

BANKRUPTCY AND DEBT ADVICE (SCOTLAND) ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Discharge following sequestration

Section 17 – Discharge of debtor

34. This section replaces section 54 of the 1985 Act ('Automatic discharge of the debtor') with 3 new sections to replace the existing process whereby a trustee is required to apply to the sheriff to defer an automatic discharge, with a new process whereby the trustee (for cases where AiB is not the trustee) must prepare and send a report to AiB without delay after 10 months from when sequestration was awarded. The report will include information on the debtor's assets, liabilities, financial and business affairs. It will also contain information on the conduct of the debtor and whether they have cooperated with their trustee, and complied with the statement of undertaking. Section 64 of the 1985 Act sets out the debtor's responsibilities in cooperating generally in sequestration—failure to take every practicable step necessary to enable the trustee to perform the trustee's functions under the Act can result in the debtor having to appear before the sheriff to explain non-compliance, which can result in a fine or imprisonment.
35. The trustee must also send a copy of the report to the debtor and all known creditors to allow them to make representations within 28 days to AiB. Decisions by AiB to grant or refuse to grant discharge will be able to be reviewed by AiB and then appealed by the trustee or any creditor to the sheriff (see section 54B). A decision to discharge the debtor will not take effect until a 14 day period has elapsed beginning with the day of notification of the decision.
36. For cases where AiB is the trustee, the new section 54A ('Discharge where Accountant in Bankruptcy the trustee') provides that AiB should, instead of applying, intimate a report to the debtor and any creditor, together with a proposal for whether discharge is to be granted. The trustee, the debtor or the creditor will be able to apply to review the decision within 14 days, as above, and to make representations to AiB within 21 day thereafter, after which AiB must award or refuse discharge. That award or refusal is to be appealable to the sheriff as with a decision on an application. A discharge will not take effect until the 14 day period has elapsed. Further provision is made in section 54B for reviews and appeals under these sections.

Section 18 – Repeal of discharge on composition

37. This section repeals section 56 ('discharge on composition'), section 56K ('effect of discharge on approval of offer of composition') of and schedule 4 to the 1985 Act. Changes made by this section provide for the removal from sequestration of the option for the debtor to propose a composition settlement (a debt relief settlement where debtors must offer partial repayment of no less than 25 pence in the pound) with the creditors in return for a final discharge of their claims.

Section 19 – Deferral of discharge where debtor cannot be traced

38. This section inserts 4 new sections after section 54C of the 1985 Act (inserted by section 7 as noted above), in order to create a requirement on trustees to act as set out in those sections, in circumstances where the debtor's whereabouts cannot be ascertained and the trustee is, therefore, unable to carry out their usual functions.
39. The new section 54D provides that, if the trustee is unable to ascertain the debtor's whereabouts, the trustee must submit to AiB, no sooner than 8 months and no later than 10 months after the date of award of sequestration, a notice to the effect that, despite investigation into the debtor's whereabouts, the trustee has been unable to locate the debtor. If AiB is satisfied that it would not be reasonably practicable for the trustee to continue to search for the debtor, then AiB will issue a certificate deferring the debtor's discharge indefinitely.
40. If AiB issues such a certificate then section 54E allows the trustee to apply to AiB to resign from office, no later than 6 months after the indefinite discharge has been agreed. However, should the debtor be traced before this application is made, the trustee should continue to administer the case as nominated. Where a trustee wishes to resign under the above circumstances, and the trustee has satisfied AiB that the trustee has attempted to trace the debtor and that it is not practical or cost effective to continue the search, AiB must agree to the resignation of the trustee and AiB becomes trustee. The costs incurred in the administration of the case, prior to the case being transferred to AiB, are to lie with the original trustee. Thereafter, should the debtor be traced, the trustee will be able to submit a claim in the sequestration.
41. Section 54F provides for where the debtor subsequently makes contact with the trustee. In such cases, if the trustee is satisfied that the debtor has cooperated in the administration of the estate, made a full and fair surrender of the debtor's estate, a full disclosure of financial and business affairs and the provision of any relevant account or other related documentation, the trustee must send a report in accordance with section 54(5) to AiB, no later than 10 months after the debtor makes contact or is traced by the trustee. This means that the report must include information about the debtor's assets, liabilities, financial affairs and business affairs as well as their conduct in relation to the sequestration. AiB will consider the report and any representations made before deciding on whether to grant discharge or not.
42. Section 54G provides for the debtor or any creditor to be able to apply for a review of decisions by AiB to discharge or to refuse to discharge a debtor under section 54F, and for onward appeal to the sheriff. Separately to the process where the debtor cannot be traced, if a sequestration was awarded wholly inappropriately, the debtor may retain the usual rights to recall the sequestration (now exercisable at any time – section 26(1) (b) of the Act).

Section 20 – Unclaimed dividends and unapplied balances

43. This section amends section 57 ('Discharge of trustee') of the 1985 Act in order to simplify the process and specify that all unclaimed funds should be paid to AiB who will then consign or otherwise manage the funds and return the funds to the public purse on expiry of the specified 7 year period as at present.

Section 21 – Assets discovered after trustee discharge: appointment of trustee

44. This section inserts 3 new sections after section 58A of the 1985 Act. The new section 58B enables AiB to reappoint the previous trustee in a sequestration where after the trustee's discharge, but before the expiry of 5 years from the date of sequestration, assets valued at £1,000 or more are identified that would have vested in the trustee prior to the debtor's discharge. Some assets which come to light are claimable by the trustee for creditors after the discharge of the debtor. To ensure cases are not reopened without good cause under this procedure, section 58B provides that the value of the

*These notes relate to the Bankruptcy and Debt Advice (Scotland)
Act 2014 (asp 11) which received Royal Assent on 29 April 2014*

newly identified estate should be greater than the costs for seeking re-appointment as trustee, and the potential costs for realising the identified new asset (section 58B(4)). In order to reopen the sequestration under this procedure, the trustee would have to demonstrate:

- the estimated value of the newly identified estate;
 - the reason why the newly identified estate forms part of the debtor's estate; and
 - the reason why the asset was not recovered.
45. Section 58C creates requirements that the debtor and any other relevant parties should be informed that the trustee (or AiB) intends to seek reappointment as soon as practicable after reappointment, and that the debtor is reminded of the requirement to cooperate with the trustee in any investigation or realisation of assets.
46. Section 58D enables the debtor or other relevant parties to appeal to the sheriff against the reappointment, within 14 days of notification if they disagree with AiB's decision whether to reappoint a trustee. Should assets be identified more than 12 months after discharge, the trustee will only be able to be reappointed with agreement of the sheriff, as under the existing law.