



Scottish Law Commission  
*promoting law reform*

# **Consultation Paper on the Consolidation of Bankruptcy Legislation in Scotland**

August 2011

This Consultation Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission.

## NOTES

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**The Commission would be grateful if comments on this Consultation Paper were submitted by 30 November 2011.**

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

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# Chapter 1 Introduction

## Background to the consolidation project

1.1 In our Eighth Programme of Law Reform, published in February 2010, we mentioned that we were undertaking a project to consolidate the legislation relating to bankruptcy in Scotland.<sup>2</sup> The project followed a suggestion by the Accountant in Bankruptcy. The suggestion was supported by the Scottish Government which gave its approval to the project in October 2008. Although most of the law proposed for consolidation is already contained in a single Act, the Bankruptcy (Scotland) Act 1985 (referred to in this consultation paper as "the 1985 Act"), that Act has been so heavily amended, on so many occasions, that it has lost coherence and rational structure. Many of its provisions (whether sections, subsections or paragraphs) are inordinately long; and numbering has become complex and unwieldy.

1.2 The primary aim of consolidation is to make the legislation on a particular area of law more accessible for practitioners and for those affected by it. Consolidation involves the bringing together of earlier enactments on the subject matter into one statute. Although consolidation may involve a certain element of policy decision-making, it would be in relation to matters of detail rather than to any issues of substantive policy.

## History of bankruptcy legislation in Scotland

1.3 The 1985 Act gave effect, with some modifications, to the Commission's Report on Bankruptcy and Related Aspects of Insolvency and Liquidation, published in February 1982. The 1985 Act was a major restatement of the law of bankruptcy in Scotland. It repealed the Bankruptcy (Scotland) Act 1913, which had introduced summary sequestration, but otherwise had been a restatement of the Bankruptcy (Scotland) Act 1856. In turn the 1856 Act had been based on the Bankruptcy (Scotland) Act 1839. The 1985 Act also repealed two Acts of the pre-union Scots Parliaments, namely the Bankruptcy Acts of 1621 and 1696.

1.4 Although the 1985 Act uses the term "bankruptcy" the long title makes clear that the Act deals mainly with sequestration, the principal procedure in Scots law for resolving personal insolvency. The Act (except for a very few provisions which have effect throughout the United Kingdom) extends to Scotland only.

1.5 The process of bankruptcy is supervised and administered by the Accountant in Bankruptcy. The Accountant's office is an independent agency of the Scottish Government and acts impartially while remaining accountable to Scottish Ministers. The Accountant in Bankruptcy is appointed under section 1 of the 1985 Act.

## The current consultation exercise

1.6 In addition to this Consultation Paper, the Commission has prepared a draft Bankruptcy (Scotland) Bill, a draft Bankruptcy (Scotland) Act 2011 (Consequential

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<sup>2</sup> Eighth Programme of Law Reform, Scot Law Com No 220, (2010), para 1.36.

Provisions and Modifications) Order 2011 and draft Tables of Destinations and Derivations, all of which are available on the Commission's website.<sup>3</sup>

1.7 The purpose of this Consultation Paper is to invite comments on our provisional proposals for amendments to the 1985 Act. However, practitioners and others may have suggestions about other changes that they think should be made to the Act. We would welcome any such suggestions.

### **Next steps**

1.8 Following the consultation period, the next stage in the project will involve preparation of our report and final draft Bill, which will be submitted to Scottish Ministers. In preparing our report, recommendations and final draft Bill, we shall take account of the responses received from consultees. However the consolidation cannot be regarded as a vehicle for law reform;<sup>4</sup> rather it is a means of producing a coherent and reasonably contemporary restatement of the law. It may therefore be that we shall not be able to take up some suggestions for recommendations which may be made to us; but in that case we shall refer those not taken up to the Scottish Government and the Accountant in Bankruptcy for separate consideration.

### **Legislative competence**

1.9 The subject matter of the draft Bill is, for the most part, not reserved to the United Kingdom Parliament in terms of Schedule 5 to the Scotland Act 1998 (referred to in this Consultation Paper as "the 1998 Act"). Therefore (subject to what is said in the following paragraph) it would be competent for the Scottish Parliament to pass a Bill arising from the report which the Commission will submit to Scottish Ministers in due course, following upon this consultation. In our view the draft Bill and the proposed amendments contained in the Consultation Paper do not raise any issues relating to compliance with the European Convention on Human Rights.

### **Application of certain provisions in English law**

1.10 Any draft Bill which the Commission recommends in its report to Scottish Ministers would be for the Scottish Parliament to enact. But some of the provisions consolidated would require to have effect outwith Scotland<sup>5</sup> and therefore an order, under section 104 of the 1998 Act, might supplement the draft Bill and complete its restatement of bankruptcy law. (Section 104 provides for subordinate legislation which the person making the

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<sup>3</sup> The documents are available on the Commission's website at: <http://www.scotlawcom.gov.uk>.

<sup>4</sup> See paragraphs 3.36 to 3.41 of the Scottish Parliament's current Guidance on Public Bills, available at <http://www.scottish.parliament.uk/business/bills/billguidance/gpb-c.htm>.

<sup>5</sup> See paragraph 1.4 above and section 78(5) and (6) of the 1985 Act.

legislation considers necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament). The making of an order under section 104 of the 1998 Act would be a matter for UK Ministers and any such order would require to be laid before the UK Parliament. For the purposes of this consultation, the Commission has prepared the accompanying draft of the order, under that section, which it is envisaged might be necessary or expedient in consequence of the draft Bill were it to become an Act.

# Chapter 2      Proposed amendments to the Bankruptcy (Scotland) Act 1985

## Introduction

2.1 In this chapter, we invite consultees to comment on our provisional proposals for amendments to the 1985 Act.

2.2 The proposed amendments are intended to remove anomalies, to treat like cases in the same way or to omit provisions that are no longer of any practical utility. The amendments have been included in the Commission's draft consolidation Bill. Considerations of legislative competence and of giving effect to certain provisions in other jurisdictions of the United Kingdom require the various provisions to be divided between a Bill of the Scottish Parliament and an order under section 104 of the 1998 Act.

2.3 The draft Bill and draft order have been prepared taking account of underlying drafting considerations, such as a preference for gender neutrality, the resolution of ambiguities, modernisation and simplification of language and the breaking up of long provisions into shorter ones.

2.4 Amendments to the 1985 Act provided for in legislation not yet in force have been treated in the draft Bill as if that legislation were in force. For example, the Bankruptcy and Diligence etc. (Scotland) Act 2007 contains provisions which will, when commenced, amend the 1985 Act. Also amendments to the 1985 Act provided for in the Scotland Bill, as introduced in the UK Parliament, have been treated in the draft consolidation Bill as if the Scotland Bill were enacted.

### *Proposed amendments to the 1985 Act*

#### **The expression "right or interest"**

2.5 The expression "right or interest" occurs at several places in the 1985 Act. With such changes as have been made since devolution to the law of heritable property, the expressions "right in land" and "interest in land" have become virtually synonymous in Scottish enactments. Anything encompassed by the latter expression will also be encompassed by the former (though the converse is not always the case: cf. the exclusion in paragraph (a) of the definition of "interest in land" in section 28(1) of the Land Registration (Scotland) Act 1979 (c.33)).

- 1. We therefore propose that wherever the words "right or interest" occur in the 1985 Act the words "or interest" should be omitted.**

2.6 This proposal is given effect in sections 59(8), 62(7), 63(7), 75(1), (2), (3)(a)(i), (ii), (iv), and (ix), (4) and (5) and 76(1) and (7) of the draft Bill.

## **Appointment of the trustee in the sequestration**

2.7 Section 2 of the 1985 Act provides, both in subsection (1B) and in subsection (1C), for the Accountant in Bankruptcy to be deemed to be appointed to be the trustee in the sequestration. We consider that this unnecessarily complicates the construction of the provisions and note that were subsection (1C) simply to provide that the Accountant in Bankruptcy is not to appoint a trustee in the circumstances mentioned in that subsection then subsection (1B) would apply anyway and there would be no need for further deeming.

- 2. We therefore propose that subsection (1C) of section 2 be amended accordingly.**

2.8 This proposal is given effect in section 37(13) of the draft Bill.

## **Debtor applications**

2.9 Subsections (9) and (10) of section 5 of the 1985 Act have effect *inter alia* when a debtor fails to comply with subsection (6A) of that section. Since subsection (6A) is applied expressly for the purposes of section 6 of the Act it might be thought that subsections (9) and (10) apply consequentially for the purposes of section 6 also. That would not appear to have been the UK Parliament's intention.

- 3. We therefore propose that the non-application of subsections (9) and (10) of section 5, for the purposes of section 6 of the 1985 Act, be put beyond doubt.**

2.10 This proposal is given effect in section 6(4) of the draft Bill.

## **Sequestration of other estates**

2.11 While limited liability partnerships would appear to come within the generality of paragraph (b) of section 6(2) of the 1985 Act, so too it appears would companies registered under the Companies Act 2006. The latter are mentioned expressly in paragraph (a) of section 6(2), but not the former.

- 4. We therefore propose, that for the avoidance of any uncertainty, limited liability partnerships should also be mentioned expressly in section 6.**

2.12 This proposal is given effect in section 4(2)(b) of the draft Bill.

## **Meaning of apparent insolvency**

2.13 Paragraph (c) of section 7(1) of the 1985 Act includes the words "unless it is shown that at the time when any such circumstance occurred, the debtor was able and willing to pay his debts as they became due or that but for his property being affected by a restraint order or subject to a confiscation, or charging, order he would be able to do so". It seems improbable, notwithstanding the words "be able to do so", that the intention can have been, in considering whether apparent insolvency has been constituted, to shift from the time when any of the circumstances set out in that paragraph occurred to the present. In other words, it appears to us that the tests of being able and willing to pay debts as they became due and

of being able so to pay but for the effect of a restraint, confiscation or charging order should both be referable to the time when a circumstance occurred.

**5. We therefore propose that paragraph (c) be re-worded accordingly.**

2.14 This proposal is given effect in section 15(2) of the draft Bill.

**Application of section 7 of the 1985 Act to partnerships and unincorporated bodies**

2.15 Given that subsection (1) of section 7 of the 1985 Act refers expressly to constitution anew of apparent insolvency it would seem appropriate to have corresponding reference both in referring to the apparent insolvency of a partnership and in referring to the apparent insolvency of an unincorporated body.

**6. We therefore propose that subsection (3) of section 7 include such reference.**

2.16 This proposal is given effect in section 15(5) and (6) of the draft Bill.

**When sequestration is awarded**

2.17 Section 12(4) of the 1985 Act defines, for the Act, the expression "the date of sequestration". Paragraph (b)(i) provides, in certain circumstances, for that date to be the date on which the sheriff grants warrant to cite the debtor to appear before the sheriff to show cause why sequestration should not be awarded. But it is only if the petition for sequestration has led on to an award of sequestration that the granting of the warrant should have any relevance in the context of subsection (4).

2.18 The potential for confusion in employing the expression "the date of sequestration" in circumstances where sequestration may not in fact be granted is exemplified in section 14(1) of the 1985 Act. If, as is the effect of the section as presently drafted (and as read with section 12(4)(b) of the 1985 Act), copies of the order of the sheriff are to be sent off on warrant being granted, whether or not sequestration is subsequently awarded, it would be more straightforward and comprehensible to draft by reference (only) to the granting of the warrant.

**7. We therefore propose that the wording of paragraph (b) of section 12(4) of the 1985 Act be adjusted by introducing the requirement that sequestration should have been awarded.**

**8. We further propose that (for clarity and simplicity and also consequentially upon that adjustment) the reference to "the date of sequestration" in section 14(1) of that Act be replaced with a reference to the sheriff granting warrant under section 12(2).**

2.19 Proposals 7 and 8 are given effect in, respectively, sections 19(8)(b) and 22(1) of the draft Bill.

## **Termination of Accountant in Bankruptcy's functions as interim trustee where not appointed as trustee: notice etc. to creditors**

2.20 Section 13B of the 1985 Act would appear largely to have been derived from section 13A of that Act but elements of 13A have been carried over into 13B inappropriately. Thus the occurrence of the word "claim" makes sense in section 13A(4)(b) (subsection (4)(b) following on as it does from (4)(a)(ii) of 13A) but does not make any sense in the analogous section 13B(4)(b), where rather than a reference to a claim there should be a reference to a determination (that is to say, to the determination mentioned in section 13B(4)(a)(ii)).

### **9. We therefore propose that section 13B(4)(b) be re-worded accordingly.**

2.21 This proposal is given effect in section 40(4)(b) of the draft Bill.

## **Termination of Accountant in Bankruptcy's functions as interim trustee where not appointed as trustee: further provision as regards such notice**

2.22 Similarly, the reference in paragraph (c) of section 13B(5) to "the effect mentioned in subsection (9) [of that section]" makes no sense since no effect is so mentioned (and in any event there are significant conditions to be satisfied before (9) has any effect whatsoever).

### **10. We therefore propose that the anomaly in section 13B(5) be removed.**

2.23 This proposal is given effect in section 40(8)(c) of the draft Bill.

## **Recall of sequestration**

2.24 It is anomalous to give the court limited powers of recall under subsection (1) of section 17 of the 1985 Act only to give it unrestricted powers of recall under subsection (2) of that section. It therefore appears that subsection (2) is intended to follow on from paragraph (c) of subsection (1): in other words, that the "one or more awards of sequestration" referred to in subsection (2) are in fact the "one or more *other* awards of sequestration" referred to in subsection (1)(c).

### **11. We therefore propose that in section 17 of the 1985 Act the relationship between subsections (1) and (2) be clarified accordingly.**

2.25 In subsection (3)(a) of section 17, the reference to "the interim trustee" does not allow for there being no appointment of an interim trustee (cf. section 2(5) of the 1985 Act).

### **12. We therefore propose that in section 17 of the 1985 Act subsection (3)(a) should allow for there being no appointment of an interim trustee.**

2.26 In subsection (8)(b)(ii) of section 17 the words "(if any)" would not seem apt given the terms of section 2(1B) and (2C) of the 1985 Act; and if the Accountant in Bankruptcy is trustee then the duty to insert in the sederunt book a copy of an order should apply to the Accountant just as it does to any other trustee.

### **13. We therefore propose that in section 17 of the 1985 Act the provisions of subsection (8)(b)(ii) be adjusted to remove these anomalies.**

2.27 Proposals 11,12 and 13 are given effect in section 25(2), (3), (4), (11) and (12) of the draft Bill.

#### **Statement as to insufficiency of debtor's assets to pay any dividend whatsoever**

2.28 Both in section 20(1) and in section 23(3) of the 1985 Act there is a requirement for the trustee, in every case, to indicate "whether, in his opinion, the debtor's assets are unlikely to be sufficient to pay any dividend whatsoever" in respect of the preferred debts, the ordinary debts, interest on those debts and any postponed debt. We suggest that it is excessive to have a requirement for such an indication in every case. If the requirement were confined to giving an indication only in a case where the trustee was of the opinion that the debtor's assets were unlikely to be sufficient to pay any dividend whatsoever, it would necessarily follow from the absence of any such indication in any *other* case that the trustee was not of that opinion.

- 14. We therefore propose that the indication should only be required in those cases where the trustee has come to the opinion mentioned.**

2.29 This proposal is given effect in sections 28(1)(b) and 33(4)(d) of the draft Bill.

#### **Termination of original trustee's functions**

2.30 The wording of section 26(1) of the 1985 Act does not properly take account of the substitution made by paragraph 11(2)(b) of Schedule 1 to the Bankruptcy (Scotland) Act 1993 (in that a statement will be prepared under section 23(3)(d) of the 1985 Act only if the trustee determines that it is necessary to revise a statement prepared under section 20(1) of that Act).

- 15. We therefore propose that section 26(1) be amended to remove this anomaly.**

2.31 This proposal is given effect in section 42(2) of the draft Bill.

#### **Discharge of original trustee**

2.32 Section 27(3) of the 1985 Act makes no mention of a determination being issued but does provide for various persons being notified. Since subsection (2) has already described a period in terms of days after notification it seems preferable, in subsection (4) also, to provide a description in terms of days after notification rather than of days after the issuing of a determination (or indeed of days after the grant or refusal of the certificate of discharge).

2.33 And further as regards subsection (4), we observe that it would be more accurate to regard a person as being informed under subsection (2)(a) and as making representations by virtue of having been so informed rather than as having made representations under subsection (2)(a).

- 16. We therefore propose that in relation to both points section 27(4) be amended accordingly.**

2.34 This proposal is given effect in section 44(4) of the draft Bill.

## **Appeals in relation to outlays and remuneration payable to a trustee or the representatives of a trustee**

2.35 Provision is made in section 28 of the 1985 Act for appeal to the sheriff as regards certain determinations of the Accountant in Bankruptcy relating to outlays and remuneration payable to a trustee or to the representatives of a trustee. On any such appeal the decision of the sheriff is final. Analogous provision is made in section 29 of that Act (by applying, for the purposes of section 29, certain provisions of section 28) except that the provisions so applied do not include provision for the decision of the sheriff to be final. There would not appear to be any reason for the exception.

- 17. We therefore propose that the decision of the sheriff on an appeal under section 28(7) as applied for the purposes of section 29 by subsection (8) of section 29 be final, just as it is on any other appeal under section 28(7).**

2.36 This proposal is given effect in section 47(12) of the draft Bill.

## **Adjudication for debt**

2.37 The diligence of adjudication for debt being abolished prospectively by section 79 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, provision for the repeal of various references to adjudication in other legislation is made in schedule 6 to that Act. But in identifying, in the schedule, words to be repealed in section 37(8) of the 1985 Act an error appears to have been made by confusing the second occurrence of a word (the word "or") with its third occurrence. In consequence provision is made for the repeal of some only of the words which ought to have been targeted.

- 18. We therefore propose that section 37(8) of the 1985 Act be amended so as to repeal all reference in it to adjudication.**

2.38 This proposal is given effect in section 21(13) of the draft Bill.

## **Debtor's home ceasing to form part of sequestrated estate**

2.39 In section 39A of the 1985 Act, subsection (3)(d) refers to a trustee "register[ing] in the Land Register of Scotland or ..... record[ing] in the Register of Sasines a notice of title" but such wording is not apt. For the Land Register, a trustee in sequestration does not complete title in that way; instead application is made to the Keeper of the Registers of Scotland for the appropriate title sheet to be updated so as to show the trustee as proprietor.

- 19. We therefore propose that more general wording be employed in section 39A of the 1985 Act**

2.40 This proposal is given effect in section 75(3)(a)(iv) of the draft Bill (in wording apt both for completion of title under the Land Registration (Scotland) Act 1979 and for

completion of title under any Act in the form recommended by the Commission in its Report on Land Registration, published in 2010).<sup>6</sup>

2.41 As regards subsection (6)(b) of section 39A, it may be that the trustee and the Accountant in Bankruptcy will become aware of the debtor's right in the family home each on a different day and no provision is made in the 1985 Act for preferring one date over the other. Nor, if the AiB does become aware of the debtor's interest, is any obligation imposed by the Act to pass this information to the trustee. We consider that these matters could give rise to confusion and uncertainty (except of course in a case in which the AiB is the trustee).

**20. We therefore propose that one date only should be provided for in section 39A(6)(b), being the date on which the trustee becomes aware of the debtor's right.**

2.42 This proposal is given effect in section 75(5)(b) of the draft Bill.

#### **Procedure on certain appeals after end of accounting period**

2.43 Subsection (6) of section 53 of the 1985 Act might be thought to provide that the sheriff's decision is final only in an appeal against a decision under paragraph (a) of the subsection but could also be construed as relating both to a decision under paragraph (a) and to a decision under paragraph (b).

**21. We therefore propose that subsection (6) of section 53 of the 1985 Act be clarified and that it be expressly provided that the decision is final in both cases.**

2.44 Subsection (6A) of section 53 of the 1985 Act would appear, in the case of an appeal to the sheriff against a decision of the Accountant in Bankruptcy, to require a debtor who has already satisfied the Accountant as to pecuniary interest to satisfy the sheriff also. This seems to us to be an unnecessary duplication.

**22. We therefore propose that the requirement in subsection (6A) of section 53 of the 1985 Act be confined to an appeal under paragraph (a) or (b) of subsection (6).**

2.45 Proposals 21 and 22 are given effect in section 95(1) to (4) of the draft Bill.

#### **Debtor not discharged from liability to pay certain fines etc.**

2.46 Paragraph 33(1) of the schedule to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 provides that in any enactment apart from that Act, references to the district court are to be read as references to the justice of the peace court. Notwithstanding that provision, we consider that section 55(2)(aa) of the 1985 Act requires to be construed as referring both to fines imposed in a justice of the peace court and to fines imposed in a district court. This is because the liability referred to in that paragraph may, for some considerable time to come, arise in relation to a fine which was imposed in a district court.

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<sup>6</sup> Report on Land Registration, Scot Law Com No 222, (2010).

- 23. We therefore propose that, notwithstanding paragraph 33(1) of the schedule to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, the reference in section 55(2)(aa) of the 1985 Act to "a district court" should be construed as relating not only to a justice of the peace court but also to a district court.**

2.47 We also consider that section 55(3) should be simplified and shortened by the omission of paragraph (a). This is because debts (and the payment of interest on any debt) are themselves obligations and therefore fall within the compass of paragraph (b).

- 24. We therefore propose that paragraph (a) of section 55(3) of the 1985 Act be omitted.**

2.48 Proposals 23 and 24 are given effect in section 100(3)(b), (5) and (7) of the draft Bill.

#### **Notice to member State liquidator**

2.49 Subsection (2) of section 60B of the 1985 Act imposes an obligation to give notice, or provide a copy document, to a member State liquidator (that is to say, to a person falling within the definition of liquidator in Article 2(b) of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, being a person appointed in proceedings to which the article applies in a member State other than the United Kingdom) in circumstances where there is an obligation to give notice or provide such a document to the sheriff or to the Accountant in Bankruptcy. We consider that subsection (2) would be more readily construed were it to indicate that notice or provision to the member State liquidator is in addition to (and hence not instead of) notice or provision to the sheriff or Accountant in Bankruptcy.

- 25. We therefore propose that section 60B of the 1985 Act be amended to indicate that notice or provision to the member State liquidator is in addition to notice or provision to the sheriff or Accountant in Bankruptcy.**

2.50 This proposal is given effect in section 127(2) of the draft Bill.

#### **Regulations under the 1985 Act**

2.51 The drafting of subsection (1) of section 72 of the 1985 Act seems to allow two possible interpretations. The first is that the words "and the regulations may make different provision for different cases or classes of case" (which we refer to below as "the relevant power") relate to any regulations made under the Act; and the second is that the relevant power relates only to regulations subject to annulment in pursuance of a resolution. The first construction would seem much the more likely were it not for the fact that there are specific subsections and a specific sub-paragraph elsewhere in the Act which relate to making different provision under some of the regulations mentioned in subsection (3) of the section (being regulations requiring to be approved by resolution). From this we take it that it is not intended that the relevant power should relate to any of the regulations mentioned in subsection (3). In particular, we take it first that it was not intended that different provision should be made under section 5(2B)(a) or (4) of the 1985 Act; second that it was intended that such different provision as could be made under section 5A(5)(e) of that Act should be limited to different provision for different classes or description of debtor; and third that it was thought that section 39A(4) of that Act (as read with subsection (8) of the section) provided

such flexibility that superimposing the relevant power was unnecessary. However, as regards that third matter, it seems to us to be pointless and potentially confusing to disapply the relevant power to regulations under section 39A(4) (the more so were it to be done expressly in consolidating the provision).

2.52 Section 5B(5)(d) of, and paragraph 5(2)(aa) of Schedule 5 to, the 1985 Act duplicate the wording of the relevant power (and so support the interpretation that the relevant power relates only to regulations subject to annulment in pursuance of a resolution).

2.53 We submit that the second interpretation is accordingly to be preferred but that the existing provisions are far from clear.

**26. We therefore propose that the wording of section 72 of the 1985 Act should be adjusted so as to provide certainty as to the scope of the power in regulations under subsection (1) of that section to make different provision for different cases or classes of case; and that the power should apply to regulations under section 39A(4).**

2.54 This proposal is given effect in section 140(4) and (5).

### **Insolvency practitioners**

2.55 Section 73(1) of the 1985 Act defines "qualified to act as an insolvency practitioner" by reference to section 2 of the Insolvency Act 1985; however section 2 has been repealed by Schedule 12 to the Insolvency Act 1986. Provision equivalent to section 2 is made in section 390 of that Act of 1986.

**27. We therefore propose that the definition of "qualified to act as an insolvency practitioner" in section 73(1) of the 1985 Act be by reference to section 390 of the 1986 Act.**

2.56 This proposal is given effect in section 143(1) of the draft Bill.

### **Commissioners**

2.57 Section 73(1) of the 1985 Act defines "commissioner" by reference to section 30(1) of that Act. But section 30(1) relates only to the election of a commissioner and it is section 4 of the Act which introduces commissioners and sets out their functions.

**28. We therefore propose that the definition of "commissioner" in section 73(1) of the 1985 Act be by reference to section 4 of the Act rather than to section 30(1).**

2.58 This proposal is given effect in section 143(1) of the draft Bill.

## Debt payment programmes

2.59 Regulation 45 of the Debt Arrangement Scheme (Scotland) Regulations 2011<sup>7</sup> provides for the insertion, into section 7(1)(c) of the 1985 Act, of a new sub-paragraph (vii). However, there already is at that place a sub-paragraph (vii) in very similar terms. It was put there by Regulation 46 of the Debt Arrangement Scheme (Scotland) Regulations 2004.<sup>8</sup> Schedule 5 to the 2011 Regulations revokes the 2004 Regulations; but by section 15 of the Interpretation and Legislative Reform (Scotland) Act 2010, the revocation of a Scottish instrument does not affect an amendment of an enactment already made by the revoked instrument. We assume from the fact that the two sub-paragraph (vii)s are in very similar terms that the intention was simply to substitute the new for the old; but what we now have is both an old sub-paragraph (vii) and a new.

2.60 Paragraph 1 of schedule 2 to the 2011 Regulations provides for the insertion, into section 14(1) of the 1985 Act, of a new paragraph (c). However, there already is at that place a paragraph (c) in very similar terms. It was put there by paragraph 1 of schedule 3 to the 2004 regulations. Again, we assume that the intention was to substitute the new for the old; but what we now have is both an old paragraph (c) and a new.

- 29. We therefore propose that both sub-paragraph (vii) of section 7(1)(c) of the 1985 Act, as inserted by Regulation 46 of the Debt Arrangement Scheme (Scotland) Regulations 2004 (and not as inserted by Regulation 45 of the Debt Arrangement Scheme (Scotland) Regulations 2011) and paragraph (c) of section 14(1) of the 1985 Act, as inserted by paragraph 1 of schedule 3 to the Debt Arrangement Scheme (Scotland) Regulations 2004 (and not as inserted by paragraph 1 of schedule 2 to the Debt Arrangement Scheme (Scotland) Regulations 2011) be omitted.**

2.61 This proposal is given effect in sections 15(1)(e) and 22(1)(c) and (8) of the draft Bill.

## Legal status and legal relationships

2.62 Section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986, as amended by section 21(2) of the Family Law (Scotland) Act 2006, provides *inter alia* that "the fact that a person's parents are not or have not been married to each other shall be left out of account in determining the person's legal status or establishing the legal relationship between the person and any other person". It follows that paragraph (b) of section 74(4) of the 1985 Act, with its reference to illegitimacy, is both superfluous and inapt.

- 30. We therefore propose that paragraph (b) of section 74(4) of the 1985 Act be omitted.**

2.63 This proposal is given effect in section 144(6) of the draft Bill.

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<sup>7</sup> SSI 2011/141.

<sup>8</sup> SSI 2004/468.

## Extent

2.64 Section 78(6) of the 1985 Act mentions provisions of the Act which extend to England, Wales and Northern Ireland as well as to Scotland. Among them is listed "paragraph 16(b) of Schedule 4". But paragraph 16 has both a sub-paragraph (1) and a sub-paragraph (2) (and each of the sub-paragraphs has a head (b)). This would seem to have come about because the need for an amendment to section 78(6) consequential upon the insertion of a second sub-paragraph by paragraph 31(4) of Schedule 1 to the Bankruptcy (Scotland) Act 1993 was not noticed.

- 31. We therefore propose that, in section 78(6) of the 1985 Act, the reference to paragraph 16(b) of Schedule 4 be adjusted so as to constitute a reference to (and only to) paragraph 16(1)(b) of Schedule 4 to the Act.**

2.65 This proposal is given effect in article 7 of the draft Bankruptcy (Scotland) Act 2011 (Consequential Provisions and Modifications) Order 2011.

## Determination of amount of creditor's claim

2.66 Special provision is made, in sub-paragraph (2) of paragraph 2 of Schedule 1 to the 1985 Act, for the application of sub-paragraph (1) of that paragraph to a periodical allowance payable on divorce or on the dissolution of a civil partnership. Unfortunately the application provided for in sub-paragraph (2) does not take account of the fact that the words "in the case" (by reference to which a substitution is made) occur twice in sub-paragraph (1). We observe that an intention to refer to the first such occurrence is very much more probable than an intention to refer to the second.

- 32. We therefore propose that sub-paragraph (2) of paragraph 2 of Schedule 1 to the 1985 Act be adjusted so as to be construed accordingly.**

2.67 This proposal is given effect in paragraph 2(2) of schedule 1 to the draft Bill.

## Discharge on composition

2.68 Paragraph 9(3) of Schedule 4 to the 1985 Act refers to provisions being "adapted by paragraph 9(2) and (3) of Schedule 2 to [the Act]"; however Schedule 2 has been repealed by section 11(6) of the Bankruptcy and Diligence etc.(Scotland) Act 2007. New adaptations (now described as "modifications of procedure") are to be found in section 53A of the 1985 Act.

- 33. We therefore propose that the new adaptations contained in subsections (2) to (4), (7) and (10) of section 53A of the 1985 Act be referred to (as nearest equivalents) instead of those contained in paragraph 9(2) and (3) of Schedule 2.**

2.69 In sub-paragraph (a) of paragraph 16(1) of Schedule 4 to the 1985 Act the reference to "the order" does not take account of the amendments made to the paragraph by section 21(10) of the Bankruptcy and Diligence etc.(Scotland) Act 2007.

- 34. We therefore propose that sub-paragraph (a) of paragraph 16(1) of Schedule 4 to the 1985 Act be amended to substitute a reference to the date of the granting by the Accountant in Bankruptcy of a certificate discharging the debtor.**

2.70 Proposals 33 and 34 are given effect in, respectively, paragraphs 11(4) and 20(1)(a) of schedule 3 to the draft Bill.

### **Re-enactment of certain provisions of the Bankruptcy (Scotland) Act 1913**

2.71 The syntax of paragraph 24(3) of Schedule 7 to the 1985 Act is such that the words "in the meantime" qualify the obtaining of a decree of furthcoming but not the carrying through of an auction. There appears to be no practical reason for this distinction.

- 35. We therefore propose that paragraph 24(3) of Schedule 7 to the 1985 Act be amended to make clear that the words "in the meantime" qualify both the obtaining of a decree of furthcoming and the carrying out of an auction.**

2.72 This proposal is given effect in paragraph 1(4) of schedule 6 to the draft Bill.

### **Concurrence in a debtor application**

2.73 The amendment, by paragraph 60(3) of schedule 1 to the Bankruptcy and Diligence etc. (Scotland) Act 2007, of section 73(5)(b) of the 1985 Act together with the repeal by schedule 6 to the 2007 Act of the words ", or the concurring in," in section 8(5) of the 1985 Act, resulted in section 73(5)(b) being deprived of any meaning (there then being no reference in the 1985 Act to which section 73(5)(b) could relate). We consider that this could not have been the Scottish Parliament's intention and that the fact that section 73(5)(b) was not repealed but was merely amended to insert a reference to "concurrence in a debtor application" in place of "concurrence in a petition for sequestration" points to there having been no intention to disturb the underlying rule as to limitation of actions in the circumstances mentioned in paragraphs (a) to (c) of section 73(5).

- 36. We therefore propose that it be provided that concurrence in a debtor application bars the effect of any enactment or rule of law relating to the limitation of actions in any part of the United Kingdom.**

2.74 This proposal is given effect in section 13(6) of the draft Bill and in article 6(1)(d) of the draft Bankruptcy (Scotland) Act 2011 (Consequential Provisions and Modifications) Order 2011.

# Appendix

## List of consultees

### Organisations

Association of Chartered Certified Accountants

Consumer Focus Scotland

Citizens Advice Scotland

Faculty of Advocates

Insolvency Practitioners Association

Institute of Chartered Accountants in Scotland

Law Society of Scotland

Money Advice Scotland

Scottish Association of Law Centres

Scottish Law Agents Society

Sheriffs' Association

Society of Writers to HM Signet

### Academics

Professor George Gretton, University of Edinburgh

Nicholas Grier, Edinburgh Napier University

Professor William McBryde, University of Edinburgh

Ms Donna McKenzie Skene, University of Aberdeen

Scott Wortley, University of Edinburgh

**Individual consultees**

Alan W Adie, MIPA, MCIBS, MICM

David Bennett, WS, NP, Consultant, Gillespie Macandrew LLP

Sheriff William H Holligan

Roy Roxburgh, Consultant, Maclay Murray & Spens, LLP

**Government departments**

Law Reform Division, Justice Directorate

Legal Secretary to the Advocate General for Scotland

Legal Secretary to the Lord Advocate

Office of the Scottish Parliamentary Counsel

Scottish Government Legal Directorate

Solicitor to the Advocate General for Scotland

Department for Work and Pensions

Child Maintenance Enforcement Commission

**Scottish Parliament**

Director of Legal Services, Scottish Parliament