

EXPLANATORY MEMORANDUM TO
THE BANKRUPTCY (SCOTLAND) ACT 2016 (CONSEQUENTIAL PROVISIONS
AND MODIFICATIONS) ORDER 2016

2016 No. 1034

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This Order is made in consequence of the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) to consolidate bankruptcy legislation in Scotland, primarily the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”), the Bankruptcy and Debt Advice (Scotland) Act 2014 and the Protected Trust Deeds (Scotland) Regulations 2013 (S.I. 2013/318). The Order would update the law in those parts of the UK outside Scotland, and UK statute in relation to Scotland, as a consequence of the 2016 Act.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

- 4.1 This Order is to be made in exercise of the powers conferred by section 104 of the Scotland Act 1998 (“the 1998 Act”). Section 104 of the 1998 Act provides for subordinate legislation to be made by the UK Government, which contains provisions that are necessary or expedient in consequence of any provision made by, or under, an Act of the Scottish Parliament. In this case, provision is required in consequence of the 2016 Act, which was passed by the Scottish Parliament in March 2016 to consolidate the law of personal insolvency in Scotland. The intention is to bring the Order into force on 30 November 2016 to coincide with the commencement of the 2016 Act, together with updated subordinate legislation. The 2016 Act as a consolidation Act makes no changes to Scottish bankruptcy law. The Order is subject to affirmative resolution procedure in the UK Parliament.
- 4.2 The Order, among other things, makes the changes required to the law of England and Wales, and of Northern Ireland, as a result of the 2016 Act.
- 4.3 Articles 2 to 4 and 6 of the Order restate and consolidate the provisions of the 1985 Act which currently extend beyond Scotland, by virtue of section 78(6) of that Act.
- 4.4 Article 5 restates provisions on regulation-making powers of the Secretary of State consolidated in the 2016 Act, in particular for UK Parliamentary procedure.

- 4.5 Schedule 1 to the Order makes the required consequential changes, principally to primary legislation, which touch on reserved matters. It updates that legislation to refer to provisions of the 2016 Act consolidation, rather than the corresponding provisions of the 1985 Act or the Protected Trust Deeds (Scotland) Regulations 2013. Part 2 of that Schedule updates four items of secondary legislation in the same way.
- 4.6 The provisions of the 1985 Act and the 2016 Act referred to include those amended by section 4 of the 2014 Act, which replaced Income Payment Orders under section 32(2) of the 1985 Act (and related Income Payment Agreements) with Debtor Contribution Orders – see paragraphs 1, 13(4) or 14(2)(b)(ii) and 25(9)(b)(i) of Schedule 1 to the Order. Some amendments also replace references to ‘permanent trustee’ with ‘trustee’ as the former is no longer required in line with changes made by the Bankruptcy & Diligence etc. (Scotland) Act 2007 (asp 3).
- 4.7 The enactments mentioned in Schedule 2 to the Order are repealed or revoked to the extent mentioned in column 2 of that Schedule.
- 4.8 Under article 7, the changes will not apply to bankruptcies petitioned or applied for before the coming into force of the Order, or to trust deeds for the benefit of creditors executed before that date.

5. Extent and Territorial Application

- 5.1 This Order extends to the whole of the UK, other than articles 4 and 6, which extend to England and Wales, and Northern Ireland.
- 5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.

6. European Convention on Human Rights

- 6.1 The Secretary of State for Scotland, the Rt Hon David Mundell MP, has made the following statement regarding Human Rights:
- 6.2 “In my view the provisions of the Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 In their eighth programme of Law Reform, the Scottish Law Commission (“the SLC”), at the suggestion of Accountant in Bankruptcy officials on behalf of the Scottish Government, undertook a project to consolidate bankruptcy legislation in Scotland.
- 7.2 The main purpose of the consolidation is to bring together Scottish laws on insolvency to make bankruptcy policy more accessible, both for the money advice community and those experiencing financial difficulties. This resulted in the 2016 Act.

- 7.3 The main legislation consolidated in the 2016 Act is the Bankruptcy (Scotland) Act 1985. The 2016 Act also takes in the Bankruptcy and Debt Advice (Scotland) Act 2014 which amended the 1985 Act following a programme of consultation and engagement with stakeholders. The wider legislative programme of reforms also amended the regime on voluntary Protected Trust Deeds for the benefit of creditors: subordinate legislation also consolidated into Part 14 of the 2016 Act.

Consolidation

- 7.4 This Order stands alone (though it forms part of a consolidation with the 2016 Act).

8. Consultation outcome

- 8.1 No formal consultation by the Government has taken place on the Order: Orders taken forward under section 104 of the 1998 Act are not usually consulted on as they are made in consequence of Acts which have previously been the subject of separate consultation exercises.
- 8.2 The Scottish Law Commission (SLC), however, consulted fully both on a draft Bill and accompanying Order under section 104 of the 1998 Act. The consultation is available on-line¹, and resulted in the SLC *Report on the Consolidation of Bankruptcy Legislation in Scotland*² on which the 2016 Act and the Order are based. The Scottish Parliament also noted informally a draft of the Order provided for information with the Bill which became the 2016 Act.
- 8.3 The 2016 Act is a consolidation Bill and therefore makes no changes to the law of bankruptcy.

9. Guidance

- 9.1 This Order stands alone, and guidance is not necessary.

10. Impact

- 10.1 This instrument has no impact of a regulatory nature on the private sector or civil society organisations and no significant imposition or reduction of costs is foreseen.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.

11. Regulating small business

- 11.1 The legislation will not have any significant impact on activities undertaken by small businesses.

12. Monitoring & review

- 12.1 The effect of this Order is purely consequential. It does not create new policy or frameworks and, therefore, no monitoring or review of the effects of this Order are required.

¹ dated August 2011 - <http://www.scotlawcom.gov.uk/publications/consultation-papers-and-other-documents/>

²http://www.scotlawcom.gov.uk/files/7113/6853/1202/Report_on_the_Consolidation_of_Bankruptcy_Legislation_in_Scotland.pdf

13. Contact

- 13.1 Stuart Matheson at the Scotland Office (telephone: 0131 244 9029 or email: stuart.matheson@scotlandoffice.gsi.gov.uk) can answer any queries regarding the instrument.