1. We are pleased to have the opportunity to submit a response to the committee’s inquiry into the impact of COVID-19 on businesses, workers and the economy in Scotland.

2. We have already written on some of the debt and insolvency aspects of this issue: see our blog pieces of 23 March 2020 (Debt and Insolvency Law in the Age of Coronavirus) and 16 April 2020 (Legislating for the Insolvency Impact of the Coronavirus Crisis) at https://www.abdn.ac.uk/law/blog/index.php. Since the last piece, there have of course been further developments, most notably the passing and coming into force of the Coronavirus (Scotland) (No 2) Act 2020 and the introduction of the Corporate Insolvency and Governance Bill into the UK parliament, which had its first reading on 20 May 2020. We will be publishing a further piece considering these developments shortly.

3. In our view it is clear that, as is the case elsewhere, the COVID-19 coronavirus pandemic is having, and will continue to have for some considerable time, a severe impact on businesses, workers and the economy in Scotland in the short, medium and long term. This in turn raises wide-ranging questions in relation to the law of debt and insolvency which is our specialist area. It has been widely acknowledged, including in the debates on the Coronavirus (Scotland) (No 2) Bill, that the short-term economic contraction in Scotland (and the rest of the UK) is likely to be deeper than during the financial crisis of 2008 and it remains unknown whether the economic recovery will be quicker than in the wake of that previous crisis. In any event, it seems to us that there will undoubtedly be major macroeconomic and microeconomic consequences, including increased personal, corporate and state debt and an increase in both consumer and business insolvencies.

4. Also in our view, the crisis has highlighted the weaknesses of a credit-based economy such as ours (and many others). As the Report of the Review Committee on Insolvency Law and Practice¹ (generally referred to simply as the Cork Committee) acknowledged as far back as 1982, credit is the lifeblood of our economy. A large proportion of consumers and businesses are highly reliant on debt, and as was also acknowledged in the debates on the Coronavirus (Scotland) (No 2) Bill, even short-term interruptions to income can be critical in terms of the ability to service that debt.

¹ Cmnd 8558.
In a business context, this has been illustrated by the collapse of an increasing number of businesses, including large, high-profile business such as Flybe, Carluccio’s, Debenhams, Laura Ashley, Casual Dining Group and Specialist Leisure Group. These examples show how little it can take to tip a business over the edge, albeit that the trigger in this particular scenario has been particularly sudden and almost universal. Cash flow – or lack of it – and/or insufficient reserves are key difficulties for businesses of all sizes and have been exacerbated by the crisis, which has disproportionately affected a number of sectors in particular, including retail, sport, tourism, hospitality and entertainment.

In a consumer context, there is a different version of the same problem. As once again acknowledged in the debates on the Coronavirus (Scotland) (No 2) Bill, many individuals have suddenly and unexpectedly found themselves with no or reduced work/income and little or no savings, resulting in an inability to pay ongoing commitments and service their debts. The traditional advice is to have savings of at least three, and preferably six, months available to cope with any financial crisis, although even before the current crisis, some questioned whether even six months was enough. The reality, however, appears to be that many people do not have such reserves, for any one or a combination of reasons. This is not intended to be a judgement of people in this position, merely a statement of fact. Some people could not manage this if they wanted to, others could but choose not to.

In our view, the response to the crisis in the medium- and longer-term needs to take cognisance of, and address, those weaknesses in a broader way.

5. The UK and Scottish governments have, of course, implemented a number of measures designed to alleviate the financial pressures produced by the crisis, including mortgage holidays, the furlough scheme and various support schemes for businesses and the self-employed, and a key theme of the last meeting of the Financial Inclusion Policy Forum on 20 April 2020 was how to further support specific cohorts of consumers at this challenging time.\(^2\) We are concerned, however, that even these measures may not be sufficient to allow many individuals and businesses ultimately to avoid insolvency, especially since it is at present very uncertain how long restrictions of one sort or another will remain in place. A number of businesses have already declared redundancies despite the existence of the aforementioned support schemes. In addition, the changes in behaviour brought about by the restrictions might lead to medium- or long-term, or even permanent, changes in behaviour, including a reduction in domestic and/or foreign travel and tourism and a reduction in demand in the retail sector, coupled with increased online activity, which might have a continuing impact upon specific types of business and mean that some of those businesses will no longer be viable, even with significant government support. This could lead to further business closures or contractions and thus further redundancies. We anticipate that this will be exacerbated if/when the aforementioned

government support is eventually reduced/withdrawn, which seems inevitable at some point.

6. The UK and Scottish governments have also already passed legislation to deal with various aspects of the crisis including specific aspects of debt and insolvency law and related matters which are the focus of this submission. Thus, in Scotland, the Coronavirus (Scotland) Act 2020 has temporarily extended the moratorium on diligence provided for in Part 15 of the Bankruptcy (Scotland) Act 2016 and allowed such a moratorium to be obtained more than once in any 12 month period. We consider, however, that the legislation is not sufficiently clear as to whether the extended period will apply in full if a moratorium commences while that Act is in force but its provisions expire before the end of the extended period, and we consider that this could usefully be clarified. The extension of the moratorium period clearly gives more time for a debtor to access the necessary money advice, but we are concerned that advice services are already over-stretched and that given the likely significant uplift in demand, they may not be able to cope without increased funding and other support to increase capacity. There may also be practical issues of access to such services during the period when restrictions remain in place.

7. While the provisions relating to the moratorium represented an immediate and focused intervention in the field of bankruptcy law, the Coronavirus (Scotland) (No 2) Act 2020 has now implemented a number of broader measures in the context of bankruptcy law, including measures to allow the electronic service of documents; increasing the maximum amount of debt for minimal asset cases to £25,000; increasing the minimum amount of debt for a creditor petition to £10,000; increasing the period for the trustee to make proposals for a debtor contribution; making provision for virtual meetings of creditors; making provision for the electronic signature of forms; providing for temporary exemption from, and reduction of, certain fees including the fee for a debtor application for sequestration; and providing for the electronic signature of forms and transmission to the register of inhibitions which is of critical importance in the context of sequestration. We generally welcome these measures, although we have some reservations regarding the blanket increase in the minimum amount of debt for a creditor petition for reasons discussed further below. We consider, however, that as some of the restrictions are lifted, there could be a need to take further steps to protect debtors in a vulnerable economic position and the position should be kept under review.

8. The Scottish legislation also has a number of other provisions which have indirect relevance for debt and insolvency law insofar as they are also designed to protect debtors. Individuals are given extended protection from eviction from their homes for, _inter alia_, non-payment of rent, while tenants of commercial premises are given extended protection from irritancy for non-payment of rent. Similar protections have also been introduced in England and Wales by the Coronavirus Act 2020. Furthermore, we understand that the Accountant in Bankruptcy has suspended sales and evictions in ongoing sequestrations where AiB is the trustee in sequestration and is encouraging trustees in other sequestrations to do the same as well as introducing a raft of other measures to assist debtors and facilitate the ongoing administration of cases. We understand the motivation for such measures, but we
are concerned that despite the provisions which have now been enacted in legislation, there remains no statutory basis for some of them. We therefore suggest that consideration may need to be given to further measures in this respect.

9. With regard to corporate insolvency, the UK government has now introduced the Corporate Insolvency and Governance Bill which is due to complete its passage through the UK parliament on 3 June 2020. The Bill contains measures to implement reforms to insolvency law which were already planned, in particular a moratorium providing a “breathing space” from creditors enforcing their debts for a period of time while a company seeks a rescue or restructure, the protection of a company’s supplies to enable continued trading during the moratorium and a new restructuring plan which will bind creditors and include a “cramdown” provision. The Bill also contains provisions temporarily suspending the wrongful trading rules for a period of three months with retrospective effect from 1 March 2020 and provisions limiting the use of statutory demands for payment of debt and winding up petitions by creditors. The inclusion of the latter provisions was apparently prompted by cases of landlords using these procedures to get round the restrictions on taking action against tenants for non-payment of rent which were introduced by the coronavirus legislation in England and Wales, but the provisions are not restricted to cases involving unpaid rent and extend to all cases where the debtor’s inability to pay is caused by the coronavirus crisis. The Bill also contains a time-limited power to amend corporate insolvency law and related legislation by regulations and provision for the temporary relaxation of filing requirements and the extension of certain deadlines for filing etc for companies. We consider that these measures, which will all apply in Scotland, are to be welcomed, although it may be noted that while liability for wrongful trading has been temporarily suspended, other provisions relating to personal liability of directors remain in place, and we wonder how much effect the reforms to insolvency will actually have in terms of increasing corporate rescue at a practical level.

With specific regard to the provisions for the protection of a company’s supplies to enable continued trading during the moratorium, we note that when earlier provisions were introduced for extended protection for a company’s essential supplies in the form of 233A of the Insolvency Act 1986 in cases involving a rescue procedure, those provisions were subsequently extended to cases involving protected trust deeds by s 173A of the Bankruptcy (Scotland) Act 2016. We therefore wonder whether there is merit in considering the extension of the provisions currently under consideration in the same way, and also whether there is merit to considering similar provisions for business debt arrangement schemes.

10. Perhaps understandably, the focus of the response to the crisis in Scotland, as well as in the rest of the UK and indeed other countries, has to date been on providing protection to both consumer and business debtors who are or may be in

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3 INSOL Europe in partnership with LexisNexis has produced a tracker of global insolvency reforms in response to the crisis which is available on the INSOL Europe website at [https://www.insol-europe.org/technical-content/covid19](https://www.insol-europe.org/technical-content/covid19). Of course, care needs to be taken in considering reforms adopted elsewhere but such reforms can provide useful examples of responses to shared problems.
financial difficulty, including by increasing their ease of access to insolvency processes where debtors wish to utilise that option. We consider, however, that some thought also requires to be given to the position of creditors who, if they remain unpaid and unable to exercise remedies, may themselves become at risk of insolvency. This is particularly so in the case of creditors who are individuals or micro, small or medium sized businesses, and could create or exacerbate a domino effect with significant additional negative consequences for the wider economy. We mentioned above our concern that the Scottish legislation has brought about, albeit temporarily, a blanket increase in the minimum debt level for creditor petitions for sequestration. One technical issue which arises here is that because a creditor petition for sequestration requires the debtor's apparent insolvency to have been constituted within the period of 4 months prior to the presentation of the petition, creditors who are temporarily stopped from petitioning for sequestration may find that when the restrictions expire, they will have to take steps to constitute the debtor's apparent insolvency anew if they still wish, and otherwise still entitled, to proceed with a petition for sequestration, causing further expense to the creditor and, undoubtedly, further distress to the debtor. We suggest that a more nuanced approach, such as that adopted by the Corporate Insolvency and Governance Bill to winding up in corporate cases, where the restrictions apply only if the debtor's inability to pay is linked to the coronavirus crisis (which could perhaps be included as a presumption), might be worthy of consideration. At the present time, there are already considerable practical restrictions on a creditor obtaining payment, not least the fact that court business has been severely limited as we refer to further below, but we consider that an appropriate balance has to be struck between the interests of debtors and the interests of creditors which may be equally impacted by the crisis albeit in different ways.

11. We understand that the present limitations on the work of the courts is affecting insolvency law matters in a number of different ways. There has, of course, been some resumption of business, albeit carried out remotely, in the Court of Session, and in the sheriff courts (yet somewhat unevenly in the latter context), within whose jurisdiction almost all court business relating to bankruptcy as well as some corporate insolvency falls. Arrangements have been made for the courts to deal remotely with, inter alia, commercial actions and corporate insolvency proceedings sisted by the court ex proprio motu, administratively adjourned to a date on or after 1 June 2020 or in respect of which no further order was made, where the court is satisfied that there is good reason why the action should be restarted and that the action can be progressed remotely without recourse to a hearing which requires the leading of evidence. And in terms of civil business generally, urgent and necessary business will continue to be dealt with. While we understand the pressure that the courts are under, we do consider that it is important that routine matters can also continue to be dealt with, and would urge that all necessary resources are made available to allow this to happen as soon as practically possible. We appreciate that the legislation already enacted by the Scottish parliament has gone some way to address a number of the practical issues which have arisen in order to facilitate the continuation of court business, but we think that consideration may also have to be
given to further changes such as to methods of service and changes to time limits to take cognisance of the altered circumstances in which the courts are operating.

12. Looking to the medium- and longer-term, if the predicted increase in financial casualties does materialise, we wonder how they are to be dealt with effectively. While restrictions such as self-isolation and social distancing continue, as it seems likely they will in at least some form for the foreseeable future, we foresee some very practical problems arising. In the case of businesses, we have particular concerns as to how insolvency practitioners can actually take effective control of assets and run businesses in these circumstances. We also have concerns as to how businesses can effectively be rescued and how any buyers or investors for distressed businesses or their assets can be found in the current climate. For individuals, the ability to take steps to address their problems depends on access to money advice and we have concerns as to how that will be able to be made available in the circumstances as well as to resourcing issues. Furthermore, we are concerned that advice services and the Accountant in Bankruptcy may be in danger of being overwhelmed by a large increase in cases. We also consider that in the longer term, some attention needs to be given to the respective roles of the Accountant in Bankruptcy and the courts and whether this needs to be reviewed.

13. At both the Scottish and UK levels, the coronavirus crisis is already changing the debt and insolvency law landscape, directly through the reform of insolvency law itself but also as an indirect consequence of other measures. While some of the changes are designed to be temporary, albeit that they may in fact be in place for quite some time, others, such as the implementation of the planned reforms to corporate insolvency law, are not, and it might usefully be considered whether some of the temporary changes which have been brought about, such as the increased use of electronic and technological solutions, might usefully be made permanent even after the crisis has passed. With regard to reform of insolvency law more generally, we are aware that the committee has recently carried out an inquiry into protected trust deeds and issued a report recommending a number of changes. At the same time, a review of the changes brought about by the Bankruptcy and Debt Advice (Scotland) Act 2014 has been underway and, as acknowledged in the committee’s report on protected trust deeds, the Scottish government has committed to a wider review of the debt and insolvency landscape in Scotland. We agree with the committee’s recommendation in its report on protected trust deeds that this review should still be carried out as a matter of urgency if possible, since we also agree with the committee’s view as stated in the report that new approaches may be needed across all debt solutions in light of the concerns about mounting debt resulting from the COVID-19 crisis.

14. We are happy to discuss any aspect of this submission or provide any further input the committee may require.