

## POLICY NOTE

### THE BANKRUPTCY AND DEBT ADVICE (SCOTLAND) ACT 2014 (COMMENCEMENT NO. 2, SAVINGS AND TRANSITIONALS) ORDER 2014

SSI 2014/261 (C. 23)

The above instrument was made in exercise of the power conferred by section 57(2) and (3) of the Bankruptcy and Debt Advice (Scotland) Act 2014 and all other powers enabling the Scottish Ministers to do so. It is laid under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

#### Policy objectives

1. The Scottish Government gave a commitment to modernise the bankruptcy system in Scotland, ensuring that the people of Scotland have access to the appropriate debt management or debt relief mechanisms which will allow them to deal with the economic challenges society faces today.
2. As part of its programme of bankruptcy reform, the Scottish Government introduced the Bill for the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”) which received Royal Assent on 29 April 2014. The overall policy intention behind the 2014 Act is to improve the administration of bankruptcy in Scotland, underpinned by the following key principles:
  - ensuring that the people of Scotland have access to fair and just processes of debt advice, debt relief and debt management;
  - those individuals who can pay should pay their debts, whilst acknowledging the wide range of circumstances and events that contribute towards financial difficulty and insolvency for both individuals and businesses; and
  - securing the best return for creditors by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses.
3. The policy aim in making this Order is to bring the 2014 Act into operation and set out a transitional regime to govern when provisions contained within the 2014 Act come into force and predecessor schemes cease to apply. Most provisions will only apply to petitions or applications for sequestration received on or after 1 April 2015, however, there are exceptions explained below.

#### *Specific Provisions*

4. **Article 3:** brings the 2014 Act into force from 1 April 2015, insofar as it is not already in force.
5. Section 27 in relation to section 17G(7) is not however commenced. Subsection (7) of section 17G purports to give powers to the sheriff to remit a case to AiB. This provision was included in the Bill for the Act at introduction in relation to interim recall but, as a result of amendments made to the Bill to remove interim recall, is no longer required. Pending repeal of the provision, it does not have any substantive effect.

6. **Article 4:** provides for the main saving provision so most of the provisions of the 2014 Act will not apply to sequestrations where either the petition for sequestration is presented, or a debtor application for sequestration is received by the Accountant in Bankruptcy (“AiB”) before 1 April 2015. The Bankruptcy (Scotland) Act 1985 as in force immediately before that date will continue to apply to these sequestrations, except in relation to the provisions of the 2014 Act listed in article 4(3).
7. Article 4(4) makes clear that bankruptcy restrictions undertakings are treated as sequestration for these purposes and are caught by the same saving (and may run to the end of their term).
8. **Article 5:** provides that debtor applications signed prior to 1st April 2015 may be made on or after 1 April 2015 where the debtor has not received money advice in accordance with section 1 of the 2014 Act before submitting the application. In that respect, those applications are treated as incomplete applications under section 11A(1) of the 1985 Act, and AiB can request further information from the debtor, and that money advice is taken.
9. **Article 6:** requires a sheriff to have regard to the Common Financial Tool (“the CFT”) method of assessing the debtor’s contribution from income established in the Common Financial Tool made under section 5D of the 1985 Act as amended by the 2014 Act<sup>1</sup>. This is where an application for variation of an Income Payment Order is made and the petition or the debtor application for sequestration was presented or made prior to 1 April 2015. The same position applies where a trustee in sequestration is considering agreeing to a variation of an Income Payment Agreement. Although the CFT must be considered, regard may also be had to other factors, including any contribution originally fixed. The introduction of the CFT is not itself a change in the debtor’s circumstances. The policy intention is to encourage the use of the CFT as widely as possible.
10. **Article 7:** refers to the ‘moratorium’ period which will prevent creditors from proceeding with certain diligences to enforce debts for a specified period of time. The moratorium is activated when a debtor gives notice of the intention to apply for a sequestration, a trust deed seeking protected status or a debt payment programme under the Debt Arrangement Scheme. Article 7 provides for a narrow transition provision so that debtors who give notice before 1 April 2015 will be covered under 4A or 4B of the 1985 Act<sup>2</sup>, as long as their notice is received on or after 1 April 2015 in the form required under the 1985 Act (prescribed in regulation 22 of the Bankruptcy (Scotland) Regulations 2014) and as if they gave notice on that date.
11. **Article 8:** provides that section 24(1) does not apply to any petitions for recall presented before 1 April 2015.
12. The changes made by sections 26 and 27, providing for the AiB instead of the sheriff to be able to grant recall of sequestration, where the recall petition is raised only on the grounds that the debtor can pay the debtor’s debts in full, in any event will only apply to recall petitions presented on or after 1 April 2015.

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(1) To be made in Common Financial Tool etc. (Scotland) Regulations 2014

(2) Section 4A and 4B are inserted by section 8 of the Act.

13. **Article 9:** provides that section 25 of the 2014 Act which transfers applications from trustees for directions on matters in the sequestration from the sheriff to AiB will only apply to applications made on or after 1 April 2015.
14. **Article 10:** provides that sections 38 to 42 of the 2014 Act do not apply to decisions by AiB before 1 April 2015 which would be subject to review by the AiB under the relevant sections of the 1985 Act. These sections relate to a new review process introduced by the 2014 Act which allows relevant persons to apply to AiB for a review of a decision. An appeal can then also be taken to the sheriff. Where the AiB makes a decision which would otherwise be affected by sections 38 to 42 prior to 1 April 2015, the review functions cannot be applied to that decision and those seeking a review should proceed in accordance with the 1985 Act as in force prior to 1 April 2015 including where appropriate to appeal directly to the sheriff. Article 10(2) also provides that if court proceedings to review such a decision of the AiB have been raised before 1 April 2015, the new review provisions will not apply.
15. **Article 11:** provides that proceedings in relation to the power of the trustee over the debtor's family home does not apply in circumstances where court proceedings (and any appeal) have commenced prior to 1 April 2015.
16. **Article 12:** provides that nothing brought into force by this Order, other than section 8 (the moratorium on diligence), affects any trust deed granted before 1 April 2015 and the 1985 Act as in force before 1 April 2015 continues to apply to those trust deeds.

## Consultation

17. The policy options in relation to the 2014 Act were subject of the "Bankruptcy Law Reform Consultation"  
<http://www.scotland.gov.uk/Publications/2012/02/6283n> published on 24th February 2012 until 18 May 2012. In addition to the Consultation on Bankruptcy Law Reform, the Scottish Government has held a rolling programme of stakeholder events in December 2012 to August 2014, giving stakeholders the opportunity to raise their concerns. These events took place in Edinburgh, Glasgow, Inverness and Aberdeen. Further details of these events can be found on AiB's website. The Scottish Government's position, throughout the development of the Bankruptcy and Debt Advice (Scotland) Act 2014 supporting regulations has been that the majority of the provisions in the Act and supporting regulations will come into force on 1 April 2015 and this was confirmed to stakeholders who raised the issue, in the course of our stakeholder events. AiB have also engaged extensively with the Scottish Civil Justice Council in relation to the transitional arrangements for the transfer of functions from the courts to AiB.

## Impact Assessments

18. An Equality Impact Assessment ("EQIA") has been completed on the overall changes implemented by the 2014 Act. As the in-depth process of consultation and stakeholder engagement, equality questionnaire and framing exercise carried out for

the purposes of the 2014 Act EQIA did not identify any equality issues or reveal that the provisions in the 2014 Act would create barriers for any of the protected characteristics, no further impact assessment is required for this Order. The insolvency regime in Scotland is available to all, irrespective of the debtor's age, race, gender, disability or sexual orientation. A copy of the EQIA can be found on the Scottish Government website at: [www.scotland.gov.uk](http://www.scotland.gov.uk)

19. A copy of the Business and Regulatory Impact assessment for the Bankruptcy and Debt Advice (Scotland) Bill can be found on the Scottish Government website at: <http://www.scotland.gov.uk/Resource/0042/00426999.pdf>

### **Financial Effects**

20. A Financial Memorandum was published for the Bankruptcy and Debt Advice (Scotland) Bill and can be found at:

[http://www.scottish.parliament.uk/S4\\_Bills/Bankruptcy%20and%20Debt%20Advice%20\(Scotland\)%20Bill/b34as4-stage2-supp-fm.pdf](http://www.scottish.parliament.uk/S4_Bills/Bankruptcy%20and%20Debt%20Advice%20(Scotland)%20Bill/b34as4-stage2-supp-fm.pdf)

### **The Accountant in Bankruptcy on behalf of the Scottish Government**

1 October 2014