathered by my trustee, will continue to vest in my trustee even when I have been discharged from my sequestration.

12. I understand that any assets which were acquired by me in the period of my sequestration and which would have vested in my trustee had they existed at the date of my sequestration will vest in my trustee. These assets will continue to vest in my trustee even after I have been discharged from my sequestration until such times as they have been sold, realised or ingathered by my trustee.

13. I understand that I may be required by my trustee to undergo financial education and that my discharge may be dependent on completion of this financial education.

I have been informed of the above by my trustee and acknowledge that I have retained a copy of this document.

Signed : **Date :**

Witnessed : **Date :**

Annex B

GLOSSARY

A

Aliment – In Scots law another term for alimony, that is, an allowance paid to a person by that person's spouse or former spouse for maintenance, granted by a court upon a legal separation or a divorce or while action is pending.

Apparent Insolvency - A legal term that means you are unable to pay your debts and that at least one of your creditors has taken legal action against you.

Aquirenda - That is, any property or right acquired or received by a debtor after the date of bankruptcy, and at present, before his date of discharge.

Assets - Rights or other access to future economic benefits controlled by an entity as a result of past transactions or events. Fixed Assets are assets with an expected life of more than 1 year held for use on a continuous basis e.g land and buildings, patents. Current Assets include cash or other assets which can reasonably be expected to be converted to cash in the normal course of business, including stocks, debtor's accrued income and payments in advance.

B

Bankruptcy Restriction Order (BRO) - Restrictions placed on a debtor if their trustee believes they misbehaved before, or during, their bankruptcy. A BRO is currently imposed by a sheriff (**however this Bill, if passed, will see this process transferred from the Court to AiB**) and applies restrictions to a debtor's credit and work activities. The sheriff will fix the period of the restrictions and this can be for between 2 and 15 years **after** the debtor has been discharged from their bankruptcy. Details of a debtor's BRO will be recorded in the public Register of Insolvencies.

C

Composition - At any time during the bankruptcy the debtor, or any party acting for the debtor, can propose an offer of composition to the creditors. This is a voluntary agreement under which the creditors may accept payment, or part payment, for debts owed. An offer of composition must be worth a dividend of at least 25p in the pound for all creditors after all trustee's costs and fees have been paid. Composition must be agreed by at least two-thirds in value or a majority of creditors. If the creditors agree, an application for composition will be sent to the sheriff.

The debtor must, pay or offer to pay or offer acceptable security for all monies due under the terms of the composition.

If the court approves the offer of composition then the debtor will be discharged from bankruptcy.

Consignation- A form of deposit receipt whereby money is lodged in a Head Office bank account pending an order of the court or until the person entitled to it claims it.

Court of Session - Scotland's Supreme Court; the highest civil court in Scotland.

Creditor - Any person, business or organisation which is owed money by another.

Current Liabilities - Liabilities incurred in the normal course of business which fall due within one year and include creditors, accrued expenditure and deferred income.

D

Diligence - Various forms of legal process taken by creditors to enforce repayment of overdue debts.

Debt Arrangement Scheme (DAS) - A debt management tool introduced by the Scottish Government and accessed through an approved money advisor (see www.dasscotland.gov.uk). It may help you if you have one or more debts and want to pay what you owe by giving more time for repayments free from the threat of enforcement (diligence) or bankruptcy.

Debtor - Any person who owes money to another.

Discharge - The formal termination of a legal office or state, e.g. trustees may apply to be formally discharged once their functions are completed. A debtor is also discharged from bankruptcy, usually one year after the date of sequestration.

Dividend - The distribution of funds to creditors in a sequestration. Also, the proportion of the debt repaid to a creditor in a sequestration; expressed as x pence in the £.

E

Edinburgh Gazette - An official newsletter published twice weekly for the government by the Stationery Office in which various official announcements are recorded. Previously, notifications of sequestration awards required to be published in the Edinburgh Gazette, however, this requirement ended on 15 Nov 2010. Details of all bankruptcies and protected trust deeds are published in the Register of Insolvencies.

F

G

H

I

Income Payment Order (IPO) - If the debtor was not willing to make contributions then an IPO may be placed on them by AiB. This is an order for them to contribute to their debt.

Inhibition - Inhibition allows your creditor to stop you selling, transferring, or re-mortgaging your house or land unless you pay your debt to them. It does not allow your creditor to sell your property

Insolvency Practitioner - A person (usually, but not necessarily, a chartered accountant) licensed and authorised to act as a trustee in sequestrations or trust deeds and also as liquidator, administrator, or receiver of a limited company.

Interim trustee - Someone appointed by the court to handle your estate until a permanent trustee is appointed.

Interlocutor - An order or decision of the court, usually in response to a Note or Application.

Intromission – in the context of the Bill intromissions means to provide details of the trustee’s interaction with the debtor’s estate as interim trustee.

J

K

L

Low Income Low Assets (LILA) - LILA is the route into bankruptcy introduced to provide debt relief to debtors who cannot afford to pay their debts and have low income and limited assets. Many debtors find that their creditors are unwilling to take the legal action required to bring about their bankruptcy because of the administrative and legal costs incurred, often without the creditor receiving any dividend at the end.

M

Money adviser - Somebody trained to offer advice on debt usually at a local authority money advice unit, Citizens Advice Bureau or other third sector organisation such as the charity ‘Step Change’.

Moratorium - A legally authorized period to delay payment of money due or the performance of some other legal obligation. In the context of the Bill to raise diligence, see above for a definition on diligence.

N

Note (to Court) - An incidental application or report to the court in an existing process, for example, a sequestration process.

O

P

Protected trust deed - A trust deed is a form of insolvency that transfers your 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.

Q

R

Register of Inhibitions and Adjudications - A public register of people who are unable to grant good title to their heritable property.

Register of Insolvencies (ROI) - A public register that records details of all sequestrations/bankruptcies awarded in Scotland, including details of debtor’s bankruptcy

restriction order (BRO). It also contains details of protected trust deeds and details of companies in receivership or liquidation since 1 July 1999.

S

Sederunt Book – Is the official and permanent record of the sequestration/bankruptcy process maintained by the trustee through out the bankruptcy process.

Sequestration - The Scottish legal term for Bankruptcy.

Sheriff – Is the judge in a Sheriff Court, who is an experienced solicitor or advocate appointed by the Queen.

T

Trustee – A person who administers your bankruptcy or trust deed. In sequestrations your trustee can be either the Accountant in Bankruptcy or a private insolvency practitioner (normally a chartered accountant who specialises in personal bankruptcy). In trust deeds, trustees must be an insolvency practitioner.

Trust deed - A voluntary form of insolvency and an alternative to sequestration (bankruptcy). You can transfer all or part of your estate to a trustee to realise for the benefit of your creditors.

U

V

Vesting - A legal term meaning ‘becoming the property of a person’. A debtor’s sequestrated estates are ‘vested in’, that is, they become the property of the permanent trustee.

W

X

Y

Z

This document relates to the Bankruptcy and Debt Advice (Scotland) Bill (SP Bill 34) as introduced in the Scottish Parliament on 11 June 2013

BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL

POLICY MEMORANDUM

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