BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

PURPOSE

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Bankruptcy and Debt Advice (Scotland) Bill. It describes provisions in the Bill conferring power to make subordinate legislation which were amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION AMENDED AT STAGE 2

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**

Provision

3. Section 7 of the Debt Arrangement and Attachment (Scotland) Act 2002 is amended by the Bill to ensure the power used to make the Debt Arrangement Scheme (DAS) can be used for the common financial tool.

Reason for taking this power

4. 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, as with the powers taken under section 1, inserted section 5C(2)(b) and section 2 of the Bill, in order for the tool to be

effective over time, will need to flexible to ensure a fair assessment of the debtor's ability to pay and other factors. Having the power to enact and amend the tool by regulations would provide a degree of flexibility and enable any changes required to be made more easily, ensuring the tool remains fit for purpose.

Choice of procedure

5. 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, and 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 was originally proposed that this aspect was added to the wide powers generally under negative procedure to make the scheme provided by the Debt Arrangement and Attachment (Scotland) Act 2002.

6. However, at Stage 1 the Delegated Powers and Law Reform Committee recommended that the power should be subject to the affirmative procedure in the DAS Scheme also. It is the standardisation of approach to what is appropriate expenditure or allowances for debtors in all circumstances which the Committee considers attracts the practical significance and potential controversy which merits the affirmative procedure.

7. The Scottish Government indicated it was content to prepare an amendment to that effect, and the Bill was duly amended at Stage 2. Inserted paragraph 31A of schedule 3 to the Bill applies insofar as it relates to section 7(2)(bd) of the 2002 Act.

Section 4 – Debtor contribution order

Inserted section 32D(7) of 1985 Act – provision about deduction from earnings and other income

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

Provision

8. Regulations made under this subsection in the Bill as introduced provided for the form of an instruction to an employer, to make deductions from employment earnings under subsection 32D of the 1985 Act as amended by the Bill. These regulations will also prescribe the manner in which it effects the debtor's employer and the consequences for the employer of any failure to comply.

9. As replaced at Stage 2, this section now provides for deduction from earnings or other income. Section 32D(7) makes equivalent wider provision for the form of an instruction to a third person in connection with that other income, the manner in which it effects that person and the consequences of any failure to comply with their duty to pay.

Reason for taking this power

10. There is currently no provision to allow for the deduction of an assessed contribution directly from a debtor’s wages or other income. 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. As with the power to make this detailed provision in line with that which applies under the DAS scheme in relation to employment earnings, as outlined in the Government’s response to the Committee at stage 1, having this regulatory power would provide the Scottish Ministers with a degree of flexibility in relation to other income as well and enable them to make any changes required over time more easily.

Choice of procedure

11. At Stage 1 the Delegated Powers and Law Reform Committee also recommended that the power now in section 32D(7) for employment income should be subject to the affirmative procedure. While noting its view that that there are precedents for allowing this kind of provision to be made by negative procedure, in order to meet the Committee's concerns around the limits of this power, the Scottish Government brought forward an amendment to allow enhanced affirmative scrutiny.

12. Paragraph 28(b) of schedule 3 to the Bill was accordingly amended at Stage 2 in order that the affirmative procedure applies to the expanded power as applied to other income.

13. The Scottish Government is content in line with the affirmative procedure accepted at Stage 2 in relation to employment earnings, to apply the affirmative procedure also to sources of earnings from other income, to meet the Committee’s concerns around the limits of the power. While the provision extends to other categories of income, and some aspects of the power enable wider provision to be made, the provision which would be made remains directed at the operational detail of implementing the provision in section 32D(1) to (6). The provision is only about deduction of earnings procedure and not the entitlement of the trustee to any wider categories of income covered.

Section 21 – Register of insolvencies

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

Provision

14. 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

15. 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 which are administrative procedures. The Scottish Government believes that enabling the Scottish Ministers to make such changes by Scottish statutory instrument, in the form of regulations, as can be done at present by Act of Sederunt, is appropriate.

16. At Stage 2 the Scottish Government brought forward an amendment to ensure there is no doubt whether the power allows the inclusion by these Regulations in the register of the particulars of other documents, e.g. in relation to trust deeds which are not protected or other documents relating to insolvency. This will also allow the provision made for the Register to be updated over time to reflect future changes in insolvency law.

Choice of procedure

17. Updating or amending the information on the RoI in respect of the form of the RoI and the particulars of documentation will reflect the other structures of insolvency legislation and practice over time. This is broadly administrative provision of detail to that end. Accordingly, the Scottish Government considers that the negative procedure remains appropriate for this power.

Section 34 – Power to make provision about applications to and decisions of Accountant in Bankruptcy

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

18. 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 the Accountant in Bankruptcy, applications to the Accountant in Bankruptcy for a review and decisions made by the Accountant in Bankruptcy.

Reason for taking this power

19. The general reason for taking the power was set out in the Delegated Powers Memorandum on the Bill as introduced. Inserted section 71C(3)(b) was amended at Stage 2 to clarify that the power was able to specify the form of report required for the AiB. That

was required as a consequence of the Stage 2 amendments relating to section 16 and the discharge procedure, where trustees are required to report to the AiB before the AiB takes a decision on discharge.

20. The Stage 2 amendment also allows any other document to be prescribed in relation to the matters covered by the power in section 71C – applications to, and other decisions by, the Accountant in Bankruptcy under the 1985 Act or on review. This is considered appropriate for the same reasons set out in that Memorandum. It is considered that the powers in relation to other documents are limited in the context of section 71C and to documents provided for elsewhere in the Act as amended by the Bill, or under enabling powers in the Act.

Choice of procedure

21. The Scottish Government considers that the affirmative procedure remains appropriate where the power is used to amend an Act, and that for other matters the procedural provision can take the negative procedure, for the same reasons as set out previously.

22. At Stage 1 the Delegated Powers and Law Reform Committee questioned whether the affirmative procedure would apply to textual amendments to Acts of the Scottish Parliament as well as textual amendments to Acts of the United Kingdom Parliament. While noting that the Bill would likely create the context to make the intention clear and cover both, the Scottish Government was happy to bring forward an amendment to paragraph 28(b)(iii) of schedule 3 and did so at Stage 2.

New section 48A – Debt arrangement scheme: extension to non-natural persons and fees

Amendment of the Debt Arrangement and Attachment (Scotland) Act 2002 – section 7(2)(ub) - the remuneration of payments distributers and money advisers

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

Provision

23. The regulations made under the amendments to the powers in sections 7 and 7A of the Debt Arrangement and Attachment (Scotland) Act 2002 by new section 48A of the Bill gives Scottish Ministers the power required to support amendments to the Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141) (DAS) to allow the extension of the scheme to legal persons in relation to business debt. This also provides more expressly for powers to limit the amount that can be charged by money advisers and payment distributors.

Reason for taking this power

24. Section 48A(2) allows the Scottish Ministers to widen access to the DAS scheme, to include more specifically legal persons, including non-limited liability partnerships, limited

partnerships, trusts, and corporate and unincorporated bodies where there is no other procedure provided for the winding up of those bodies. The policy aim is to provide an intervention mechanism which can assist with preventing small business insolvency. It is considered that there is a need for flexibility to allow the details of the scheme to be developed and consulted on in line with the existing powers in the 2002 Act to make the Regulations.

25. In addition to the above, section 48A(3) will enable Scottish Ministers to address growing concern around fees charged by some continuing money advisers, for their advice in respect of DAS and for the ongoing management of the Debt Payment Programme, by providing clearer powers to fix the remuneration of approved money advisers and payment distributors acting under the DAS scheme. There is a need to allow such provisions to be adjusted over time to reflect prevailing economic conditions.

Choice of procedure

26. Given the likely profile and scope of the impact of the envisaged legislation on business and those acting in relation to the DAS scheme under the legislation, the Scottish Government considers that these regulations should be subject to the affirmative procedure.

BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM