



RESPONSE TO CALL FOR EVIDENCE  
BANKRUPTCY (SCOTLAND) BILL

SCOTTISH PARLIAMENT  
DELEGATED POWERS AND LAW REFORM COMMITTEE

## **Introduction**

1. The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents around 20,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK and we have an in-depth knowledge and expertise of insolvency law and procedure.
2. ICAS's Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and protect their interests. In the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.
3. 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.
4. ICAS is pleased to have the opportunity to submit its views in response to the call for evidence issued by the Delegated Powers and Law Reform Committee of the Scottish Parliament ('the DPLR Committee') on the Bankruptcy (Scotland) Bill ('the Bill').

## **Key Messages**

5. The current legislative landscape for bankruptcy is complex. The last significant restatement of legislation was in 1985 and since that date there have been a number of major pieces of legislation which have amended the Bankruptcy (Scotland) Act 1985 ('the 1985 Act'). As a result, legislation is complex to navigate for solicitors, money advisors, insolvency practitioners, debtors and creditors.
6. We are therefore supportive of the Bill and its objective to consolidate the current legislation and provide a clearer legislative base for stakeholders to work with.
7. We are of the view that it would be desirable for further legislative change in relation to matters covered by this legislation. As a result this Bill should not be considered as an 'end' to legislative change in this area for the foreseeable future but simply an opportunity to re-form structure to provide a better foundation upon which further legislative change can be based.
8. As mentioned in the drafters notes the definition of "the EC Regulation" will require amendment when the recast regulation enter into force in June 2017, a matter of months after this legislation is expected to come into force. We also anticipate that there is a reasonable prospect that the policy reviews arising out of the most recent legislative changes will identify matters for amendment. As a result, the Scottish Parliament should be mindful that further legislative change may be required in this area within a relatively short period of time following commencement of the Act arising from this Bill.
9. Notwithstanding that legislative change could be anticipated in the foreseeable future, we consider that consolidation is appropriate at this time to act as a sound foundation upon which further legislative change can be built upon.
10. We consider that all appropriate statutes have been included within the consolidation with one exception. We would call on the Scottish Government to bring into the consolidated legislation the Debt Arrangement Scheme ('DAS') legislation.
11. DAS legislation is closely linked and in many instances shares key provisions to bankruptcy and as a result we consider that this would benefit from inclusions within the same primary legislation.

12. Inclusion of DAS with the Bill would support the Scottish Government policy of a 'Financial Health Service' by providing the legislative basis for the financial health service within a single piece of primary legislation and making it clear that debt can be dealt with via a variety of statutory routes.
13. In much the same way as trust deed legislation has been recognised as being of benefit to be transferred to primary legislation, the same rationale should be applied to DAS. In our view, it is inappropriate for the substantial legislative provisions relation to DAS to be consigned to secondary legislation.
14. In general, the approach to consolidation is appropriate. There are however a number of matters which could usefully be addressed to make the legislation more accessible. This is discussed in our detailed response below and examples provided in Appendix 1.

### **Detailed Response**

15. The law in relation to bankruptcy is mainly contained within the 1985 Act. However since this legislation was introduced 30 years ago there have been several significant Acts passed by legislators which have amended the 1985 Act. As a result of the amendments made, the 1985 Act has become increasingly difficult for those relying on the legislation to navigate. This includes solicitors, money advisors, insolvency practitioners, debtors, creditors and other stakeholders.
16. Consolidating the bankruptcy legislation will result in more coherent, accessible and usable legislation for the users of that legislation.
17. We would highlight that while there is a straight consolidation of legislation and that no changes are made to the effect or policy behind the legislation, there is a cost which will require to be incurred by those affected by the legislation.
18. As a result of the restructuring of the legislation and in particular simplification of section numbering, reviews will be required to be carried out and amendments made where appropriate to publications, websites, work programme, template letters, software, compliance checklists and other documents or resources. In addition it is likely that staff training and developments costs will require to be incurred and inefficiencies will be evident whilst those working with the new legislation become familiar with the revised structure. The time and cost of this is significant and should not be underestimated.
19. Notwithstanding that there will be a significant cost arising from the decision to consolidate legislation, on balance we consider that the benefits associated with consolidation outweigh the cost and as a result we are supportive of the policy to consolidate the bankruptcy legislation.
20. The Bill is being introduced significantly less than twelve months after the commencement of the last major piece of legislation in this area, The Bankruptcy and Debt Advice (Scotland) Act 2014. This introduced significant legislative change with effect from 1 April 2015.
21. In addition, legislation in respect of Protected Trust Deeds was commenced in November 2013 and amendments to DAS have also been introduced in the period between November 2013 and April 2015.
22. In accordance with standard procedures, we understand that the AiB will commence a review of policy in relation to those changes during the coming year. Without prejudice to that review, we consider it likely that the review will identify further changes to legislation which would be desirable to address unintended consequences or where the legislation has not resulted in the desired effect on the policy which was set out to be achieved.

23. We are also aware that as a result of recent amendments to UK insolvency legislation there are further amendments which would benefit from being introduced in Scotland to ensure that there is an alignment of procedures and powers available to trustees.
24. An example of this is the introduction in October 2015 of an extension to the provisions relating to the supply of essential services to insolvent businesses which were introduced through the Small Business Enterprise and Employment Act 2015. This has extended the scope of essential supplies to include IT and communication equipment to all insolvency procedures in the UK with the exception of personal insolvency procedures in Scotland. As a consequence at this time there is the potential for detriment to creditors where a trustee wishes to continue trading a business which is insolvent under the 1985 Act where IT services or equipment are required for that business to operate. This has been raised with the AiB who have indicated that they are supportive of a legislative change to the bankruptcy legislation in Scotland to bring this into line with other UK insolvency procedures.
25. As highlighted in the Drafter's notes the definition of "the EU Regulation" will require to be amended when the recast EC Regulation comes into force in June 2017, a matter of months after the intended commencement of this legislation.
26. We are of the view that further amendments to bankruptcy legislation are desirable either to clarify existing legislation or address more fundamental issues such as the conflict of interest in the roles and functions performed by the AiB under the existing legislation.
27. There is a reasonable expectation that there will be a requirement to amend bankruptcy legislation within the near foreseeable future, either as a consequence of the review of recent legislative amendments or as a result of additional desirable legislative change to improve the insolvency process and make it fit for purpose in a modern environment.
28. Notwithstanding that further change is likely to be desirable within a relatively short period of time, we consider that it is appropriate for the Bill to proceed at this time rather than waiting for any further changes to be made before consolidating.
29. The Bill will facilitate immediate benefit and will build a solid foundation upon which the future changes can be built.
30. Given the substantial number of amendments which have been made to the 1985 Act we make no comment on the completeness of the statutes included within the consolidation.
31. We are of the view that it would be helpful to have consolidated within the Bill provisions relating to DAS.
32. DAS was introduced into legislation in 2002 by the Debt Arrangement and Attachment Act 2002. In the intervening 13 years there have been nearly 100 amendments to that legislation arising from 10 pieces of legislation.
33. While DAS is not an insolvency procedure, it is a statutory scheme to deal with problem debt for the people of Scotland. People with debt concerns, as well as other stakeholders, will consider DAS alongside bankruptcy and trust deeds as potential options. It is for debtors to ultimately decide which debt solution they wish to enter.

34. As an example, a debtor may approach a money advisor with substantial debt, a family home with no equity and an ability to pay a contribution from income assessed by the Common Financial Tool. After assessment the options available for the debtor are:

- they are eligible to enter a DAS with debt being repaid over six or seven years with no impact on the family home;
- they could enter into a trust deed paying a contribution for four years
- they can apply for bankruptcy paying the contribution for four years

All of the debt solutions are available and appropriate for the debtor to consider.

35. Many of the provisions within DAS legislation emanate and are consistent with the 1985 Act provisions. These include debt advice requirements, moratoriums, money advisors, use of the Common Financial Tool, and the AiB role.
36. Recent changes to DAS have included an element of debt relief in certain circumstances and therefore DAS is no longer simply a debt repayment solution but can be a debt relief solution in the same way as bankruptcy and trust deeds are.
37. The Scottish Government policy of creating a Financial Health Service recognises that holistic approach. Creating a holistic legislative structure for bankruptcy and debt arrangements would further advance that policy and bring with it increased efficiencies and accessibility to legislation for those who work with it on a daily basis.
38. We would therefore call for the Scottish Government to bring forward amendments to the Bill at the next stage to incorporate DAS legislation into the consolidation.
39. We are generally content with the approach taken in the Bill to consolidation. There are however a number of matters which could usefully be addressed to make the legislation more accessible.
40. It would be of assistance to ensure that all definitions used throughout the legislation were included within the Interpretations section. There are numerous examples where definitions to be used throughout the Act remain located within specific sections.
41. The approach taken within the Bill to refer to certain persons by designation of a reference letter (for example section 14 - "OC"; section 46 - "C"; section 63 - "RT" and "OT", etc) appears to be inconsistent. We also consider that this approach does not assist with the policy intention of making the legislation more accessible and easier to understand for the end user. We agree that it is useful to abbreviate the Accountant in Bankruptcy to "AiB" in the Bill.
42. We are of the view that a number of sections and Parts could be placed more appropriately in the Bill to assist users and understanding of the legislation.
43. Examples of where the approach taken in the Bill to consolidation could be amended to assist users and their understanding of the legislation are provided in Appendix 1.

**4 December 2015**

## Appendix 1

Part 4 – Trustees and commissioners	The Bill follows a logical structure generally following the process of bankruptcy. This Part sets out provisions which overarch bankruptcy but currently sit between Parts which deal with the mechanics of bankruptcy. We would suggest that this Part would sit more appropriately prior to the existing Part 1.
Part 7 – Safeguarding Interests of creditors	The Bill follows a logical structure generally following the process of bankruptcy. This Part currently sits between debtor’s contributions and administration of the estate, both of which could be considered the ‘core’ elements of sequestration. We would suggest that this Part would sit more appropriately after the existing Part 8.
Part 9 – Examination of debtor	We would suggest that this Part could be retitled “Debtor’s duty to co-operate” and include certain other sections currently included in Part 17 (see below)
Part 15 – Moratorium on diligence	The Bill follows a logical structure generally following the process of bankruptcy. A moratorium is applied for in contemplation of DAS, bankruptcy or signing a trust deed and it may be more convenient for this Part to be at the beginning of the Bill.
Section 14(7)	The use of reference “OC” does not seem to be consistent with the approach within the Bill generally. In addition, the use of this reference does not add to the understanding, clarity or usability of the legislation. We would suggest that such designations are removed from the Bill with the exception of AiB as an abbreviation of Accountant in Bankruptcy.
Section 22(7)	The definition of “date of sequestration” could usefully be moved to Section 228 (Interpretation) as the definition is applicable throughout the Act
Section 26(1)(c), Section 27(11)(b)(ii) as examples	We would suggest that for clarity and to assist usability of the legislation “debt payment programme” and “DAS Administrator” could usefully be included within section 228 (Interpretation) as a defined terms.
Section 27(12)	The Bill contains the phrase “fall asleep”. This is significantly divergent from phraseology used otherwise in the Bill. It is also not otherwise a used phrase in legal or insolvency matters.
Sections 46 and 47	The use of reference “C” does not seem to be consistent with the approach within the Bill generally. In addition, the use of this reference does not add to the understanding, clarity or usability of the legislation. We would suggest that such designations are removed from the Bill with the exception of AiB as an abbreviation of Accountant in Bankruptcy.

Section 63	The use of references “RT” and “OT” does not seem to be consistent with the approach within the Bill generally. In addition, the use of these references does not add to the understanding, clarity or usability of the legislation. We would suggest that such designations are removed from the Bill with the exception of AiB as an abbreviation of Accountant in Bankruptcy.
Section 79(2)	The drafting of this section could be amended assisted through the relocation of the provisions of section 231 (see also comments on section 231 below).
Section 113	The use of references “T” and “TU” does not seem to be consistent with the approach within the Bill generally. In addition, the use of these references does not add to the understanding, clarity or usability of the legislation. We would suggest that such designations are removed from the Bill with the exception of AiB as an abbreviation of Accountant in Bankruptcy.
Section 206	This section could usefully be included within Part 10 (Claims, Dividends and distributions etc) as the provisions of this section relate closely to their entitlement to submit a claim.
Section 209	This section could usefully be included within Part 7 (Safeguarding interests of creditors) as the section contains powers for the trustee to challenge a transaction entered into by the debtor in a similar manner to the challenge in respect of gratuitous alienations and unfair preferences.
Section 215	This section could usefully be included within a revised Part 9 “Debtor’s duty to co-operate” bringing together all provisions relating to the ingathering of information and requirements and obligations of a debtor.
Section 218	This section would sit more appropriately within a revised Part 9 “Debtor’s duty to co-operate”
Section 219	This section would sit more appropriately within a revised Part 9 “Debtor’s duty to co-operate”
Section 222	This section could usefully be included within Part 8 under the sub heading “Contractual powers and money received” as the provisions relating to the supply of utilities relates to a contractual power of a trustee.
Section 229	The use of references “A” - “K” does not seem to be consistent with the approach within the Bill generally. In addition, the use of these references does not assist with the understanding, clarity or usability of the legislation. We would suggest that such designations are removed from the Bill with the exception of AiB as an abbreviation of Accountant in Bankruptcy.
Section 231	This section could usefully be located after section 79 bringing together matters relating to the definition of estate.