23rd Meeting, Session 4 2014

Wednesday 8 October 2014

The James Clerk Maxwell Room (CR4)

Previous Meeting Papers & Official Reports

Written Submissions

Bankruptcy SSIs:
Citizens Advice Scotland
ICAS
R3 Scottish Technical Committee
StepChange
Law Society of Scotland
Draft Budget 2015-16:
Scotland Food & Drink
STUC
Scottish Chambers of Commerce
Scottish Council for Development and Industry (SCDI)

Correspondence

Update from Minister for Energy, Enterprise & Tourism on matters raised in the Committee’s Stage 1 Report on the BADAS Bill

UK Small Business Bill LCM Note

Affirmative BADAS Act 2014 Regulations Note

Negative BADAS Act 2014 Regulations Note

Next Meeting

The Committee’s next meeting is scheduled for Wednesday 29 October.

Expected business includes:

- Consideration of the Draft Budget 2015-16;
- Consideration of the approach to the international exports inquiry.

The agenda and papers for the meeting will be posted on our website by Friday 24 October.

www.scottish.parliament.uk/economy
ECONOMY, ENERGY AND TOURISM COMMITTEE

AGENDA

23rd Meeting, 2014 (Session 4)

Wednesday 8 October 2014

The Committee will meet at 9.00 am in the James Clerk Maxwell Room (CR4).

1. **Decision on taking business in private:** The Committee will decide whether to take item 7 in private.

2. **Small Business, Enterprise and Employment Bill (UK Parliament legislation):** The Committee will take evidence on legislative consent memorandum LCM(S4) 31.1 from—

   Fergus Ewing, Minister for Energy, Enterprise and Tourism, Scottish Government;

   Chris Boyland, Head of Strategic Reform, Accountant in Bankruptcy;

   David McPhee, Head of Business and Energy Unit, Office of the Chief Economic Adviser;

   Elaine Drennan, Head of Employability, Skills and Lifelong Learning Analysis, Educational Analytical Services;

   Neil MacLeod, Principal Legal Officer, Solicitors Constitutional and Civil Law.

3. **Subordinate legislation:** The Committee will take evidence on:

   Bankruptcy and Debt Advice (Scotland) Act 2014 (Consequential Provisions) Order 2014 [draft];

   Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014 [draft];

   Common Financial Tool etc. (Scotland) Regulations 2014 [draft];
Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 [draft];

from—

Fergus Ewing, Minister for Energy, Enterprise and Tourism, Scottish Government;

Claire Orr, Executive Director Policy and Compliance, and Chris Boyland, Head of Strategic Reform, Accountant in Bankruptcy;

Graham Fisher, Scottish Government Legal Directorate.

4. **Subordinate legislation:** Fergus Ewing (Minister for Energy, Enterprise and Tourism) to move—

   S4M-11068—That the Economy, Energy and Tourism Committee recommends that the Bankruptcy and Debt Advice (Scotland) Act 2014 (Consequential Provisions) Order 2014 [draft] be approved.

   S4M-11069—That the Economy, Energy and Tourism Committee recommends that the Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014 [draft] be approved;

   S4M-11070—That the Economy, Energy and Tourism Committee recommends that the Common Financial Tool etc. (Scotland) Regulations 2014 [draft] be approved;

   S4M-11071—That the Economy, Energy and Tourism Committee recommends that the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 [draft] be approved;

5. **Subordinate legislation:** The Committee will consider the following negative instruments—

   Bankruptcy (Scotland) Regulations 2014 (SSI 2014/225)

   Bankruptcy (Applications and Decisions) Regulations 2014 (SSI 2014/226)

   Bankruptcy Fees (Scotland) Regulations 2014 (SSI 2014/227)

6. **Draft Budget Scrutiny 2015-16:** The Committee will take evidence on the Scottish Government's Draft Budget 2015-16 from—

   Garry Clark, Head of Policy and Public Affairs, Scottish Chambers of Commerce;

   Stephen Boyd, Assistant Secretary, Scottish Trades Union Congress;

   James Withers, Chief Executive, Scotland Food and Drink;
Iain McTaggart, General Manager and Company Secretary, Scottish Council for Development and Industry.

7. **Review of evidence heard:** The Committee will review the evidence heard at today's meeting.

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The papers for this meeting are as follows—

**Agenda item 2**

Note by the Clerk

**Agenda items 3 and 4**

Note by the Clerk

**Agenda item 5**

Note by the Clerk

**Agenda items 3, 4 and 5**

Written Submission

Written Submission

Written Submission

PRIVATE PAPER

Written Submission

**Agenda item 6**

PRIVATE PAPER
Purpose

1. The purpose of this paper is to invite the Committee to consider the attached legislative consent memorandum (LCM) lodged by the Scottish Government on the Small Business, Enterprise and Employment Bill.

Procedure for consideration of a legislative consent memorandum

2. Chapter 9B of the Standing Orders sets out the procedures for consideration of an LCM. This must (a) summarise the UK Bill and its policy intentions; (b) specify the extent to which the Bill makes provision to alter the competence of the Scottish Ministers, and (c) outline whether the Scottish Government intends to lodge a motion recommending that the Scottish Parliament gives its consent to the provision, along with the reasons behind this decision.

3. Once lodged, the Parliamentary Bureau refers the LCM to the relevant lead committee which is required to consider it and report its views to the Parliament. A legislative consent motion is then taken in the Parliament.

4. It is usual practice for the Parliament to have expressed a view on the LCM in time for the final amending stage in the House in which the Bill was introduced, i.e. report stage in the Commons or third reading in the Lords. The Bill is currently at Committee Stage in the Commons.

Delegated Powers and Law Reform Committee

5. The Delegated Powers and Law Reform Committee considered the LCM at its meeting on 19 August 2014 and reported that it was content with the delegated powers conferred on the Scottish Ministers in the Bill, and with the procedures to which they are subject.

Recommendation

6. The Committee is invited to:

   • consider whether to recommend that the Parliament give its consent to the relevant provisions of the Small Business, Enterprise and Employment Bill as set out in the LCM; and

   • to delegate to the Convener and Clerk the production of a short, factual report detailing the Committee’s considerations and arranging for its publication.

Alexia Forrester
Committee Assistant
LEGISLATIVE CONSENT MEMORANDUM
Small Business, Enterprise and Employment Bill

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Finance, Employment and Sustainable Growth, is:

“That the Parliament agrees that the relevant provisions of the Small Business, Enterprise and Employment Bill, introduced in the House of Commons on 25 June 2014, relating to a range of measures on access to finance, data-sharing in education, and insolvency, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by John Swinney, Cabinet Secretary for Finance, Employment and Sustainable Growth, under Rule 9.B.3.1(a) of the Parliament’s Standing Orders. The Small Business, Enterprise and Employment Bill (“the Bill”) was introduced in the House of Commons on 25 June 2014. The latest version of the Bill can be found at:

http://services.parliament.uk/bills/2014-15/smallbusinessenterpriseandemployment.html

Content of the Small Business, Enterprise and Employment Bill

3. The Bill results from the UK Government’s “Red Tape Challenge” and aims to promote economic growth by removing what are regarded as unnecessary impediments to business. The Bill will support small businesses by cutting bureaucracy and enabling them to access finance.

4. The Bill will require UK Ministers to set and report on a deregulation target for the period of each Westminster Parliament. The Bill will also aim to reduce delays in employment tribunals, improve the fairness of contracts for low paid workers and establish a public register of company beneficial ownership. The Bill will also impose higher penalties on employers who fail to pay their staff the minimum wage and will limit excessive redundancy payments across the public sector.

5. The Bill also includes measures relating to childcare, public sector procurement and to the introduction of legislation to provide for a new statutory code and an adjudicator to increase fairness for public house tenants. These measures will only be introduced in England and Wales and will not extend to Scotland.

6. The Scottish Government is determined to create a supportive business environment in Scotland and the measures in this Bill are in line with this ambition.
We are fully committed to better regulation which helps small business by reducing unnecessary burdens and creating a favourable business environment in which companies can grow and flourish. The Scottish Government has already progressed a range of successful initiatives to change the stock, flow and culture of regulation in Scotland and deliver better regulation for all. In recognising that Scotland’s businesses are the primary drivers of sustainable economic growth, we are also keen to introduce policies which will improve the performance of our businesses and make Scotland a more open and competitive place for companies to do business.

**Provisions Which Relate to Scotland**

7. The Bill makes provision in seven areas which extend to Scotland and are relevant under Chapter 9B of the Parliament’s Standing Orders. These provisions are:

- Clause 1 – Access to Finance: Power to invalidate certain restrictive terms of business contracts.
- Clause 67 – Education evaluation: Assessments of effectiveness.

8. Further detail on the effect of these provisions and the reasons for seeking the legislative consent of the Scottish Parliament are set out below.

9. Clauses 140 – 142 of the Bill make provision around the recovery of exit payments for public servants. This was a late addition to the Bill and the Scottish Government is still in discussion with the UK Government and Scottish stakeholders on the detail of the policy and the desirability of an LCM for this provision. If agreement is reached on the policy, the Scottish Government will lodge a supplementary LCM in due course. If there is no agreement, the Scottish Government will ask for the provision not to extend to Scotland and for the provision to be amended accordingly.

10. Clause 135 of the Bill makes provision around whistleblowing reporting requirements. The Scottish Government has recently been made aware that there are pending changes to the list of “prescribed persons” in the Public Interest Disclosure (Prescribed Persons) Order 1999 which will determine whether an LCM is required for this measure. The Scottish Government will continue discussions with the UK Government and ascertain whether an LCM is in fact required for this provision and will lodge a supplementary LCM in due course if required.
Reasons for seeking a legislative consent motion

Clause 1 – Power to invalidate certain restrictive terms of business contracts

11. The provisions contained in clause 1 of the Bill will directly change the law of contract in Scotland so that contracts for the supply of goods and services in Scotland can no longer contain terms which prevent the assignment of receivables (money owed for goods and services). The clause has a devolved purpose as it would make direct changes to Scots contract law generally. Legislative consent is therefore required for the Bill to extend to Scotland and would allow a parallel timetable for delivery, thereby ensuring that the legislation is consistent across Scotland, England and Wales.

Clause 67 – Education evaluation: Assessments of effectiveness

12. As the existing information sharing provisions in the Education and Skills Act 2008 only apply to persons 19 years and older, and as higher education is expressly excluded from the scope of these provisions, that provides only a partial picture on outcomes of learners. Further legislative provision is required to extend this data sharing to students under 19 and students in higher education so that a consistent approach can be taken across all sectors. Clause 67 of the Bill therefore amends section 87 of the 2008 Act to remove the restrictions on age, so that information can be shared about persons under the age of 19. Section 91 of the 2008 Act is amended by omitting subsection (6), which excluded higher education from the scope of sections 87 to 90 of the 2008 Act. This means that information that relates to higher education is included in the information which may be disclosed under the 2008 Act.

13. The proposed amendments to this Part of the 2008 Act will allow the Scottish Ministers, the Department for Work and Pensions and HMRC to share education, benefit and tax data on all school leavers and students in further education and higher education. The sharing of this information will allow us to identify wage and employment outcomes for those who have undertaken training or further or higher education in Scotland.

14. Officials have agreed with their UK counterparts that this provision falls within devolved competence as it affects the assessment of education and training services and, therefore, that the consent of the Scottish Parliament will be required if it is to be extended to Scotland. Our view is that this should be extended to cover Scotland as sharing this information will allow us to identify wage and employment outcomes for those who have undertaken training or further or higher education in Scotland.

Part 10: Clauses 106, 108, 110, 112 and 114 – Insolvency

15. Under the insolvency reservation in Head C2 of Part II of Schedule 5 to the Scotland Act 1998, the general legal effect of liquidation is a reserved matter, but the
process of liquidation and floating charges and receivership are for the most part devolved.

Clause 106 – Power for liquidator or administrator to assign causes of action

16. Clause 106 will amend the Insolvency Act 1986 (“IA 1986”) to allow administrators and liquidators to assign certain claims (rights of action) which they can pursue in the course of insolvency proceedings. So far as this relates to the position of a liquidator it is provision about the process of liquidation and therefore extension of the provision to Scotland, with a view to widening the options available to office-holders and providing the possibility of an increase in returns to creditors, triggers the need for legislative consent.

Clause 108 - Exercise of powers by liquidator: removal of need for sanction

17. Clause 108 makes provision which will allow the liquidator to exercise certain powers, the exercise of which currently requires prior agreement of either the company, a creditors’ committee or the court without the need for such agreement. This is provision about the process of liquidation, and therefore extension of the provision to Scotland, with a view to increasing efficiency and reducing costs associated with insolvency proceedings, triggers the need for legislative consent.

Clause 110 – Abolition of requirements to hold meetings: company insolvency

18. Clause 110 will (together with provision to be made in rules made under IA 1986 (“the rules”) facilitate the taking of decisions by a company’s creditors or contributories in the course of insolvency proceedings by a ‘qualifying decision procedure’ – i.e. by means other than by convening a creditors’ meeting or contributories meeting as provided for in the rules (while preserving the possibility of a meeting if a particular proportion of creditors or contributories make a written request that the decision be made by a meeting). The provision will also pave the way for certain decisions to be taken by way of a ‘deemed consent procedure’ – i.e. a procedure whereby creditors or contributories are given notice of an intended decision and are to be treated as having made that decision unless a particular proportion of them object.

Clause 112 – Ability for creditors to opt not to receive certain notices: company insolvency

19. Clause 112 makes provision which will facilitate creditors opting out of receiving certain notices which in terms of the rules they would otherwise require to be sent in cases where they have no on-going interest in the insolvency proceedings (such creditors being known as ‘opted-out creditors’).

Clause 114 – Sections 110-113: further amendments

20. Clause 114 confers power on the Scottish Ministers by regulations subject to the affirmative procedure to make certain amendments to the IA 1986 to remove
requirements to hold meetings in insolvency proceedings – e.g. to remove
requirements to hold meetings of creditors and contributories – and to provide for
decisions to be taken by either a ‘qualifying decision procedure’ or ‘deemed consent
procedure’ (on which see clause 110 of the Bill). Likewise it empowers Scottish
Ministers to amend the IA 1986 to remove any requirement to send notices or other
documents in the case of ‘opted-out creditors’ (on which see clause 112 of the Bill).

21. Clauses 110, 112 and 114 make provision about receivership and the process
of liquidation. Their extension to Scotland, with a view to increasing efficiency and
reducing costs associated with insolvency proceedings, triggers the need for
legislative consent.

Consultation

22. There has been no formal consultation on the Bill as a whole by the Scottish
Government. Both ICAS and ACCA Scotland have been informally consulted on the
measure relating to the assignment of receivables and are broadly content with the
proposal. The UK Insolvency Service carried out a formal public consultation
exercise on their proposals in the Bill between 18 July and 10 October 2013. BIS
held a Higher Education Statistics user engagement event on 30 January 2014
which highlighted the need to extend data sharing.

Financial Implications

23. There are no significant financial or resource implications anticipated as a
consequence of agreeing this LCM. While there may be some resource implications
for the analytical and ICT resource requirement for the education measures, this is
expected to be met from existing budgets. In terms of the ban on receivables, some
costs may be borne by law firms in making their staff aware of the changes to the
law proposed but these are the usual costs associated with any reform of the law.
These costs are likely to be small, however, and would be offset by the benefits for
small business gain by extending the provision to Scotland. The insolvency
measures are all intended to deliver efficiency savings in relation to different parts of
the overall insolvency process and should, therefore, come at no net cost.

Conclusion

24. It is the view of the Scottish Government that it is in the best interests of the
Scottish people and good governance that the relevant provisions outlined above
and which fall within the legislative competence of the Scottish Parliament or alter
the executive functions of Scottish Ministers should be considered by the UK
Parliament.

Scottish Government
August 2014
Economy, Energy and Tourism Committee
23rd Meeting, 2014 (Session 4), 8 October 2014

Cover Note Affirmative SSIs – BADAS Act 2014

Introduction

The following affirmative instruments under Standing Orders Rule 10.6.1(a) are part of a “package” laid to implement the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”).

Affirmative Instruments

1. The Bankruptcy and Debt Advice (Scotland) Act 2014 (Consequential Provisions) Order 2014 [draft]

Purpose of the instrument: This Order makes provision in consequence of the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”). Article 3 of, and the Schedule to, the Order make provision modifying primary and secondary legislation.

The modifications provided for are in consequence of provision in the 2014 Act which amends the 1985 Act by:

- Introducing debtor contribution orders in place of existing arrangements for income payment orders and agreements (see, in particular, section 4 of, and schedule 4 to, the 2014 Act); and
- Altering existing arrangements for discharge of a debtor who has been sequestrated (see, in particular, sections 17 and 19 of the 2014 Act).

Policy Note: The policy note on the instrument provides more information on the policy intent including consultation and impact assessments. As this Order is consequential on the provisions and policy aims of the 2014 Act, a Business and Regulatory Impact Assessment was not prepared.

Coming into force: 1 April 2015

Deadline for EET Committee to consider: 14 November 2014

SSI drawn to Parliament’s attention by DPLR Committee: 30 September 2014 – agreed that no points arose in relation to the instrument.

2. The Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014 [draft]

Purpose of the instrument: These Regulations make provision about various matters to implement provisions of the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”) which amended the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”).
Regulations 3 and 4 prescribe persons who can act as money advisers in relation to sequestration under the 1985 Act, including the classes of—

- Insolvency practitioners and persons who work for them who have been given authority by the insolvency practitioner to act on behalf of that insolvency practitioner;
- Persons approved for the purposes of the Debt Arrangement Scheme;
- Persons working as money advisers for organisations awarded Type 2 against Scottish National Standards for Information and Advice Provision, full bureau members of the Scottish Association of Citizens Advice Bureaux – Citizens Advice Scotland; or councils.

Regulation 4 provides for who may not be a money adviser, including those whose approval is revoked by the Accountant in Bankruptcy in specific cases.

Regulations 5 prescribes additional matters on which debtors must obtain money advice in making a debtor application for sequestration. Regulation 6 sets out procedural requirements for obtaining money advice in connection with debtor applications under the 1985 Act.

Regulation 7 amends the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010 which provides for a certificate that the debtor has demonstrated he or she is not able to pay his or her debts as they become due, in consequence of the 2014 Act. Those authorised to grant certificates are replaced by money advisers under section 5C of the 1985 Act as amended by the 2014 Act. The form of the Certificate of Sequestration is replaced with the form in Schedule 1 to these Regulations, which can be included in the debtor application for sequestration.

Regulation 8 makes provision for the forms of instructions by the debtor or trustee under section 32E of the Act to an employer or third party due to make payment to the debtor for deductions from earnings or other income. It also provides for how the instruction affects the recipient and what happens if the employer or third person refuse to pay the deduction.

Regulations 10 revokes the Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008 in consequence of the 2014 Act. Regulation 9 continues in effect regulation 4 of those Regulations, amending section 39A of the Bankruptcy (Scotland) Act 1985 to add certain actions for gratuitous alienations to the circumstances which preclude a family home reinvesting in the debtor 3 years after sequestration. Regulation 11 saves the regulations relevant to low income, low asset debtors in respect of sequestrations where the debtor application was made before 1st April 2015, as those sequestrations will continue under the existing low income, low asset provisions to the end of those sequestrations.

**Policy Note:** The policy note on the instrument provides more information on the policy intent including consultation and impact assessments. A Business and Regulatory Impact Assessment has been prepared for these Regulations.
Coming into force: 1 April 2015

Deadline for EET Committee to consider: 14 November 2014

SSI drawn to Parliament’s attention by DPLR Committee: The Scottish Government withdrew the instrument laid on 21 August 2014 in order to correct errors noted by the legal advisers to the DPLR Committee. An amended Order was re-laid on 4 September 2014. At its meeting on 30 September 2014, the DPLR Committee agreed that no points arose in relation to the instrument.

3. The Common Financial Tool etc. (Scotland) Regulations 2014 [draft]

Purpose of the instrument: These Regulations make provision about the method for determining an appropriate amount of a living debtor’s income to be paid to a trustee after sequestration of the debtor’s estate, known as the “common financial tool” in the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”), as amended by the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”).

The Regulations also make a number of other amendments to related legislation in the Protected Trust Deeds (Scotland) Regulations 2013 (“the PTD Regulations”).

The common financial tool is to be used in making debtor contribution orders under sections 32A to 32H of the 1985 Act, which fix the contribution which a debtor must pay from income received after sequestration for the benefit of creditors. Those orders replace income payment orders under section 32(2) of the 1985 Act. The common financial tool may also be taken into account on variation of an income payment order, though the sheriff may have regard to other factors too.

Regulations 3 and 4 provide for the common financial tool, providing for how income and expenditure of the debt is established by reference principally to the Common Financial Statement published by the Money Advice Trust (the “CFS”).

The debtor’s surplus income in excess of the lower of the debtor’s expenditure, or the “trigger figures” which are part of the CFS for a reasonable amount of expenditure is the basis of the contribution, and an amount of reasonable expenditure may be allowed to the debtor which exceeds those trigger figures. Guidance is also to be set out by the Accountant in Bankruptcy on types of income and expenditure, verifying income and expenditure and money advisers’ functions.

Supporting statements, explanation and evidence is required (regulation 4). The Accountant in Bankruptcy can in some cases related to debtor applications notify the Money Advice Trust where it appears money advisers have breached license restrictions or repeatedly failed to advise in accordance with the CFS (regulation 5).
Regulations 6 to 10 make changes to the PTD Regulations arrangements to protect debtors entering into trust deed arrangements with their creditors from other creditors. Consequential changes are made for the introduction of the common financial tool under the powers in paragraph 5 of Schedule 5 to the 1985 Act (regulation 7), building on the fact that the PTD Regulations already require users to use the Common Financial Statement.

Other miscellaneous and minor amendments are made to the PTD Regulations, including requiring trustees to seek a direction from the Accountant in Bankruptcy where creditors object to a recommended course of action where a trustee proposes a lower dividend in Form 4 submitted under the PTD Regulations (regulation 8(1)). A single valuation of specified heritable estate before a trust deed was granted is allowed as an outlay of the trust deed (regulation 9).

These Regulations do not apply to trust deeds granted before 1st April 2015 (regulation 11).

Policy Note: The policy note on the instrument provides information on the policy intent including consultation and impact assessments. A Business and Regulatory Impact Assessment has been prepared for these Regulations.

Coming into force: 1 April 2015

Deadline for EET Committee to consider: 14 November 2014

SSI drawn to Parliament’s attention by DPLR Committee: 30 September 2014- agreed that no points arose in relation to the instrument.

4. The Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 [draft]

Purpose of the instrument: The Debt Arrangement Scheme (Scotland) Regulations 2011 (“the DAS Regulations”) prescribe a scheme for the repayment of debts in Scotland (“the DAS scheme”). They provide for procedure and forms in respect of a repayment arrangement under the scheme, which on approval is described as a debt payment programme (“a programme”).

These Regulations amend the DAS Regulations to introduce the possibility of using the scheme in relation to legal persons and other entities, in connection in particular with businesses. The wider scheme will apply to partnerships, limited partnerships within the meaning of the Limited Partnerships Act 1907, corporate bodies other than companies registered under the Companies Act 2006, trusts, and unincorporated bodies of persons. Sole traders will continue to be covered by the DAS scheme as it applies to individuals. These changes are introduced from 11th December 2014.

The Regulations also make provision for consequential changes to implement the introduction of the Common Financial Tool under section 3(2) of, and other changes made by, the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the
2014 Act") (regulations 8 except paragraph (3)(a) and (c), 9(1), 10, 21(5)(a), 22, Schedule 1 and Schedule 2, form 1). These changes are introduced from 1st April 2015.

Amendments are also made to the DAS Regulations in respect of money advisers, including provision on who can apply to be a money adviser for a legal person or other entity (regulation 5 (2)) and in relation to the functions and duties of money advisers (regulation 5(1) and 7). Regulation 6 removes money advisers working for organisations working towards Scottish National Standards for Information and Advice Provision from those approved to act as money advisers under the DAS scheme.

Policy Note: The policy note on the instrument provides more information on the policy intent including consultation and impact assessments. A Business and Regulatory Impact Assessment has been prepared for these Regulations.

Coming into force: These Regulations come into force on 11 December 2014 except Regulations 8 paragraph (3)(a) and (c), 9(1), 10, 21(5)(a), 22, Schedule 1 and Schedule 2 in respect of form 1 which come into force on 1 April 2015.

Deadline for EET Committee to consider: 15 November 2014

SSI drawn to Parliament’s attention by DPLR Committee: The Scottish Government withdrew the instrument laid on 22 August 2014 in order to correct errors noted by the legal advisers to the DPLR Committee. An amended Order was re-laid on 18 September 2014. At its meeting on 30 September 2014, the DPLR Committee agreed that no points arose in relation to the instrument.

Committee Consideration

5. Affirmative SSIs are considered following the procedure set down in Rule 10.6. This allows a 40-day period for committees to consider and report on affirmative instruments. As with negative procedure, the lead committee can start but not complete its consideration before the Delegated Powers and Law Reform Committee has reported to it on most affirmative instruments. (With some affirmative instruments, which cannot remain in force beyond a stated period, the lead committee must report by the end of that period.)

6. During the time available for consideration, in order to bring the provisions into force or ensure that they stay in force, a member of the Scottish Government must lodge a motion that the committee recommend approval of the instrument to the Parliament. The motion to recommend approval is taken as an item on the agenda of the lead committee and Rule 10.6 provides for a debate lasting no more than 90 minutes. The minister is entitled to speak in the debate.

7. In advance of the debate, committees may take evidence on the instrument. In that situation, there are two separate agenda items, the first stating that the committee will take evidence on the instrument (and listing the witnesses); the second being the motion for approval. It is not uncommon for a minister to attend
a committee meeting to give evidence on the instrument and then to move and speak to the motion.

8. Any MSP can lodge amendments to the minister's motion. As instruments can only be approved or rejected in their entirety, an amendment seeking to alter the wording of the instrument is inadmissible. However, for example, an amendment could be lodged regretting that certain provisions have not been included in the instrument or commending the Scottish Government for bringing forward legislation promptly. The text of the motion (whether or not amended) forms part of the committee's report.

9. Where the lead committee agrees to recommend approval of an instrument, it reports in those terms and there is then a Bureau motion to the Parliament proposing that the instrument be approved.

10. If the lead committee were to disagree to the motion to recommend approval and report accordingly, there would be nothing to prevent the Scottish Government from lodging a motion for approval for debate in the Parliament.

Action

Following evidence from the Minister, the Committee is invited to decide whether it wishes to agree to the motions below and to report its decision to the Parliament.


S4M-11069: Fergus Ewing: Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014 [draft]—That the Economy, Energy and Tourism Committee recommends that the Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014 [draft] be approved.

S4M-11070: Fergus Ewing: Common Financial Tool etc. (Scotland) Regulations 2014 [draft]—That the Economy, Energy and Tourism Committee recommends that the Common Financial Tool etc. (Scotland) Regulations 2014 [draft] be approved.

S4M-11071: Fergus Ewing: Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 [draft]—That the Economy, Energy and Tourism Committee recommends that the Debt Arrangement Scheme (Scotland) Amendment Regulations 2014 [draft] be approved.

The Committee is also invited to delegate responsibility for the drafting and publication of a short, factual report to the Convener and Clerk.

Alexia Forrester
Committee Assistant
Economy, Energy and Tourism Committee

23rd Meeting, 2014 (Session 4), 8 October 2014

Cover Note Negative SSIs – BADAS Act 2014

Introduction

The following three negative instruments under Standing Orders Rule 10.4 are part of a “package” laid to implement the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”).

Negative Instruments

1. The Bankruptcy (Scotland) Regulations 2014 (SSI 2014/225)

   **Purpose of the instrument:** These Regulations re-enact, with modifications, the Bankruptcy (Scotland) Regulations 2008 (S.S.I. 2008/82) except for regulation 8 of those Regulations. They make provision following amendments to the Bankruptcy (Scotland) Act 1985 by the 2014 Act.

   **Policy Note:** The policy note on the instrument provides more information on the policy intent including consultation and impact assessments. A Business and Regulatory Impact Assessment has been prepared for these Regulations.

   **Coming into force:** 1 April 2015

   **Deadline for EET Committee to consider:** 10 November 2014

   **SSI drawn to Parliament’s attention by DPLR Committee:** At its meeting on 30 September 2014, the DPLR Committee noted that there are a couple of drafting errors in the instrument and a failure to follow normal drafting practice, as various provisions in the notes within the Forms in Schedule 1 are not drafted in gender-neutral terms.

   The DPLR Committee drew the Regulations to the attention of the Parliament on the general reporting ground, for these reasons:

   First, the Regulations contain a couple of minor drafting errors. Regulation 19 refers to section 54D(4)(b) or (6)(b), without specifying that these are provisions of the 1985 Act. Page 27 also contains notes for the completion of the Form 4 statement of assets and liabilities contained in Schedule 1, but the page is duplicated with page 26.

   The Scottish Government has undertaken to correct these errors by means of amending Regulations, which would be laid before the Parliament before these Regulations come into force on 1 April 2015.

   Second, there is a failure to follow normal drafting practice, as various provisions in the notes within the Forms in Schedule 1 are not drafted in gender-neutral terms. This applies at pages 34, 37, 39, 41, 124 (at paragraph 3), and 127 (at paragraph 3) of the Regulations.
The Scottish Government has undertaken to correct those provisions if and when other amendments to the relevant forms in Schedule 1 are to be made, or if in future the Regulations were to be revoked and the relevant provisions re-enacted. However an amending instrument will be brought forward to correct the minor errors described above, and so the Committee considers that the various non gender-neutral references should be amended at the same time, before these Regulations come into force on 1 April 2015.

The Committee also draws the Regulations to the attention of the Parliament on the reporting ground (h), as the meaning of the saving provision in paragraph (a) of regulation 24(1) could be clearer. There could be a consistent use of tense in subparagraphs (i) and (ii). Paragraph (a) could accordingly have made clearer that it applies to sequestrations proceeding either on a petition for sequestration presented, or on a debtor application made, before 1 April 2015 - regardless of whether the date of presentation of the petition or the date of making the debtor application was before, on or after the date of making these Regulations.

The Scottish Government has indicated that it may have been more consistent to have used “is” instead of “was” in regulation 24(1)(a)(ii), but it has not indicated that the provision will be amended. The Committee considers that regulation 24(1) should be amended at the same time as the minor errors set out above are corrected, to provide better clarity and consistency of provision.


**Purpose of the instrument:** These Regulations set out the procedure for the making of applications to, and decisions by, the Accountant in Bankruptcy (“AIB”) under the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”) as amended by the 2014 Act.

They prescribe forms to be used in applying to AIB under the 1985 Act.

Regulations 3 to 7 make provision for general procedure to apply across different applications to AIB under the 1985 Act. They provide for how applications are made to AIB, including service of applications on other parties and the ability for AIB to make inquiries for further evidence or information.

Regulations 8 to 18 make particular procedural provision in relation to specific applications under the 1985 Act—

- Section 3A(2) application to AIB for direction by trustee;
- Section 17A application for recall where only ground that debtor has paid or is able to pay debts in full;
- Section 25(3)(a) objection to statutory meeting appointing a replacement trustee (by persons other than AIB);
- Section 28A(7)(a) to determine or appointment or replacement trustee acting in more than one sequestration;
- Under section 29(1A)(a) and (6A)(a) removal of trustee from office by AIB;
- Under section 42(2A)(b) extension of time limit for contractual powers of trustee;
- Under section 56A(3) proposal to make bankruptcy restrictions order;
- Under section 56E(3) to annul or vary a bankruptcy restrictions order;
- Under section 59A(1) to convert a protected trust deed into sequestration;
- Under section 63A a corrective order or to waive a time limit to cure a defect;
- Where the Accountant puts a value on a debt under paragraph 3 of Schedule 1 to the Act.

Regulation 19 makes provision for time limits following a reference being made to the sheriff by AIB.

Regulations 20 to 22 provide for additional procedure in review proceedings before AIB. Staff involved in any initial decision of AIB under review must not be involved in review decisions (regulation 21). Review decisions of the AIB must be made public (regulation 22).

**Policy Note:** The policy note on the instrument provides more information on the policy intent including consultation and impact assessments. A Business and Regulatory Impact Assessment has been prepared for these Regulations.

**Coming into force:** 1 April 2015

**Deadline for EET Committee to consider:** 10 November 2014

**SSI drawn to Parliament’s attention by DPLR Committee:** 30 September 2014 - agreed that no points arose in relation to the instrument.

3. **The Bankruptcy Fees (Scotland) Regulations 2014 (SSI 2014/227)**

**Purpose of the instrument:** These Regulations prescribe the fees and outlays payable to the Accountant in Bankruptcy in respect of the exercise of that office’s functions under the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”). They also prescribe when and in what manner certain fees and outlays are due for payment.

They revoke and replace the Bankruptcy Fees etc. (Scotland) Regulations 2012 (“the 2012 Regulations”), subject to a saving in regulation 13 for petitions and applications for sequestration lodged or trust deeds granted before 1st April 2015. They are made following the amendment of the 1985 Act by the Bankruptcy and Debt Advice (Scotland) Act 2014, including in relation to functions transferred from the court to the Accountant in Bankruptcy.

The fees formerly payable under the 2012 Regulations are shown in column 3 of the Table of Fees in the Schedule to these Regulations (“table of fees”); where there is no change this is expressly stated. In some cases, the fees may be met as expenses in the distribution of the estate of the debtor (see section 51 of the 1985 Act).

The fees set by Part 1 of the table of fees relate to the exercise of the Accountant in Bankruptcy’s functions of acting as interim trustee and trustee in sequestration.
(regulations 3 to 5). The fees set by Part 2 of the table of fees relate to other functions of the Accountant in Bankruptcy (regulations 6 to 12).

**Policy Note:** The policy note on the instrument provides more information on the policy intent including consultation and impact assessments. A Business and Regulatory Impact Assessment has been prepared for these Regulations.

**Coming into force:** 1 April 2015

**Deadline for EET Committee to consider:** 10 November 2014

**SSI drawn to Parliament’s attention by DPLR Committee:** At its meeting on 30 September 2014, the DPLR Committee drew the instrument to the attention of the Parliament on the reporting ground (h), as the meaning of the saving provision in regulation 13(1) could be clearer. There could be a consistent use of tense in subparagraphs (a) and (b). Regulation 13(1) could accordingly have made clearer that it applies to sequestrations proceeding either on a petition for sequestration presented, or on a debtor application made, before 1 April 2015 - regardless of whether the date of presentation of the petition or the date of making the debtor application was before, on or after the date of making these Regulations.

**Committee Consideration**

4. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Standing Orders Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament. If that is also agreed to, Scottish Ministers must revoke the instrument.

5. Each negative instrument appears on a committee agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

6. On this occasion, the Minister and officials will be present to answer questions.

**Action**

7. The Committee is invited to consider and note the three instruments.

Alexia Forrester
Committee Assistant
BANKRUPTCY AND DEBT ADVICE (SCOTLAND) ACT 2014 REGULATIONS

SUBMISSION FROM CITIZENS ADVICE SCOTLAND

Introduction

Citizens Advice Scotland (CAS) supported many of the measures in the Bankruptcy and Debt Advice (Scotland) Bill. We welcomed its aims and objectives particularly the key aim of ensuring that the people of Scotland have access to fair and just processes of debt advice, debt relief and debt management.

We therefore welcome the opportunity to respond to the Bankruptcy and Debt Advice (Scotland) Act regulations that have been laid. We generally support the regulations, although we have some issues and concerns that we would like the Committee to consider. Our response is to the following draft Scottish Statutory Instruments:

- Draft SSI: The Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014
- Draft SSI: The Common Financial Tool etc. (Scotland) Regulations 2014

Draft SSI: The Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014

Section 4

CAS is concerned with the proposed section 4 (2) that the Accountant in Bankruptcy may revoke or suspend the approval of a money adviser who fails without good cause to apply the common financial tool in accordance with the regulations or to comply with section 6 in relation to obtaining evidence from clients. (see section 6 below).

We are concerned about the potential implications that this would have on an adviser’s approval as a money adviser and therefore employment. We are also concerned about the implications for the bureau that employs them if a contracted employee is unable to fulfil their duties due to approval being withdrawn. If the AiB were to have this role, we would ask that the suspension of approval would be the absolute last resort and that the involvement of the bureau, as employer, would be the first step of remedial action.

We question whether this regulation is necessary and what evidence supports its inclusion.

Section 6

CAS is concerned that these regulations may prove to be overbearing and prescriptive on money advisers. Section 6 (1 – 3) states that advisers must obtain evidence of the debtor’s income and expenditure, retain this evidence for at least two years, and provide this evidence to the AiB as required. This is referenced in the policy intentions in the Business and Regulatory Impact Assessment, where it states this will allow the AiB to audit approved money advisers and, where appropriate suspend or revoke the approval status of advisers and also in Section 4 (2) (b).
While we strongly agree that advisers should obtain and retain evidence, where possible, as an integral part of their role, we are concerned that by making this mandatory and linked to approval status for advisers, this could have an unintended negative impact on advisers and debtors. For example, many of the clients that bureaux advise lead a chaotic lifestyle, which can make collecting evidence on income and expenditure very difficult and time consuming. This can impact on the time that the adviser can spend with other clients.

There is also a potential that linking mandatory evidence collection with approval status will lead to a disincentive to carry out any debt relief work for clients where evidence is difficult to collect, as advisers may be concerned that that their approval as a money adviser and therefore their employment could be compromised if they cannot obtain sufficient evidence from the client (see section 4 (2) (b)).

We are also concerned that this regulation fails to reflect that the relationship between advisers and clients is collaborative, rather than one of agency of the AiB, which the linking of adviser approval to collection of information on behalf of the AiB implies.

In order to avoid these unintended consequences, we believe the mandatory requirement on obtaining and retaining evidence should not be linked to the approved status of advisers, and that flexibility should be built in for debtors for whom collecting full evidence would be very difficult.

Section 8

Regulation 8 (1) applies to deductions from debtor’s earnings and other income. As stated in our evidence to the Bill, this action must only be taken as a last resort and where all other possible remedial actions have been explored. We believe that if a debtor fails to make two payments it could be for a legitimate reason such as an unforeseen change of circumstance or need for emergency payment.

Given that this action may have a negative impact of some debtors’ employment, this action must only be used when the client is fully aware that it is going to take place.

One of the reasons we did not continue to push for an amendment at Stage 3 that there should be four missed payments not two before any income deduction, is that we were content with assurances that debtors would be informed in writing that this action would be taken and be encouraged to seek advice.

Draft SSI: The Common Financial Tool etc. (Scotland) Regulations 2014

Section 3

CAS welcomes the use of the Common Financial Tool and Statement and the regulation stating that no contribution will be due from debtors whose income is solely derived from benefits or tax credits.

However, CAS is concerned about regulation 3 (2) which states that the debtor’s contribution is to be the debtor’s whole surplus income as assessed by the Common Financial Statement, which is not the current practice of many Insolvency
Practitioners who allow some leeway on the Stepchange trigger figures. We are concerned that this leaves no room for savings and/or the development of contingency funds to cover for an unexpected cost or event. For example, an unexpected family death could entail a significant outlay, with the average simple funeral in Scotland costing more than £3,000.

A key part of financial capability is the development of economic resilience to unexpected costs, with its absence being one of the main causes of debt. CAS therefore recommends that either savings are built in to the contributions taken from the debtor, as has been suggested as part of the Financial Health Service, or that contributions should be lower to allow the debtor to build economic resilience themselves.

Under regulation 3 (3), we welcome that the AiB may allow ‘reasonable’ expenditure above the CFS trigger figures, although we would like more detail about what the AiB would deem reasonable expenditure.

In the Business and Regulatory Impact Assessment of the Common Financial Tool regulations, it states that the use of the CFS could lead to a 107% increase in the funds ingathered by the AiB. While this increase is said to be based on debtors being better able to sustain payments, we remain concerned that this increase may still relate to higher contributions from certain debtors who may be placed in additional hardship as a result.

Citizens Advice Scotland
October 2014
Executive Summary

Introduction

1. The Institute of Chartered Accountants of Scotland (ICAS) regulates circa 75% of insolvency practitioners (IPs) who take appointments in Scotland and we have an in-depth knowledge and expertise of bankruptcy law and procedure. ICAS regulated IPs will play a key role in delivering a robust debt management and debt relief regime for the people of Scotland.

2. ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all of the implications and that alleged failings within the process are supported by evidence.

3. ICAS is pleased to have the opportunity to submit its views on subordinate legislation on the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”) to the Economy, Energy and Tourism Committee and would be pleased to provide further information to the Committee should this be required.

4. A number of Regulations (“the Regulations”) have been laid in Parliament in furtherance of the 2014 Act. In particular we will refer to:

- The Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014 (“the Money Advice Regulations”);
- The Common Financial Tool etc. (Scotland) Regulations 2014 (“the CFT Regulations”);
- The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014 (“the Applications and Decisions Regulations”); and
- The Debt Arrangement Scheme (Scotland) (Amendment) Regulations 2014 (“the DAS Regulations”)

Comments on the Regulations

Policy objectives

5. The Regulations are part of a package of legislative amendments aimed to ensure that appropriate, proportionate debt management and debt relief mechanisms are available to the people of Scotland and that these are fit for the 21st Century. This is an objective which ICAS fully supports.

6. The primary legislative amendments are contained within the 2014 Act which was previously considered by the Committee as the Bankruptcy and Debt Advice (Scotland) Bill (“the Bill”). ICAS provided evidence to the Committee
on the Bill as it progressed through Parliament. Some of the comments made in relation to the Bill remain applicable to the Regulations.

7. The Regulations aim to provide a ‘financial health service’ to the citizens of Scotland and make the statutory debt management and debt relief process more efficient, fit for purpose and strikes the best balance between the needs of debtors and creditors. We believe that the Regulations do not fully meet these objectives and that significant issues exist within the Regulations. The reasons for arriving at this conclusion are set out below.

Response to the Regulations

8. We are pleased to note that some of the concerns raised by ICAS and others at the time of the laying of the Protected Trust Deeds (Scotland) Regulations 2013 have now been recognised and accepted by the Scottish Government as being wholly appropriate and have been amended at the earliest opportunity through new legislation. In particular we are pleased to note that it shall now be possible to recover the cost of obtain property valuations prior to the signing of a trust deed as an outlay of a protected trust deed. This will ensure that a debtor can access and be provided with best advice. The lack of detailed consultation with recognised experts in insolvency prior to The Protected Trust Deeds (Scotland) Regulations 2013 would of course have allowed this issue to be addressed a year earlier than it has and ensured that debtors were able to receive the best advice during that period.

9. We have a number of concerns in relation to the Regulations which impact on the ability of the Regulations to achieve their objectives. Our primary concerns are dealt with below. Where no comment is made we are broadly satisfied with the Regulations.

10. Our detailed consideration of the Regulations is attached in Appendix 1.

Inadequate or ineffective consultation

11. We are concerned that the Regulations have once again been drafted and laid in Parliament without adequate consultation with stakeholders. Where consultation has taken place with stakeholders, and where there was general consensus of opinion, the views expressed by the stakeholders appear to have been largely been ignored.

12. The Business and Regulatory Impact Assessments (“BRIA”) indicate that the Regulations were consulted upon at recent AIB Stakeholder events. While presentations were made to those events on the regulations, the detail was very high level and certainly insufficient to ascertain whether the Regulations were appropriate or provide any significant qualitative feedback.

13. It is our view that where opinions were expressed at the stakeholder events and general support for these opinions existed, these have not been reflected within the Regulations. As an example, the stakeholder events in Edinburgh and Glasgow both raised significant concerns that the existing Debt Arrangement Scheme (DAS) was to be amended to require all debts to be
included. The clear view expressed from the stakeholder meetings was that this was undesirable, unnecessary and would weaken the DAS scheme making it is less attractive debt management solution. Despite these representations the requirement for all debt to be included in DAS has been retained without explanation.

14. ICAS were represented on the Business DAS Working Group which considered aspects of the DAS Regulations. Significant concerns were raised by the Working Group about the effectiveness of the proposed ‘Business DAS’ to provide a workable debt management solution for non-limited company entities. Significant concerns were raised about:

- the period for DAS being restricted to 5 years
- that in practical terms the 5 years was from application making the actual repayment significantly less than the proposed 5 years
- that all debt had to be included
- the costs which would be associated with viability reviews

These concerns raised by the Working Group have not been addressed in the DAS Regulations laid. The DAS Regulations require that only an Insolvency Practitioner (“IP”) can be a money adviser in relation to a ‘Business DAS’. **It is our view that IPs are unlikely to recommended Business DAS in its current format as a viable debt management solution** and as a result a real opportunity to provide a rescue vehicle to struggling businesses and save employment may be lost.

15. While the CFS Regulations and DAS Regulations were made available in a draft form to the respective Working Groups, we are concerned that the lack of scrutiny of the other Regulations together with a lack of visibility across all of the Regulations, has resulted in a significant number of minor issues not being apparent until the Regulations have been laid. While individually items may be relatively minor, the significant number of such issues throughout the Regulations mean that overall we are concerned about the robustness of the Regulations and significant uncertainty over matters such as access criteria to the Minimal Asset Process, how the Common Financial Statement is to be used to calculate ‘surplus income’ for Debtor Contribution Orders, etc.

16. Due to the lack of appropriate and effective consultation carried out, if the Regulations are commenced in their current form, significant guidance will require to be issued by the AIB or recognised professional bodies in order to clarify the effect and provide for further processes which are unclear, deficient or omitted from the Regulations. We consider that in the interests of better regulation that this approach is undesirable.

**Accountant in Bankruptcy conflict of interest**

17. ICAS is concerned that the conflicting roles and responsibilities of the Accountant in Bankruptcy (AIB) as Scottish Government policy advisor, supervisor of debt management/debt relief services and supplier of debt...
management/debt relief services. This was a concern raised previously with the Committee by ICAS and others when the Bill was being considered. During the Committee’s consideration of the Bill our concerns were taken on board and Government assurances were given that these would be addressed through the Regulations. It is our view that the concerns raised by the Committee, ourselves and others have not been addressed adequately in the Regulations and in particular as part of the Applications and Decisions Regulations.

18. Our concerns were also raised when the Committee considered the Protected Trust Deeds (Scotland) Regulations 2013 (“the 2013 PTD Regulations”) at which time the AIB proposed to establish a Protected Trust Deed Review Board when the Regulations were commenced. At that time we noted that this group would not address any of the conflict of interest issues as it would have no statutory basis of operation. Despite the 2013 PTD Regulations having been commenced over 10 months ago, no Review Board has been established and any reviews are to be undertaken by the AIB Policy and Compliance staff.

19. The provisions with the Applications and Decisions Regulations relating to the carrying out of reviews provide little in the way of safeguards against conflicts of interest. The only safeguard is that the Accountant herself or a staff member involved in an original decision shall be prevented from being involved in a review decision (Regulation 21). This does not adequately address threats such as independence, confidentiality, familiarity, and adequate knowledge amongst others.

20. While the 2014 Act provides for the review to be further appealed to the sheriff and this acts as a safeguard against overall injustice, this is a costly route to be taken and a significant barrier to justice to those already in financial difficulty. It therefore has to be hoped that appeals to the court should be rare, but this will only happen if there is trust and confidence in the decision making and review process. We are concerned that due to the substantial conflicts of interest and lack of appropriate safeguards that trust and confidence in decision making and reviews will be impinged upon.

21. **It is our view that a Review Committee should be established within the Applications and Decisions Regulations.** The Review Committee should be comprised of persons entirely independent of AIB (or as a minimum as a majority independent of AIB) and who are suitably experienced persons with a knowledge and understanding of bankruptcy or legal matters. We would envisage that AIB staff could conduct the review work with a ‘recommendation’ being passed to the Review Committee for final oversight and decision. It is unlikely that such a Committee would add cost or significant time delays to any review as it would operate in the same way as other AIB Committees (such as the Notes for Guidance Committee, Policy and Cases Committee, etc.) where the members provide their time on a voluntary basis.

22. In our opinion the conflict of interest issues are a significant barrier to achieving an effective debt management and debt relief mechanism for the people of Scotland which is fit for the 21st Century.
Inappropriate regulation of money advisers and loss of control over Scottish debt procedures

23. The Money Advice Regulations transfers control on a practical level over who may operate as a Money Adviser in Scotland to the Money Advice Trust (“MAT”), a charity established in England and Wales, rather than retaining this within the realm of the AIB and its supervisory functions or the regulatory regime of recognised professional bodies under the Insolvency Act 1986.

24. The Money Advice Regulations require all Money Advisers to have a licence to use the Common Financial Statement from MAT. There are no safeguards that MAT is required to provide a licence to approved Money Advisors. It is also our understanding that the licencing for the Common Financial Statement is provided at an organisation level, but Money Advisor is an individual status. We understand that there are no intentions for MAT to change their licencing at this time and therefore there is a fairly significant disconnect between the legislative requirements and the legal licencing position.

25. We are concerned that without appropriate safeguards being written into the Money Advice Regulations there is the possibility of the loss of a licence through one individual’s actions within an organisation could result in implications for many individuals. This may result in a breach of provisions within the European Convention on Human Rights.

26. We are concerned about the lack of adequate safeguards to ensure appropriate regulation of approved money advisers. In particular, there are no provisions to ensure that where the draconian measure of withdrawing approved money advisor status is to be taken by the AIB that there is provision neither for notification of the proposed decision nor for the right to make representations before the decision is made. Again, we consider that this may breach an individual’s rights under the European Convention on Human Rights.

27. The arrangements between MAT and the Scottish Government for the use of the CFS offer inadequate protection to the Scottish debt management and relief legislative framework.

Conclusion

28. We consider that the Regulations contain significant shortcomings which are fundamental to the efficient and effectively delivery of the policy objectives such that the Committee may wish to consider recommending rejection of all the Regulations at this stage. The opportunity could then be taken by the Scottish Government to actively engage with significant stakeholder to ensure that revised Regulations are laid which will address the deficiencies.

Institute of Chartered Accountants of Scotland
October 2014
Appendix 1 – Detailed commentary on the Regulations

The Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014

- MAT can dictate wholly and without recourse who can provide Money Advice in Scotland through full and unfettered control of licencing.

- MAT licencing is at firm level but Regulations require individual licences. There is an obvious conflict between the legal position of the licence and the statutory provisions.

- MAT would be able to withdraw licence to a firm because of one person’s actions but affect other money advisors ability to continue to act as money advisor. Potential ECHR issues.

- There is concern that 4(1)(b) restricts some IPs/their employees’ ability to act as a money advisor when part of a larger group.

- AIB is able to revoke or suspend money advisor status without appropriate notification, representation before decision or right of appeal. Concern that this contravenes RPB / Insolvency Act 1986 licencing provisions. Potential to breach ECHR.

- AIB is not required to notify money advisor of suspension or revocation (only the debtor)

- The BRIA states in relation to the most recent AiB stakeholder events “This was their opportunity to contribute to the development of the regulations. No concerns were raised in relation to the Bankruptcy (Advice and Deduction from Income etc.) (Scotland) Regulations 2014.” This is incorrect as the presentations were high level and did not present stakeholders with an adequate opportunity to contribute. It is therefore misleading to suggest that no concerns were raised.

Secondary issues

- ‘approved money advisor’ is used throughout Reg 4 but only ‘money advisor’ in the Act and Reg 3

- Reg 4(1)(e) – interim order is not appropriate to withdraw approved money advisor status – should only be when full order made

- Reg 4(3) – which debtor is to be notified? All that the money advisor ever advised? Only those where an application is in process and received by AiB? What about those where the AiB hasn’t yet received their application? Is advice prior to revocation still valid?

- Certificate for Sequestration – qualification of a person who works for an IP refers to Reg 3(a)(1) (Cert of Seq Regs) but Reg 3 (Cert of Seq Regs) is withdrawn in full by Regulation 7.
• Form 1 – Bankruptcy Ref number looks out of place as part of debtor details (would be better under trustees details); “my employer or third person” is unnecessary after “authorise”; no place for trustees reference to be included to assist trustees to tie up payments recd – bankruptcy reference number is not helpful; what about employers who would prefer to send a cheque rather than bank transfer;

• Forms 2 & 3 – similar comments to above.

• BRIA - fails to adequately cover the additional costs on money advisors in dealing with AiB audit requests. Some of this will be double costing to IPs who are already monitored by their RPBs.; Fails to recognise anti-competitive elements through MAT licencing; Business forms not tested – error in forms which should have been picked up.

The Common Financial Tool etc. (Scotland) Regulations 2014

• Reg 3(2) – the trigger figures effectively become an allowance. This is because there is nothing to ensure that the debtor has to have expenditure in the relevant categories of the CFS (i.e. it is the total of the trigger figures).

• Reg 3(7) – Provides for nil contribution where sole income is from benefits or tax credits which effectively circumnavigates the provisions within section 5(2ZA)(a)(ii) of the Act and allows someone to enter MAP because they are temporarily receiving benefits.

• Reg 3(11) – it is unacceptable to delegate within Regulations matters to Notes for Guidance thereby bypassing Parliamentary scrutiny. Where Notes for Guidance are to be used it is our view that this should be provided for within primary legislation.

• Reg 4(3) – There may be Data Protection/ECHR issues around this as it covers any statement. For example, the trustee in making a variation may have to notify the debtor’s employer where there is a deduction from earnings. This notification (by virtue of this Reg) has to provide a copy of the evidence that the debtors circumstances have changed. This could include extremely sensitive personal information which may or may not impact on the debtor’s employment.

• Reg 9 – It is unclear what a “specified heritable property” is. It is unclear whether only a single valuation would be allowed where the debtor has several properties (for example home plus multiple buy to let) or whether it is a single valuation per property.

Secondary issues

• Reg 3(2) – the inclusion of “surplus” means that the literal interpretation of the Regulation is that the contribution is to be set at a level where the debtor’s expenditure is allowed twice.
• Reg 3(4) – requires evidence of why the expenditure is reasonable. For example, if additional expenditure is claimed due to a medical condition then the evidence will have to be that the debtor has that medical condition and that the condition requires something – this may breach a debtor’s rights to privacy under ECHR and will place burden on health professionals.

• Reg 4(1) – it would not be possible for an application for review or appeal by an ‘interested party’ to contain or be accompanied by the statement required.

• Reg 4(2) – as per Reg 3(4)

• Reg 7(5) – wording of (ii) doesn’t make any sense when read against (h). “a statement” should be part of (i)

• Reg 8(1)(b) – wording doesn’t work – after creditors there remainder of (b) should revert back to that main (2A) provisions.

• Form 3 – suggests that TD’s can be linked – this is prevented by SIP3.3; debtors details – ECHR issues – not sure that all info is relevant to creditors consideraton of TD; What does “completed” mean – date of debtors discharge or trustees discharge; Note 2 “employed” is incorrect term;

• Form 4 – “conveying” should be “conveyed”; What does “completed” mean – date of debtors discharge or trustees discharge; Statement of performance – no ability to include e.g. PPI, gratuitous alienations, (unfair preferences), etc.; Note 3 requirement is inconsistent with SIP7; Note 7 does not set out correctly position as in Reg 19 PTD Regs 2014 (div to be paid within 6 weeks of 24 months not in month 24).

• Explanatory note does not accurately reflect Reg 5.

• BRIA - BRIA fails to adequately consider the additional costs of training and compliance through introduction of CFT. Business forms not tested – error in forms which should have been picked up.

**The Debt Arrangement Scheme (Scotland) Amendment Regulations 2014**

• The outcome of consultations with the Business DAS Working Group have not been taken account of – not all debts should be included in a DPP; 5 year time limit for other legal entities was inconsistent and unduly restrictive; “viability” was inappropriate wording and misleading; time limits refer to from date of application which further shortens the 5 year period – should be from approval; IP should not be “agreeing” to sale of non-trading assets (issues with liability, shadow management responsibilities, etc.).

• Overall, the restrictive nature of provisions relating to legal entities makes the provisions largely unusable and it is likely that the legislative provisions will have little take up by money advisors in much the same way as the original DAS scheme was not used until significantly amended.
• Form 1 – Declaration above Debtors signature – may not be possible to make that statement if for example spouses enter DAS at different times

• Form 4B section 7 – Declaration that the debtor is ‘viable’ is not acceptable without a reference to statutory definition.

• Form 7 – confirmation form of words is not acceptable to be signed off by an IP. (net income and expenditure forecast, financial safeguards, business can make all of the payments…)

Secondary issues

• Some of the language remains inappropriate – e.g., Trusts/Unincorps do not ‘work’ - they have ‘operations’

• Form 1B – references to ‘business DAS’ are inappropriate throughout; section 7, 7a(f) – who can make a written request and issues about commercial confidence?

The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014

• Reg 6(4) – The Accountant should consider all applications and should not just be able to refuse to consider an application. The consideration should be based on the information available at the specified time.

• Reg 7(1) – Why are review applications excluded from this provision. It is more likely that as part of a review process there should be an opportunity to attend a hearing, etc.

• Reg 21 – Inadequate separation of duties to avoid conflicts of interest and concerns about adequacy of legal or specialist expertise. Separate Review Committee (either external or internal but with majority lay members) should be required. (See comments on Reg 7(1) also).

Secondary issues

• Regulations are not clearly laid out – lack of clarity/transparency when general provisions apply and don’t apply.

• Reg 4(1)(h) – typo - should be “Accountant in Bankruptcy”

• Reg 5(2) – “A copy of the application must before it is made be sent to… “ - How can a copy of the application be sent before the actual application is made.? Should be sent after the application is made (simultaneously).

• Reg 5 – provision should be included for AiB timescale to make decisions where no timescale is specified in Act or Regulations, suggest 14 days.

• Reg 5(2) – Does not make any sense to notify someone who can only appeal a decision
- Reg 5(2) – does “able to review” require notification then to the Sheriff Court as they are “able to review”, should this not be “able to seek review.”

- Reg 5(2) – who is “any other interested person”

- Reg 5(12) – Difficulties in identifying the principal office of a partnership for example, 2 partners working from their respective homes or multiple office professional practice.

- Form 4 – Would expect this to have an item specifying who the creditors have elected as replacement trustee.

- Reg 10 (3)(b) – 14 days is too long for the sequestration to effectively be without either original or replacement trustee in control.

- Reg 10 – Reg does not specify how quickly the Accountant requires to make a decision after expiry of period when written submissions may be made. This should be “without delay” or within say “two business days”.

- Reg 13(2)(a) – timescale should be stated – 7 days to be consistent with (2)(b)

- Reg 17 and 18 – timescale should be stated

- Form 1 – Does not contain details of the applicants representative (required in any notice under Reg 3(2)). Is it a “Plea in Law”?

- Form 2 – Inconsistent with Form 1. Why a Crave?

- Form 5 – Further meeting of creditors – “shall be held” rather than “may be held”

- Form 6 – The proposed trustee’s consent to act should be evidenced or incorporated into the form, especially as given this form is to be used by a Member State Liquidator who is unlikely to be familiar with Scottish procedures.

**The Bankruptcy (Scotland) Regulations 2014**

**Secondary issues**

- Reg 3(3)(b) – “sent electronically” is this supposed to restrict the use of an image of a manuscript signature to where the form is sent electronically? Or does this allow images of manuscript signatures to be sent electronically onto the form which can then be printed (which would be the desired position).

- Reg 11 – It is now difficult to find rates published in a national newspaper. It would have been better to modernise the Regulation by referring to the middle market rate published by the Bank of England (or any high street bank)
• Reg 18 – Given current economic position and number of debtors who are declared bankrupt due to cashflow insolvency (and hence attract a reversion) it is disappointing that the rates haven’t been lowered. It would perhaps be appropriate to peg this against BoE base rates as a modernisation move.

• Reg 20 – The regulation doesn’t actually provide for any more than is in the Act as it only provides that the premium “may be taken into account”. Section 69 doesn’t limit to sequestration so why does the Regulation. The Regulation should be re-worded to make it clear that the premium shall be allowed as an outlay and to include trustee in a trust deed for clarity.

• Why was Reg 8 of the 2008 Regs (definition of Associate) not just revoked and re-enacted the same as other provisions – just causes confusion with another set of Regulations still to be considered.

• Form 4 – “Income” above bank accounts should be on previous page

• Q5-Q7 duplicated

• Form 5 – page 2 item 2 – VAT is no longer relevant to ask for

• Forms 7, 8 and 9 – Note 1 does not fully reflect the continued obligation of the debtor “to take every practicable step necessary to enable the trustee to perform the functions conferred upon him”

• Form 10 – This form could be improved by

• Referring to section 54D(2)(b) to make it clear that a copy of that form is to be sent to creditors (you need to refer to Form 11 to know this)

• including a statement on the face of the form (cross referring to the notes) that any interested person may make representations to the AiB within 14 days of (date of application)/(date of deferral notice is given)

• Form 12 – Would expect the form to have included any further information which the trustee has ascertained during the course of enquiries (eg former addresses, potential assets or assets abandoned), claim for time costs/outlays (s54E(6)(c)), etc.

• Form 14   Note under 6.3 (and subsequent 2 pages) seems superfluous at application stage. Money advisor will have had to verify.

• Money advisor declaration should include information on qualification as Money Advisor to retain consistency with DAS application form

• Form 15 Section 4 – not clear that doesn’t need completed where application is a partnership which is apparently insolvent

• 4.4(d) – should refer to application rather than petition

• Own property section duplicated
• Doesn’t ask about property owned or rented where they don’t do business from

• Form 17 – not all IPs are a “member” of their authorising body as you do not need to be a member to be regulated and authorised by a particular RPB

• Form 22 – has not been updated to deal with issues of Replacement Trustee and Keeper of Registers only recording initial trustee

• Lack of consistency in forms between use of “bankruptcy” and “sequestration” e.g. Form 5 refers to “Sequestration of the estate of” while Form 6 refers to “Bankruptcy of the estate of”

The Bankruptcy Fees (Scotland) Regulations 2014

Secondary issues

• Definition of expenses of realisation should be reviewed

• Reg 11(3) only provides that the AiB may waive the balance due when a MAP case is transferred to full administration where no false or misleading information is given. What assurances can be given that this will happen?
Introduction

1. R3, the Association of Business Recovery Professionals, is the leading professional association for insolvency, business recovery and turnaround specialists in the UK. It promotes best practice for professionals working with financially troubled individuals and businesses. It has UK-wide representation and debates key issues facing the profession. Most insolvency practitioners (IPs) operating in Scotland are members.

2. The Association’s Scottish Technical Committee which is comprised of experienced IPs, Solicitors, an Academic and an Advocate, participated in the consultation process that led to the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the Act”). Some of our views and recommendations are reflected in the Act which we welcome, however a significant number are not.

3. The Association’s Scottish Technical Committee has a commitment to engage with policy makers and the legislature to ensure that insolvency legislation in Scotland is fit for purpose and workable.

4. Given the limited time scale for written evidence our comments are restricted to a general overview of the Regulations.

Policy objective

5. We reiterate our comments contained in our written response to the Economy, Energy and Tourism Committee (the Committee) in respect of the Bankruptcy & Debt Advice (Scotland) Bill, that R3 supports the policy that “appropriate, proportionate debt management and debt relief mechanisms should be available” to the people of Scotland.

General Comments on the Regulations

Accountant in Bankruptcy (AiB) conflict of interest

6. R3 STC’s concerns over the conflicting roles of the AiB as Scottish Government advisor on policy, supervisor and provider of debt management and debt relief services, were raised previously with the Committee. These concerns which were acknowledged at the time have been overlooked in the Regulations.

The same concerns were raised at the time the Protected Trust Deed (Scotland) Regulations 2013 were being considered by the Committee. Despite the AiB’s assurances that a Protected Trust Deed Review Board would be appointed this has not yet been done. It is for note that the said Review Board has no statutory locus and will not consider conflict of interest matters. Again, concerns expressed
by R3 and others over conflicts of interests and a lack of independence have not been addressed.

7. The setting up of an appropriately qualified and experienced panel or board wholly independent of the AiB to review issues including conflict of interest would demonstrate independence and transparency of processes and ensure appropriate safeguards are in place to achieve the policy objectives.

Regulation of Money Advisors

8. The Bankruptcy (Money Advice and Deduction from Income etc.)(Scotland) Regulations 2014 set out the approved classes of persons to act as money advisors. These include:

- insolvency practitioners, persons who work for insolvency practitioners and have been authorised by the IP they work for to act on their behalf
- persons who work as money advisors for organisations which have been awarded accreditation at Type 2 level or above against the Scottish National Standards for Information and Advice Provision
- persons approved for the purposes of the Debt Arrangement Scheme
- money advisors for Citizen Advice Scotland
- money advisors for local authorities in Scotland

9. To use the Common Financial Statement money advisors are required to be licensed by the Money Advice Trust (“the Trust”) a Charity registered in England & Wales. The licence agreement is governed by English Law and is subject to English jurisdiction. Under the Common Financial Tool etc. (Scotland) Regulations 2014 where it appears to the AiB that a money advisor in using the Common Financial Statement has contravened a licence requirement she may notify the Trust of the contravention. This brings into question the AiB’s supervisory function and the regulatory regime of recognised professional bodies in an area which is devolved to Scotland.

Lack of full and proper consultation

10. R3 previously has expressed its concerns over a lack of proper formal consultation with stakeholders in advance of new legislation and changes to existing legislation being introduced. Stakeholder events do not constitute in-depth consultation and presentations at these events do not provide the relevant details attendees seek.

11. We believe that if draft regulations are circulated in advance to the main technical bodies for scrutiny the policy objectives for an efficient statutory debt management and debt relief process which is fit for purpose and strikes the best balance between the needs of debtors and creditors will be achieved.
Conclusion

12. It is our view that the Regulations fail to address fundamental issues which are key to delivering the Scottish Government's policy objectives. In support of written evidence submitted by ICAS, we therefore recommend that the Committee consider rejecting all the Regulations at this stage and advise the Scottish Government to engage fully with key stakeholders to ensure revised Regulations which are workable and fit for purpose are laid.

R3 Scottish Technical Committee
October 2014
BANKRUPTCY AND DEBT ADVICE (SCOTLAND) ACT 2014 REGULATIONS

SUBMISSION FROM STEPCHANGE DEBT CHARITY SCOTLAND

Process and timescale for implementation

We are concerned at the rapid production process of these regulations, and the lack of proper consultation on the detail.

StepChange Debt Charity Scotland were grateful for the opportunity to comment at various stakeholder events hosted by officials at the Accountant in Bankruptcy (AiB), and in the Scottish Financial Tool Working Group, but the level of detail provided prior to laying the legislation was lacking. Feedback from attendees at the stakeholder events would indicate that there are a large number of concerns within the sector about the proposed legislative changes. Now the regulations have been laid, there is no scope to amend two of them, and we believe that as drafted, there remain several potential adverse and unintended consequences for individuals with problem debt. We feel that the BRIAs published alongside the regulations do not reflect the concerns that were raised or the potential impact on the charity’s working practices.

We are also concerned that the timetable for implementation is unrealistic, even if the regulations were watertight in policy terms. Although some issues have been addressed many are still unknown, particularly until the AiB officials produce the guidance to support the CFT. It is our understanding that this will not be available until December, at the earliest, which leaves the charity, and the sector as a whole, very little time to integrate it into our processes for a ‘go-live’ on 1st April 2015.

Impact on Clients – Evidencing Income and Expenditure

The Common Financial Tool etc. (Scotland) Regulations 2014 and the Bankruptcy (Money Advice and Deductions from Income etc.) Regulations 2014 not only prescribes that the advice sector must use the Money Advice Trust Common Financial Statement (CFS), but also that they get evidence of income and expenditure from clients (CFT Reg 3 & MA Reg 6). The detail of what will be accepted as evidence is still to be set out in the guidance as prescribed in the CFT Reg 3(11).

It’s not clear how prescriptively AiB will apply the triggers (CFT Reg 3(3) & (4)) and ranges for different expenditure categories within the CFS, or what will happen if the specific circumstances of a client point to higher or lower spending.

In addition, partner/other linked household income may have to be included in the assessment CFT Reg 3(5), which raises issues about one member of the household not knowing another’s circumstances, or not wanting them involved. In extreme cases, this could put people at risk.

We understand that this will be addressed in the guidance but at this time it leaves the sector with a degree of uncertainty. In particular, we are concerned that many clients will not be able to provide the evidence required. It can take clients a number
of weeks to make a commitment to certain solutions. We need to start ‘warning’ our clients now about the impending changes and that evidence might be needed, but we don’t know what that is. This is an unacceptable situation for people in financial distress, for whom every day without protection from creditors is ramping up their debts even further.

The principle behind using an assessment tool which incorporates ‘trigger’ figures is that the individual and their creditors do not need to provide or see evidence of the expenditure unless it is above the recognised spending figures. The CFS and StepChange Debt Charity’s own assessment tool have been working very effectively in the sector based on that principle for over 20 years.

Therefore, we feel that the regulations impose an unnecessary barrier for individuals to access statutory debt solutions which may result in fewer people accessing the Debt Arrangement Scheme, Trust Deeds or Bankruptcy. More people may be forced to look for alternative and potentially more expensive ways of managing their problem debt.

Impact on clients and money advisers – bankruptcy forms

The Bankruptcy (Scotland) Regulations 2014 have made significant changes to the bankruptcy forms. In particular we have concerns about the debtor application form, Form 14, which is currently 16 pages long but which will increase to 33 pages. More worryingl, where a debtor needs a Certificate for Sequestration to support their application, the form will require a total of 7 signatures (2MA, 4 client & 1 witness).

We understand that the AiB are developing a new bankruptcy application portal to enable money advisers to submit debtor bankruptcy applications on behalf of their clients, in particular those eligible for the Minimal Asset Process. The AiB are projecting a final product by end Jan or mid Feb 2015. Whilst we welcome technological advances, there will be an additional strain on our advisors’ time and our resources as client information will have to be re-typed into the AiB system.

With so much detail to be either ironed out or unveiled, StepChange Debt Charity feels that a commencement date of April 2015 is unrealistic, given the extensive IT system AiB need to develop, test, roll-out and the training requirements necessary.

In general we feel that, had there been a greater opportunity to consult on the regulations, there would be less ambiguity and errors in the legislation which would reduce the likelihood of the unintended consequences and uncertainty which we and our clients now face.

In an ideal world we would ask the Committee to recommend that Regulations are withdrawn and re-written, however, we accept that that is not practical or helpful at this time. Therefore, we would ask the Committee to recommend from the Scottish Government create a more realistic timetable for implementation and that creates space either for (a) proper consultation with the sector on the detailed guidance, and not just within the Working Group, and (b) amended regulations to be drafted. This would also ensure that there is sufficient time and training resources available for all in the free money advice sector in Scotland to ensure that they are sufficiently prepared for the introduction.
We acknowledge the Scottish Government’s desire to move forward speedily with its Financial Health Service for Scotland, a project we have always supported. None of our comments will slow the overall progress towards a better system for Scotland, but we do not believe that Ministers want an important part of that structure to start badly next April, with delays and uncertainty for the very people it is trying to help.

StepChange Debt Charity Scotland
October 2014
Dear Murdo,

Further to my letter of 14 January, and ahead my appearance before Committee next week, to give evidence on our package of Bankruptcy and Debt Advice (Scotland) Act 2014 regulations, I am writing to you today to provide the Scottish Government’s update on various matters covered in Committee’s Stage 1 Report.

These are either - matters on which we committed to provide further information in due course; or some where your officials have asked for an update, on the basis that things will have moved on in the intervening 9 months and there will be further progress to report which might be relevant to Committee’s consideration of the Regulations. The update is provided in the attached Annex.

I trust this will be helpful to you and your members and I look forward to my appearance on 8 October.

Yours Sincerely

FERGUS EWING

St Andrew’s House, Regent Road, Edinburgh  EH1 3DG
www.scotland.gov.uk
Money advice (paras 6 & 6, p5): Where are matters in relation to AiB working with the money advice sector on assessing the impact of mandatory money advice on the sector and recording the 'uptake' of advice by money advisers?

Now that the Act has been passed and the SSIs have been laid, AiB, on behalf of the Scottish Government, in conjunction with members of the money advice sector will develop a research framework, which will allow the Scottish Government to monitor the impact of the new legislation. Once the findings of this research have been reviewed, the Scottish Government will consider whether any changes to the legislation or associated guidance are necessary.

Money advice levy (para 7, p5 and para 21, p8): Where are discussions with the UK Government on the levy/contributions paid by the financial services industry?

The Minister for Energy, Enterprise and Tourism wrote to the Financial Secretary to the UK Treasury in April 2014, requesting a meeting to discuss a number of issues. Due to the changes in personnel in that particular role, there was a delay in the Treasury’s response to the Minister’s letter. The Economic Secretary to the UK Treasury, Andrea Leadsom MP has written to the Minister accepting his request to meet.

Financial education (para 16, p7): Where are matters in relation to the monitoring of the financial education module, e.g. discussions with Money Advice Scotland, and the reconvening of the Scottish National Standards on Financial Education Working Group?

Money Advice Scotland has developed the financial education module in partnership with Accountant in Bankruptcy and the Money Advice Service. It was piloted earlier this year with debtors and money advice organisations. The module is currently being refined to take account of valuable feedback which was largely positive. Money Advice Scotland is in the process of reducing the content and simplifying the language to make it more universally accessible. The timescale that Money Advice Scotland are working to is for a completion date on 3 October 2014. AiB has also reconvened its Scottish National Standards on Financial Education working group. A meeting was scheduled for 15 September 2014 to discuss the financial capability module and development of the standard. However this meeting did not take place, due to a public holiday, and will now be held on 20 October 2014.

Financial education (para 26, p9): What was the cost of developing and delivering the module?

The costs of developing the module have been met through current funding provided to Money Advice Scotland and through funding provided by the Money Advice Service to develop the e-learning version of the module. As the Minister announced during the Bankruptcy and Debt Advice (Scotland) Bill 2013 debate in December last year, £200,000 of funding was provided to Money Advice Scotland to help roll-out financial education across the money advice sector.
Common Financial Tool (para 29, p9): Has the CFT Working Group been reconvened and what has been discussed?

The CFT working group has met on six occasions since its inception in February 2013. Since the Bill was passed, the Group has met twice. On 17 July 2014, the Group met to discuss the draft CFT regulations. All members of the Group, including IPs and money advice sector organisations such as StepChange, have participated fully in providing useful feedback which was carefully considered and taken into account as the Regulations were finalised. The Group also met on 2 September 2014 to discuss specific topics for the development of the guidance in support of the CFT. The Scottish Government is grateful to all involved, for their expert help and advice. Further meetings are planned to shape and further develop the guidance in the coming months.

Common Financial Tool (para 30, p9): Where are matters in relation to the development of the guidance for the review process?

AiB has taken on board the feedback from stakeholders at the last meeting of the CFT working group and is now preparing a draft guidance document which will be circulated to the group for consideration and comment. The CFT Working Group will continue to meet, to shape and finalise the guidance and to provide a forum for continuous improvement where issues and concerns can be discussed and addressed.

Bank accounts (para 39, p11): Where are matters in relation to undischarged bankrupts and their ability to hold a bank account?

The Scottish Government, in response to feedback from stakeholders, brought forward as an amendment at Stage 3 of the Bill process, which reflected the equivalent legislation in England and Wales, insofar as it offered a degree of protection for banks who interact with a bankrupt’s bank account. The Minister has met with Anthony Browne, Chief Executive of the British Bankers Association, and has been advised that, since the introduction of the new legislation in England and Wales, banks have agreed not to refuse to allow an individual to open a basic bank account on the grounds of bankruptcy alone. Mr Browne also advised that he would raise the matter with his members in Scotland. Nonetheless, the Scottish Government believes that banks should still play their part, by ensuring that accounts are allowed to be opened and remain open. This is an on-going issue and, at the time of writing, the Economic Secretary to the UK Treasury, Andrea Leadsom MP has written to Mr Ewing accepting his request to meet to discuss a number of issues.

Minimal Asset Process (para 41, p12): Are you able to provide an update on your work to review of research and/or data around early discharge?

The Scottish Government has given an undertaking that Accountant in Bankruptcy will carry out a review of the new provisions a year after they come into force. This will involve the analysis of statistical data and feedback from stakeholders collated by Accountant in Bankruptcy. They will be looking at, amongst other things, the impact of the new provision of ‘early discharge’. The Scottish Government will review the findings of this research and consider whether any changes are necessary to the legislation or associated guidance in light of its findings. Any changes identified will be brought to the attention of the Scottish Parliament and Parliamentary committees where necessary. A final report detailing the findings and conclusion of the review will be published.

Transfer of functions (para 51, p13): Are you able to provide an update on any discussion[s] with the Sheriffs’ Association?
The Minister met with members of the Sheriffs Association on 4 March 2014. As a result of this meeting the Scottish Government brought forward an amendment at Stage 3, which put beyond doubt the grounds on which an appeal against a review of an AiB decision may be made to the sheriff. AiB are currently in discussion with colleagues in the Scottish Court Service to ensure the smooth transition of these functions from the Courts to AiB.
Tomorrow, the world...

An export plan for Scotland’s food and drink industry

Scotland
A LAND OF food and drink
Tea to China

Cheese to France. Fish to Japan. Meat to Germany. Even tea to China. And that's before we mention whisky...

Scottish produce travels the world – from Beijing to Brussels, Delhi to Detroit – and with it our reputation as a Land of Food and Drink.

The reasons are simple. We have fantastic natural resources. And we have people with the imagination and ambition to meet growing worldwide demand for a fantastic eating and drinking experience.

Since 2007, when we first began to bring together everyone concerned with food and drink in Scotland, we've created a world-leading support network for our businesses.

Under the umbrella of Scotland Food & Drink, government and industry have developed a unique way of working together. This partnership is starting to attract attention from other countries around the world.

Today any Scottish food or drink business of any size can turn to us for advice and support. Many already have.

While whisky has become a global trailblazer, our focus for other food and drink products has so far been the home market. After all, 85% of these are sold to customers in the rest of the UK.

SCOTLAND’S EXPORT OPPORTUNITIES: DAIRY

Dairy consumption in China looks set to rise at a compound rate of 13% a year between now and 2017. High-end milk products could see 20% annual growth rates*.

SCOTLAND’S EXPORT OPPORTUNITIES: SEAFOOD

In China annual seafood consumption has rocketed from 11.5kg per head in 1990 to 25.4kg in 2004. Current predictions put it at 35.9kg by 2020**.

* Source: FT.com
** Source: foodexport.org

We'll keep working closely with UK retailers and foodservice organisations to extend the range of premium Scottish produce on offer.

But we can't rely on the home market alone for growth. So now we're marshalling all our national export expertise and setting our sights on the prizes to be won beyond our shores.

It's time to take our industry global.
SCOTLAND’S EXPORT SUCCESS: SEAFOOD

- Exported to over 100 countries
- Two-thirds of the world’s langoustine sourced in Scotland
- Scottish monkfish, crab and langoustine chosen for 2011 Bocuse d’Or Culinary competition
- Scottish salmon and langoustine partners to World Chefs 2012–2014 Global Challenge.

SCOTLAND’S EXPORT SUCCESS: SALMON

- Fresh Scottish salmon exported to over 60 countries worldwide
- First foreign product to gain France’s prestigious ‘Label Rouge’ quality mark, 1992
- Protected Geographical Indication (PGI) status granted by European authorities, 2004
- Named ‘Best farmed salmon in the world’ by international seafood buyers, 2011.
Hunger for growth

Food and drink in Scotland has come a very long way in seven years. Back in 2007 we set a target of £12.5bn turnover by 2017.

We smashed that target last year – six years early – and now we’ve raised it to £16.5bn. Among other things it’s a great story of how quality can win through, even in tough economic times.

A significant proportion of that has come from exports. Our food and drink industry today is Scotland’s fastest growing exports sector – up from £3.7bn in 2007 to £5.3bn in 2012 (and another 2017 target, £5.1bn, smashed along the way).

Meanwhile, looking at food exports alone, £8 in every £10 of revenue comes from just 10 markets, and half of that is salmon and seafood.

So while the overall picture is certainly a success story, it’s not as balanced as it should be. We’re very ambitious indeed for Scotland’s food and drink industry – and we’re still only scratching the surface of the vast global potential for exports.

Now the challenge and opportunity is clear: we need to export a broader range of products into a broader range of markets.

We know there’s a real hunger to do this in the industry. This is about how we start to turn that into a reality.

£16.5bn
NEW TURNOVER TARGET BY 2017

£7.1bn
NEW EXPORT TARGET BY 2017

Now we’re aiming for £7.1bn by 2017. If we meet that it will mean our exports will have nearly doubled in a decade.

That’s the good news. The slightly less good news is that food and non-whisky drinks currently account for only 20% of our export activity, with whisky taking the lion’s share.
The answer was simple: unprecedented collaboration and pooling of resources. This means specialist support for the whole industry on a scale that it has never experienced before.

The key will be putting feet on the ground. We’ll be bringing together all our combined market and sector expertise to build a global team of food and drink experts, operating in our priority export markets.

Their brief will be to open up a raft of new opportunities for ambitious Scottish exporters. Specialists who really know their business, they’ll knock on doors and build contacts with importers and buyers such as hotels, restaurants and supermarkets.

We are able to do this because Scotland Food & Drink is a unique partnership and we have impressive resources to call on.

Scottish Development International (SDI), the trade and inward investment body, has over 240 staff based in Scotland and in 27 offices around the world – an incredible bridgehead into a huge range of local markets.

The many trade bodies which partner us also have a tremendous fund of market knowledge and contacts.

But we won’t just be providing market intelligence and access. We’ll create tailored programmes for individual markets – for example, raising awareness of Scotland’s premium seafood and salmon with leading chefs in Asia.

Always conscious of the bigger picture, we’ll also trumpet Scotland as a Land of Food and Drink at the main global shows like ANUGA in Cologne and Seafood Expo Global in Brussels.

We’ll take Scottish companies overseas to learn about different markets and build direct relationships with buyers and distributors.

And we’ll make the most of events as such as the Commonwealth Games and the Ryder Cup to bring key customers on inward trade missions to Scotland. Then they can see our unique natural larder for themselves.
The first fifteen

We’ve identified 15 markets where we believe Scotland’s food and drink businesses have the biggest opportunities. This is where we can put our effort and resources to work most effectively, right across the industry.

Our planning is based on extensive research into international market opportunities, along with our own knowledge of Scotland’s food and drink businesses and their current export activities.

We’ll be making support available to Scottish companies that intend to take their products into these markets. They may be first-time exporters. They may be growing their share of existing markets, or breaking into new ones.

Of course, other companies may have strong prospects in other markets and we’ll continue to support them, but these 15 are where we’re putting our collective effort to benefit the industry as a whole.

Top prospects Of the 15 markets we’ve earmarked, the seven that follow are those where we have the best opportunity either to strengthen our existing presence or to gain new footholds. They are:
- North America (USA & Canada)
- France
- Germany
- Middle East (UAE, Saudi Arabia & Bahrain)
- Mainland China and Hong Kong
- Japan
- SE Asia (Singapore, Thailand)

In the more mature markets, France and North America for example, we’ll be looking to forge stronger relationships with buyers and encourage our businesses to develop new products. In newer markets such as Asia we need to do more to raise awareness of what Scotland has to offer.

We know this model will work. Some of our competitor countries already follow it and we’re starting to see dividends from adopting this approach ourselves.

In Germany, for example, one of our food and drink specialists has been working with Scottish red meat companies. Several have been able to fast-track into real business opportunities as a result.

Over the next three years we’re looking to build a team of 16 specialists across these markets.

Their job will be to help Scottish businesses get to know the lie of the land and the key customers. They’ll also bring overseas buyers to Scotland to experience our Land of Food and Drink for themselves.

Tailored activity The second tier, six markets in all, also offer significant opportunities. These are markets where we already have a presence, both through SDI and the industry.

At this stage though, they don’t call for the same level of additional, dedicated on-the-ground support as the first seven.

Here we’ll concentrate instead on building customer relationships, and creating a programme of tailored activities for each market. They are:
- Spain
- Italy
- Benelux (predominantly Belgium and Netherlands)
- Russia
- Nordics (Norway, Denmark Sweden & Finland)
- South Korea
Watch and wait These last two markets have considerable potential for the future, but we need to learn more about them and any possible barriers to entry we might face. For now we'll keep a watching brief through research and learning journeys. Over time we would expect to start actively developing opportunities.

- India
- Africa (initially focusing on South Africa)

Scotland’s presence in the world
Learning from whisky

Scotch whisky, with its phenomenal global reach, is an industry made up of all types of businesses, from smaller, family-owned firms breaking into new markets to large companies that have been exporting around the world for decades. The common factor is a drive to succeed and an unflinching commitment to quality.

With global export sales of nearly £4.3bn in 2012, Scotch whisky is well placed to open doors overseas for other Scottish industries. There’s much the rest of us can learn from its success, and we’re constantly looking at new ways to apply it. Research tells us we can emulate whisky in other sectors, such as dairy and bakery, where there is as-yet-untapped export potential.

Our market specialists will be focusing their efforts primarily on food, along with niche independent Scotch whiskies, and the broad non-whisky drinks sector including craft beers and soft drinks.

SCOTLAND’S EXPORT SUCCESS: SCOTCH WHISKY

• The world’s most popular spirit, sold in around 200 markets worldwide
• More sold in one month in France than cognac in a whole year
• 40 bottles exported every second.

SCOTLAND’S EXPORT OPPORTUNITIES: CRAFT BREWING

The craft beer sector in the USA is heading for four straight years of double-digit growth, following mid-year 2013 growth of 15% in dollar sales, 13% in volume*.

* Source: US Brewers Association
What makes this different

This is the dawning of a new golden era of food and drink in Scotland and we have grand ambitions for exports. We’re talking about nothing less than international-ising an entire sector of the Scottish economy.

As more and more Scottish businesses hit the export trail, we’re laying the foundations for an industry that will be sustainable way beyond the immediate horizon of 2017.

Today we’re better-resourced and more collaborative than ever before. We’re also more focused – on those opportunities which research and our collective knowledge tell us will bring the best returns for Scotland.

Our team of specialists will be able to forge new relationships with buyers and distributors in priority markets. Their aim will be to nurture and grow these over the longer-term.

We’ll support their efforts back in Scotland with increased market awareness and development activity, so companies can tackle export opportunities with greater understanding and confidence.

That support will come through SDI and the wider Scotland Food & Drink partnership – in which trade associations will have an important role to play.

Just as importantly, we’ve agreed how we can collaborate to help individual businesses and key sub-sectors develop their international trade. For example, we’ll be able to provide shared market insights and sector contacts, and quickly direct our customers and members to the best source of advice.

What’s different now is that we’re all working together in a collective approach, with a shared set of market priorities. That means that we can really make the most of our resources, expertise and contacts to deliver even more for Scotland’s food and drink industry.

SCOTLAND’S EXPORT OPPORTUNITIES: PREMIUM FOOD SERVICE

In SE Asia, rapid growth in the foodservice industry is driven by large populations of young consumers, high per capita spending, a well developed dining-out culture and a growing focus on healthy but indulgent foods. Singapore foodservice retail sales are predicted to rise from $7.9bn in 2012 to almost $9.4bn in 2016*.

* Source: Euromonitor International
What now?

Our export plan kicks in from April 2014. We're already working to recruit the new specialists and we expect to start placing them in markets over the summer.

We also intend to run workshops to share the plan in more detail as we roll it out. These will include sessions on specific markets with input from our people on the ground.

And a last word: none of this would be happening without the extraordinary partnership we've created under the Scotland Food & Drink umbrella.

Government brings with it the political clout to break down trade barriers, industry comes with expert knowledge of individual sectors. The combination is unique and unstoppable.

SCOTLAND’S EXPORT SUCCESS: THE MARKETS, 2007–2012*

- USA (our largest food and drink market) up 82%
- France (our second largest market) up 46%
- China up 96%
- Middle East up 53%
- Japan up 226%
- Germany up 88%
- Singapore up 114%.

* Source: HMRC Regional Trade Statistics and Overseas Trade Statistics
Join the charge

Whatever your involvement with food and drink, however large or small your business, we can help you with three crucial things:

- finding out which markets suit your business best
- helping you understand how each market operates
- connecting you to the networks that will help you make the most of them.

Our message to the world of food and drink is this: the Scots are coming! We want you to be part of the charge.

Call us on 0845 607 8787 or email us today on foodanddrinkexports@scotent.co.uk

SCOTLAND’S EXPORT SUCCESS: RED MEAT

- Scotch beef and lamb among first European red meat products to receive Protected Geographical Indication (PGI) status, 1986.
Scotland Food & Drink
3 The Royal Highland Centre
Ingliston, Edinburgh EH28 8NB
0131 335 0940
www.scotlandfoodanddrink.org
Follow us on Twitter @scotfooddrink

The Scotland Food & Drink Export Partnership
BANKRUPTCY AND DEBT ADVICE (SCOTLAND) ACT 2014 REGULATIONS

SUBMISSION FROM LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Insolvency Law subcommittee (‘the committee’). A number of the Society’s committee members also sit on the R3 Scottish Technical Committee.

The committee welcomes the opportunity to submit its views on subordinate legislation on the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”) to the Economy, Energy and Tourism Committee of the Scottish Parliament and its comments are below.

General Comments

1. We fully endorse the comments of ICAS and R3 that were submitted to the Economy Energy and Tourism Committee on 3 October 2014.

2. We are disappointed in the short timescale given to respond to such complicated and important regulations and are concerned that the Regulations have been drafted and presented with inadequate consultation with stakeholders.

3. We fully endorse paragraphs 17 - 22 of the ICAS response commenting on the conflict of interest in the responsibilities given to the Accountant in Bankruptcy and the failure to establish a Protected Trust Deed Review Board.

4. With reference to The Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) 2014 regulations, it is important that every category of Money Adviser has experience, training and knowledge in the Scots laws of bankruptcy before undertaking any money advice. Money Advice will inevitably involve consideration of the impact of the law of Bankruptcy in Scotland. The quality of the advice must be at a high level due to the impact bankruptcy has on the debtor.

5. Referring to paras 24 - 26 of the ICAS response, the effect on a firm of the withdrawal of a Money Advice licence held by one of its members or staff (which results in the firm as a whole losing the ability to advise) is wholly disproportionate and objectionable.

Law Society of Scotland
October 2014