

BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Bankruptcy and Debt Advice (Scotland) Bill. It describes the purpose of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Introduction

3. In this Memorandum:

“AiB” means the Accountant in Bankruptcy¹;

“the 1985 Act” means the Bankruptcy (Scotland) Act 1985 (c.66);

“the 2002 Act” means the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17);

“DAS” means the Debt Arrangement Scheme;

“DAS Regulations” means the Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141).

Outline of Bill provisions

4. The Bill contains 53 sections and four schedules. It contains provisions for debtors to receive mandatory advice from an approved money adviser before entering any statutory debt solution and for vulnerable debtors to receive targeted financial education, to help improve their awareness of the underlying causes of financial difficulty and improve their ability to better manage their finances and reduce the burden of debt. The Bill also provides for:

- the development of a Common Financial Tool for use by money advisers;
- a new ‘Minimal Asset Process’ route into bankruptcy;
- AiB to review decisions before onward appeal to the sheriff;

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

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

- a more efficient process for e-Applications over the web;
- AiB to transfer debtors between products more easily;
- changes to the process for discharge of debtors, in order that the debtor must satisfactorily cooperate with their trustee and with creditors;
- improvements to the processes for re-opening bankruptcy cases;
- the transfer of certain mainly administrative bankruptcy functions from the sheriff; and
- a requirement on creditors to submit claims within 120 days.

5. Further information about the Bill’s provisions is contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 34, and in the Policy Memorandum published separately as SP Bill 34-PM.

Rationale for subordinate legislation

6. The Bill contains several delegated powers which are explained in more detail below. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to:

- the need to make proper use of valuable Parliamentary time;
- the need to provide the flexibility to respond to changing circumstances without the need for further primary legislation; and
- the desire to allow adjustments to the technical detail of the administration of bankruptcy in Scotland without the need for further primary legislation.

Delegated powers

7. The Bill contains the following delegated power provisions:

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

New section 5C(1)(d) of 1985 Act—prescribing matters on which advice must be taken

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

8. Section 1(2) inserts a new section 5C (“Money advice”) into the 1985 Act. Section 5C(1)(d) allows the Scottish Ministers to prescribe types of advice, in addition to those listed in sub-paragraphs 5C(1)(a) to 5C(1)(c), that a debtor is required to obtain from a money adviser. A similar process is in place for money advice under the DAS under the 2002 Act.

Reason for taking this power

9. This power enables the Scottish Ministers to make regulations to add to the categories of advice which the debtor must obtain. The money advice sector is subject to changes over time which reflect shifts in debtors' requirements and priorities as well as other factors, for example a greater demand for telephone advice, and changes in the provision of credit, for example the greater availability of online lending. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable them to make any changes required more easily.

10. A similar power is provided in relation to the DAS under section 3(3) and 7(1) of the 2002 Act

Choice of procedure

11. Negative procedure is considered appropriate as this is an administrative matter to provide flexibility on the detail of the role of the money adviser. The power does not allow for the amendment of any primary legislation.

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

New section 5C(2)(b) of 1985 Act—prescribing descriptions or classes of money adviser

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Provision

12. To allow the Scottish Ministers to prescribe descriptions or classes of money adviser, from whom debtors will be required to obtain advice. A similar power is provided in relation to those who provide certificates of sequestration at present under section 5B(5) of the 1985 Act at present and in relation to DAS under the 2002 Act (as modified by the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3), section 212.)

Reason for taking this power

13. This power enables the Scottish Ministers to amend the definition of an 'approved money adviser'. See for example the categories prescribed in the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010 (SSI 2010/397). The money advice sector is subject to changes over time which reflect shifts in debtors' requirements and priorities as well as other factors. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility enabling them to set the categories of approved persons by reference to what organisations etc. are providing advice at the relevant time and make any changes required more quickly.

Choice of procedure

14. In keeping with the procedure in relation to similar powers in section 5B(5) of the 1985 Act the Scottish Government believes that the use of this power should be subject to the higher level of parliamentary scrutiny attached to the affirmative procedure.

Section 2 – Financial education for debtor

Inserted section 43B(1) of 1985 Act—prescribing courses of financial education

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

15. The power to make regulations to prescribe the content, format and delivery of a course of financial education, different courses for different circumstances and for particular courses to be specified by a trustee where particular circumstances apply. The provision of financial education to debtors who meet the criteria set out in section 43B(2) is intended to help improve the debtor's awareness of the underlying causes of financial difficulty and improve their ability to better manage their finances and reduce the burden of debt.

Reason for taking this power

16. The rationale for taking this power is similar to that for taking the power in section 5C(2)(b) (above). In order to be effective over time, the prescribed courses in financial education will have to reflect shifts in debtors' requirements and priorities and changes in the availability of credit as well as other factors, including the available courses. Having this regulatory power would provide a degree of flexibility and also enable any changes required to be made more easily.

Choice of procedure

17. Providing for and modifying the courses will involve the need for detailed assessment of the available courses and can therefore be an administrative matter. The Scottish Government accordingly considers that the negative procedure would be appropriate.

Section 3: Debtor's contribution: common financial tool

Inserted section 5D of 1985 Act—power to make regulations about the method used to assess debtor's contribution (common financial tool)

Amendment of section 7 of the Debt Arrangement and Attachment (Scotland) Act 2002

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure / Negative procedure – DAS Scheme

Provision

18. To give the Scottish Ministers the power to make regulations about the method (the common financial tool) which will be used to assess the debtor's income, liabilities, the amount allowed to the debtor for expenditure and the amount of the debtor's contribution (if any).

19. Section 7 of the Debt Arrangement and Attachment (Scotland) Act 2002 is also amended to ensure the power used to make the DAS Scheme can be used to similar effect.

Reason for taking this power

20. The mandatory use of a common financial tool by money advisers will ensure that individuals are treated the same in sequestration as regards their contributions from income, providing consistency, transparency and clarity for individuals across debt solutions in Scotland. The provision to be made in the common financial tool will be detailed and, as with the powers taken under section 1, inserted section 5C(2)(b) and 2 (above), in order for the tool to be effective over time, it will need to change to reflect shifts in debtors' circumstances and other factors. Having the power to enact and amend it by regulations would provide a degree of flexibility and enable any changes required to be made more easily.

Choice of procedure

21. The Scottish Government recognises the broad application of the common financial tool and that it will make significant determinations in relation to a debtor's income, liabilities, expenditure and the amount of the debtor's contribution (if any). For that reason, the Scottish Government believes that the use of this power should be subject to the level of parliamentary scrutiny attached to the affirmative procedure. In the DAS Scheme it is proposed that this aspect is added to the generally wide negative procedure powers to make the scheme provided by the 2002 Act.

Section 4 – Debtor contribution order

Inserted section 32D(5) of 1985 Act – provision about deduction from earnings

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

22. To provide for contributions towards the debtor's sequestration to be deducted directly from the debtor's earnings by the debtor's employer, subsection 32D(5) enables the Scottish Ministers to make regulations which govern the instructions which the debtor will give to their employer, authorising them to make deductions. Regulations made under this subsection will provide for the form of such an instruction, the manner in which it effects the debtor's employer and the consequences for the employer of any failure to comply with their duty to pay under subsection 32D(3).

Reason for taking this power

23. There is currently no provision to allow for the deduction of an assessed contribution directly from a debtor's wages. To put such provision in place, the Scottish Government believes that it would be appropriate, if required, for the Scottish Ministers to be able to provide for the detailed operation of the provision without recourse to further primary legislation. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable them to make any changes required more easily.

Choice of procedure

24. Once the procedure to allow for the deduction of an assessed contribution directly from a debtor's wages is in place, modifying its operation will be an administrative matter and, therefore, the Scottish Government considers that the negative procedure would be appropriate.

Section 5 – Debtor application

Inserted section 5(2ZA) of 1985 Act – prescribing types of benefit, periods, property and sums applying where debtor has few assets

Inserted section 5(2ZB)(b) of 1985 Act – prescribing value of vehicle

Inserted section 5(2ZB)(c) of 1985 Act – prescribing disregarded assets

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

25. Section 5 of the Bill provides for the replacement of the current 'low income, low asset' route in to bankruptcy (see sections 5(2B)(c)(ia) and 5A of the 1985 Act and the Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008 (SSI 2008/81)) with a new "minimal asset process" ("MAP") for debtor applications under the 1985 Act, intended to provide debt relief only to debtors whose income is derived from social security benefits or for those individuals who have been assessed, using the common financial tool, as being unable to make a contribution towards what is owed. Subsection (2ZA) sets out the criteria which the debtor must meet in order to be eligible for the MAP.

26. Subsections (2ZA), (2ZB)(b) and (c) give the Scottish Ministers powers to prescribe and modify the criteria which will determine eligibility for the MAP, these criteria include: the benefits which the debtor may be receiving, the period of time during which an award of sequestration must not have previously been made against the debtor, the amount of property the debtor may own and the total amount of the debtors assets and/or debts (2ZA) and the value of any vehicle or other assets the debtor may own (2ZB).

Reason for taking this power

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

bankrupt through this route. In order to address this, the Bill makes provision for the MAP. The Scottish Government believes it would be appropriate, if required, for the Scottish Ministers to be able to modify the operation of the MAP, in order to reflect shifts in debtors' circumstances as well as other factors, without having to have recourse to further primary legislation. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable them to make any changes required more easily.

Choice of procedure

28. Setting and changing the detailed values or individual assets taken into account within the structure of the MAP criteria, to allow change to the specific criteria is considered a matter of detail. The Scottish Government believes the use of this power can be left to the level of parliamentary scrutiny attached to the negative procedure.

Section 5 – Debtor application

Inserted section 5(2ZC) of 1985 Act – making provision about valuation of assets

Inserted section 5(2ZD) of 1985 Act – modifying few asset criteria

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Provision

29. In relation to the provision for MAP bankruptcy, subsections (2ZC) and (2ZD) give the Scottish Ministers more general powers to modify the criteria which will determine eligibility for the MAP, and to make provision for how the value of the debtor's assets is to be determined.

Reason for taking this power

30. As noted, the Scottish Government believes it would be appropriate, if required, for the Scottish Ministers to be able to modify the operation of the MAP, in order to reflect shifts in debtors' circumstances as well as other factors, without having to have recourse to further primary legislation. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable any changes required to be made more easily.

Choice of procedure

31. The Scottish Government recognises the potential of the powers to make wider changes to the MAP, or in relation to valuation, to make a significant difference to the operation of the regime for MAP which would be added to the 1985 Act, in relation to the administration of a debtor's sequestration. For that reason, the Scottish Government believes that the use of this power should be subject to the level of parliamentary scrutiny attached to the affirmative procedure.

Section 7 – Discharge, conditions etc.

Inserted section 54C of 1985 Act – prescribed form for certificate of discharge

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

32. To enable the Scottish Ministers to prescribe the form of the certificate of discharge for debtors who have been awarded sequestration on a “minimal asset” basis.

Reason for taking this power

33. Prescribing the form of the certificate of discharge is administrative, and also allows flexibility to change the form as necessary to reflect other developments in bankruptcy provisions. This is in line with the current powers in the 1985 Act to prescribe the certificate of discharge (current section 54(2) of the 1985 Act).

Choice of procedure

34. As an administrative matter, this is considered suitable for the negative procedure in line with the current powers in the 1985 Act to prescribe the certificate of discharge (section 54(2)).

Section 7 – Discharge, conditions etc.

Inserted section 55A(2) of 1985 Act – power to prescribe amount of credit

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

35. Section 55A which would be inserted into the 1985 Act places post-bankruptcy restrictions, relating to obtaining credit and providing information when engaging in business, on debtors who are awarded sequestration on a “minimal asset” basis for a period of 6 months following their discharge. This is in order to limit the material advantages of discharge to these debtors when compared to full-administration bankruptcy.

36. Subsection 55A(2) limits the amount of credit which the debtor will be able to obtain during the period of their post-bankruptcy restriction to £2,000 and the amount of debt, above which the debtor will not be able to obtain additional credit, to £1,000 or more. Subsection 55A(2)(a) and (b) gives the Scottish Ministers the power to vary these amounts.

Reason for taking this power

37. The cost and availability of credit are subject to economic pressures and will change over time, with the effect that the amounts set by subsection 55A(2) may not in time reflect the desired policy intent. The Scottish Government believes it would be appropriate, if required, for the Scottish Ministers to be able to vary the amounts, in order to reflect changes in the cost and availability of credit, as well as other factors, without having to have recourse to further primary legislation. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable them to make any changes required more easily.

Choice of procedure

38. Once provision for the post-bankruptcy restriction is in place, varying the amounts and/or modifying the certificate of discharge will be administrative matters and, therefore, the Scottish Government considers that the negative procedure would be appropriate. Any variations and/or modifications will reflect the policy intent, which is to limit the material advantages to debtors of discharge who have been awarded sequestration on a “minimal asset” basis when compared to full-administration bankruptcy.

Section 9 – Statement of undertakings

Inserted section 2(8) of 1985 Act – power to prescribe form of statement of undertakings

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

39. To ensure a debtor is aware of the debtor’s duties and obligations during the bankruptcy process the debtor will be required to sign a ‘statement of undertaking’. Section 9 amends section 2 of the 1985 Act to this effect and gives the Scottish Ministers the power to prescribe the form of the statement of undertakings.

Reason for taking this power

40. The statement of undertakings will make 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. A draft statement of undertakings has been included in the policy memorandum for this Bill. Once the statement of undertakings is in use, the Scottish Government believes that it would be appropriate, if required, for the Scottish Ministers to be able to modify the form of the statement of undertakings in order to reflect, for example, administrative changes in the process of application for bankruptcy, without having to have recourse to further primary legislation. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable them to make any changes required more easily.

Choice of procedure

41. The form of the statement of undertakings is an administrative matter and, therefore, the Scottish Government considers that the negative procedure would be appropriate.

Section 16 – Discharge of debtor

Inserted sections 54 and 54A of 1985 Act – power to prescribe form of certificate of discharge

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

42. As part of introducing new processes of discharge from bankruptcy linking a debtor's co-operation more closely with their discharge, new sections 54(10) and 54A(2) enable the Scottish Ministers to prescribe the form in which AiB certifies that the debtor has been granted discharge after making an application under these sections.

Reason for taking this power

43. This power will support the new process whereby the trustee must apply to AiB for the debtor's discharge from bankruptcy when the trustee is satisfied that the debtor has co-operated and all statutory issues and investigations have been completed. Prescribing the form of the certificate of discharge is administrative, and also allows flexibility to change the form as necessary to reflect other developments in bankruptcy provisions. This is in line with the current powers in the 1985 Act to prescribe the certificate of discharge (current section 54(2) of the 1985 Act).

44. It is also likely that there will be administrative changes in this process over time. The Scottish Government believes it would be appropriate, if required, for the Scottish Ministers to be able to modify the form in which AiB may certify that the debtor has been granted their discharge, in order to reflect any such changes, without having to have recourse to further primary legislation. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable them to make any changes required more easily.

Choice of procedure

45. As an administrative matter, this is considered suitable for the negative procedure in line with the current powers in the 1985 Act to prescribe the certificate of discharge.

Section 18 – Deferral of discharge where debtor cannot be traced

Inserted section 54D of 1985 Act – power to prescribe form certificate of discharge.

Inserted section 54D – power to prescribe form of deferral notice and application form, debtor not traced.

Inserted section 54E – power to prescribe form of application and notice.

Inserted section 54F – power to prescribe form of notice and certificate of discharge where subsequent debtor contact

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

46. Section 18 of the Bill makes provision to allow the indefinite deferral of discharge from bankruptcy where the debtor cannot be located. Inserted section 54D(2)(a) of the 1985 Act gives the Scottish Ministers the power to prescribe the form in which the trustee must give notice to the debtor of the deferral of their discharge and section 54D(2)(c) enables the Scottish Ministers to prescribe the form in which the trustee must apply to AiB for a deferral, on the basis that the trustee has done all that it is reasonably practicable for them to do in order to locate the debtor.

47. Section 54E(2) gives the Scottish Ministers the power to prescribe the form in which the trustee must apply to AiB for authority to resign office, once a certificate has been issued under section 54D(4)(b). Section 54E(4) gives the Scottish Ministers the power to prescribe the form in which the AiB must give notice to the trustee that they have been granted the authority to resign.

48. In the event that the debtor is subsequently traced or makes contact and is able to satisfy the conditions set out at section 54F(3), then section 54F(4) gives the Scottish Ministers the power to prescribe the form in which the trustee must give notice to the debtor that they are able to apply for discharge and section 54F(8) gives the Scottish Ministers the power to prescribe the form in which AiB may certify that the debtor has been discharged.

Reason for taking this power

49. These powers to set the forms to be used will support the new process whereby the debtor who cannot be traced may have their discharge deferred indefinitely. It is likely that there will be administrative changes in this process over time. The Scottish Government believes it would be appropriate for the Scottish Ministers to be able to set, and if so required, to modify the forms of notice and/or certification, in order to reflect any such changes, without having to have recourse to further primary legislation. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable them to make any changes required.

Choice of procedure

50. Setting and modifying the forms of notice and certification will be administrative matters and therefore the Scottish Government considers that the negative procedure would be appropriate.

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

Inserted section 58B and 58C of 1985 Act – power to set amount applying where assets discovered after trustee discharge.

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

51. Section 20 inserts new sections into the 1985 Act which apply when assets which should have vested in the trustee come to light after the trustee has been discharged. Section 58B(4)(a) makes provision for the Scottish Ministers to vary the threshold below which AiB may not make an reappointment (of the original trustee) or an appointment (of AiB as trustee). The threshold is set at £1,000 in the Bill.

Reason for taking this power

52. The ‘real terms’ value of any newly identified assets will be subject to economic pressures and will change over time, with the effect that the amounts set by section 58B(4)(a) may not, in future, reflect the desired policy intent – which is that cases can be reopened under the new procedure when the value of the assets identified is sufficient to meet the costs of reopening. The Scottish Government believes it would be appropriate, if required, for the Scottish Ministers to be able to vary the amounts, in order to reflect changes in the real terms value of any newly identified assets, as well as other factors, without having to have recourse to further primary legislation. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable them to make any changes required more easily.

Choice of procedure

53. Once the process for re-opening cases is in place, varying the amounts will be an administrative matter and, therefore, the Scottish Government considers that the negative procedure would be appropriate. Any variations will reflect the policy intent, which is to reopen cases where the value of the assets identified is sufficient to meet the costs.

Section 21 – Register of insolvencies

Amended section 1A of 1985 Act – prescribing the form of the register of insolvencies

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

54. Section 21 transfers to the Scottish Ministers the power to prescribe the form of the register of insolvencies (“RoI”), currently prescribed by the Court of Session, by Act of Sederunt. This includes the particulars entered in the RoI.

Reason for taking this power

55. Currently if the information held on the RoI needs to be updated or amended, then the Court of Session makes those changes. That reflects the fact that bankruptcy was a court-centred process. With the changes made by the Bankruptcy and Diligence etc. (Scotland) Act 2007, sequestration and the wider linked forms of insolvency, in the form of protected trust deeds, and debt relief provided by the DAS Scheme are a less court-based process. The Scottish Government believes that enabling the Scottish Ministers to make such changes by statutory instrument, in the form of regulations, as can be done at present by Act of Sederunt, is appropriate.

Choice of procedure

56. Updating or amending the information on the RoI will be an administrative matter and, therefore, the Scottish Government considers that the negative procedure would be appropriate.

Section 22 – Sederunt book

Amended section 62 of 1985 Act – power on sederunt book transferred to Scottish Ministers, including a power to amend new Schedule 3A to the 1985 Act.

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

57. To transfer to the Scottish Ministers the power to regulate the period for which AiB must retain sederunt book records of trustees in insolvency, which period was previously regulated by the Court of Session, by Act of Sederunt. Section 22(4) amends section 62 of the 1985 Act in order to give the Scottish Ministers the power to modify Schedule 3A added by section 22(5) of the Bill, which sets out the information which the trustee must include in the sederunt book.

Reason for taking this power

58. Currently the period for which AiB must retain sederunt book records can be changed by statutory instrument in the form of court rules made by act of sederunt. In addition, there may be a need to adjust the information which the trustee must include in the sederunt book. The Scottish Government believes that enabling subordinate legislation to make such changes continues to be appropriate, and should be done by regulations by the Scottish Ministers.

Choice of procedure

59. Once the provision for the sederunt book in the Bill is in place, changing the period for which AiB must retain the records or amending the information in the sederunt book will be administrative matters. The Scottish Government accordingly considers that the negative procedure would be appropriate.

Section 26– Recall of sequestration by Accountant in Bankruptcy

Inserted section 17A, 17D and 17F of 1985 Act – power to set periods for recall of sequestration.

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

60. Section 26 creates a new procedure for recall of bankruptcy by AiB where the debtor is in a position to pay the debtor's debts in full. New sections 17D(2)(a) 17D(3) and 17F(7)(a) and (b) give the Scottish Ministers powers to vary the periods provided for in those provisions in which either the trustee must distribute the debtor's estate and notify AiB under 17D(1) or, where AiB is the trustee, AiB must distribute the debtor's estate under 17F(7).

Reason for taking this power

61. Recall of an award of bankruptcy can be granted in a wide range of circumstances and the provision in legislation needs to reflect this. This power is required in order to provide flexibility and ensure that the new processes for recall continue to be as efficient as possible and can be adjusted in light of experience.

Choice of procedure

62. Changing the period in which the debtor's estate must be distributed will be an administrative matter and, therefore, the Scottish Government considers that the negative procedure would be appropriate.

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

Inserted section 71C of 1985 Act – power to make provision about applications to and decisions of the AiB.

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative if it amends an Act, otherwise negative

Provision

63. To give the Scottish Ministers the power to make regulations on the procedures which will apply in relation to the miscellaneous processes transferred from the sheriff, including applications to AiB, applications to AiB for a review and decisions made by AiB.

Reason for taking this power

64. Transferring these miscellaneous processes from the court to AiB will reduce the burden on the courts in respect of dealing with bankruptcy procedures including those that can be categorised as administrative in nature. The Scottish Government considers that this will result in swifter access to decision making and avoid duplication. This power is needed in order to manage the new processes as efficiently as possible. It is in line with the general powers to make court rules in the Sheriff Court (Scotland) Act 1971 (and the Court of Session Act 1988) which apply to applications to the courts. Those powers will not be available in relation to applications to AiB.

65. The power includes the ability to amend any enactment, including the 1985 Act, for instance it includes the ability to modify time limits in the 1985 Act. The power is however limited to matters of procedure. This power is considered necessary in view of the complex provision made for court applications, and in order that adjustments can be made where necessary to ensure that applications to the courts and to AiB work smoothly together and can be adjusted if necessary in light of experience should any issues arise.

Choice of procedure

66. The Scottish Government believes that it would be appropriate for regulations made under this section which contain a provision which adds to, omits or replaces any part of an Act to be subject to the affirmative procedure and for any other regulations made under this section to be subject to the negative procedure.

Section 42 – Time limits for sequestration of limited partnership

Amended section 8A of 1985 Act – power to set time limit for debtor application for sequestration of limited partnership.

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

67. Section 42 of the Bill restates existing provisions including on the time limit for the presentation of a petition or debtor application for the sequestration of the estate of a limited partnership. New sections 8(2)(a) and 8A(2)(b) give the Scottish Ministers powers to vary or set these time limits.

Reason for taking this power

68. The process of sequestration of a limited partnership fits into a complex framework of insolvency law and practice, which is often subject to adjustments in order to take account of sectoral or other change. This power is needed in order to provide flexibility and ensure that the process continues to be as efficient as possible.

Choice of procedure

69. Changing the time limit for the presentation of a petition or imposing a time limit in relation to a debtor application will be an administrative matter and, therefore, the Scottish Government considers that the negative procedure would be appropriate. This is in line with the existing powers in section 8 of the 1985 Act.

Section 44 – Effect of sequestration, renewal of period of inhibition etc.

Amended section 14 of 1985 Act – power to prescribe form sent by trustee to renew period of inhibition

Power conferred on: the Court of Session
Power exercisable by: act of sederunt
Parliamentary procedure Laid, no procedure

Provision

70. Section 44 restates the wording to clarify the effect of section 14 of the 1985 Act in light of comments by sheriffs and proposals of the Scottish Law Commission on the operation and drafting of provisions in the 1985 Act on extension of effect as an inhibition of sequestration, on its renewal. This restates existing provision on the process by which a trustee may send a memorandum to the Keeper of the Register of Inhibitions for recording in that register. The new section 14(4) restates provision for the form of the memorandum to be prescribed by the Court of Session by Act of Sederunt.

Reason for taking this power

71. The effect of sequestration on the period of inhibition reflects current insolvency law and practice, however this can often be subject to adjustments in order to take account of sectoral or other change. This power is needed in order to provide flexibility and ensure that the process continues to be as efficient as possible.

Choice of procedure

72. The existing act of sederunt provision is retained.

Section 50 – Ancillary Provision

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative if it amends an Act, otherwise negative

Provision

73. To empower the Scottish Ministers to make supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to any provision of the Bill. Subsection (2) confirms that the power in subsection (1) extends to the power to make provision in consequence of, or in connection with, any modification, or proposed modification, of any enactment relating to bankruptcy and debt advice.

74. Subsection (3) states that an order under this section may modify any enactment, including the provision made by the Bill, apply any provision of any enactment (with or without modifications), and may include supplementary, incidental, consequential, transitory or transitional provision or savings.

Reason for taking this power

75. To provide the flexibility to make any necessary adjustments that may arise in light of experience on the operation of the Act as timeously as possible. The Scottish Government recognises the potentially broad application of this power, which includes the facility to modify primary legislation, and to alter the provisions in the Bill. Any supplementary use of the power would though be strictly construed. It is however considered important to ensure the workability in practice and in light of experience of the complex and technical matters addressed in the Bill.

Choice of procedure

76. In light of the potentially broad application of this power in some respects, in particular modifying primary legislation, and the provisions in the Bill, any use of this power which adds to, omits or replaces any part of an Act would require the level of parliamentary scrutiny attached to the affirmative procedure. Other uses will require the negative procedure. These procedures are typical for ancillary powers.

Section 52 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: Order

Parliamentary procedure: Laid, no procedure

Provision

77. To enable the Scottish Ministers to commence the Bill, including transitory, transitional provisions and savings.

Reason for taking this power

78. It is normal for the Scottish Ministers to be able to implement the commencement of Bills in order to ensure suitable administrative provision is in place.

Choice of procedure

79. No procedure is provided for aside from laying in Parliament in line with the Interpretation and Legislative Reform (Scotland) Act 2010, which is typical for commencement powers. It is not unusual to include the power to make transitory, transitional provisions and savings provision in the commencement order if necessary. This allows flexibility in implementing the arrangements in the Bill, including in light of the complexity of some of the measures it contains.

Schedule 1 (“minimal asset” debtors with few assets)

Inserted Schedule A1, paragraph 1(4) – power to prescribe form for debtor’s current state of affairs

Inserted Schedule A1, paragraph 2(5)(a) – power to prescribe total value of debtor’s assets

Inserted Schedule A1, paragraph 5(4) – modified power to prescribe form of debtor’s current state of affairs

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

80. Schedule A1, read with section 5(2ZA), makes various provisions about the application of certain sections of the 1985 Act to debtors entering the MAP, under section 5(2ZA).

81. Paragraph 1(4) modifying section 43A of the 1985 Act gives the Scottish Ministers the power to prescribe and modify the form of the account of the debtor’s current state of affairs which the debtor must provide in writing.

82. Paragraph 2(5)(a) gives the Scottish Ministers the power to vary the total value of the assets which the debtor may not exceed if they are to be eligible for the MAP.

83. Paragraph 5(4) modifying section 43A of the 1985 Act—for where the debtor ceases to be covered by MAP sequestration—includes for the Scottish Ministers a further power to prescribe and modify the form of the account of the debtor’s current state of affairs.

Reason for taking this power

84. As noted, the Scottish Government believes it would be appropriate, if required, for the Scottish Ministers to be able to set the form of the account of the debtor’s state of affairs and modify the total asset value in the operation of the MAP, without having to have recourse to further primary legislation. Having this regulatory power would provide the Scottish Ministers with a degree of flexibility and enable any changes required to be made more easily in relation to these matters of detail in the scheme of the MAP provisions.

Choice of procedure

85. Setting and changing the detailed values or individual assets taken into account within the structure of the MAP criteria, to allow change to the specific criteria is considered a matter of detail. The Scottish Government believes the use of this power is appropriate for the level of parliamentary scrutiny attached to the negative procedure.

Schedule 1 (“minimal asset” debtors with few assets)

Inserted Schedule A1, paragraph 2(7) – power to modify duty to consider when few asset process ceases to apply

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Provision

86. As noted, Schedule A1, read with section 5(2ZA), provides for the application of certain sections of the 1985 Act to debtors entering the MAP process. Paragraph 2(7) gives the Scottish Ministers the power to make regulations which would modify the circumstances, mentioned in sub-paragraphs (3) to (6) when AiB has a duty to consider whether the modifications of provisions of the Act in paragraph 1 and the MAP procedure should cease to apply in relation to that debtor.

Reason for taking this power

87. As above, the Scottish Government believes it would be appropriate, if required, for the Scottish Ministers to be able to modify the operation of the MAP, without having to have recourse to further primary legislation. Having this regulatory power would provide a degree of flexibility and enable any changes required to be made more easily.

Choice of procedure

88. Setting and changing the detailed values or individual assets taken into account within the structure of the MAP criteria, to allow change to the specific criteria is considered suitable for the affirmative procedure because of its potential impact on the overall scheme and the debtor.

Schedule 3 - (minor and consequential amendments), paragraph 28(a)

Inserted section 72(1A) – different provision for different cases or classes of case

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Provision

89. Paragraph 28(a) of schedule 3 to the Bill (with consequential repeals) amends section 72(1) of the 1985 Act to clarify that the general power to make different provision for different cases or classes of case extends to all of the subordinate powers in the 1985 Act. This is because of a doubt that this power applies only to regulation-making powers in the 1985 Act under the negative Parliamentary procedure for Scottish statutory instruments. The Scottish Law Commission discussed this issue in their recent Report on the consolidation of the 1985 Act². The effect is to confirm that it extends to the affirmative Parliamentary procedure regulation-making powers in the Act—certain specific provisions which provided express powers are also repealed where they duplicate the general power.

Reason for taking this power

90. The reason for clarifying the delegation of this general latitude for the affirmative procedure powers in the Act is for administrative flexibility in line with the modern approach to drafting delegated powers of including the power to make different provisions for different purposes. In every case where the existing powers under the Act may be extended, the safeguard of affirmative procedure is retained.

Choice of procedure

91. The power is relevant across the specific delegated powers in the Bill. The reasons for delegating those powers and the choice of Parliamentary procedure in each case are particular to the specific powers in question.

² *Report on the Consolidation of Bankruptcy Legislation in Scotland*
[http://www.scotlawcom.gov.uk/files/7113/6853/1202/Report on the Consolidation of Bankruptcy Legislation in Scotland.pdf](http://www.scotlawcom.gov.uk/files/7113/6853/1202/Report_on_the_Consolidation_of_Bankruptcy_Legislation_in_Scotland.pdf), p.12

BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM