

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 1 – Bankruptcy

Duration of bankruptcy

Section 1 – Discharge of debtor

6. This section provides for the reduction of the automatic bankruptcy period from 3 years to 1 year by amending section 54 of the 1985 Act. The title of section 54 has been changed to reflect the abolition of the 3-year period.
7. Transitional provisions may be made under section 225 of this Act to deal with individuals who have already been sequestrated when this section is commenced, have not been discharged at that date.

Bankruptcy restrictions orders and undertakings

Section 2 – Bankruptcy restrictions orders and undertakings

8. Section 2(1) of this Act inserts new sections 56A to 56K into the 1985 Act which introduce bankruptcy restrictions orders (BROs) and bankruptcy restrictions undertakings (BRUs). Currently all undischarged bankrupts are subject to a number of restrictions and disqualifications for the period up to discharge. BROs and BRUs are a way of imposing particular restrictions on debtors for a particular period after discharge depending on the debtor's conduct in relation to the bankruptcy.

New section 56A – Bankruptcy restrictions order

9. Section 56A provides that an application for a BRO can be made only if the debtor is a natural person. The BRO and BRU regime does not apply to partnerships and limited partnerships. The application can be made only by the Accountant in Bankruptcy (the "AiB") and is made to a sheriff.

New section 56B – Grounds for making order

10. Section 56B details the kinds of conduct the sheriff has to take account of when deciding whether to grant an application for a BRO. The conduct of the debtor both before and after the date of sequestration can be taken into account. The sheriff is to take into account factors including possible gratuitous alienations and unfair preferences. In addition to taking account of gratuitous alienations and unfair preferences within

the meaning of those terms as defined in the 1985 Act, the sheriff can consider any alienation or preference which is challengeable under common law.

New section 56C – Application of section 67(9)

11. Section 56C provides the sheriff with the power to apply section 67(9) of the 1985 Act to the debtor during the time the BRO is in force. Section 67(9) states that a debtor, who has obtained credit in excess of £500 in a single transaction without informing the lender of the debtor's status as an undischarged bankrupt or as someone subject to a BRO or BRU made in England and Wales, will have committed an offence. This offence will also apply to any debtor who, over a number of transactions, obtains any amount of credit above a maximum level of £1,000. The effect of section 56C is to permit the sheriff to apply these restrictions to a debtor subject to a BRO made in Scotland under section 56B.

New section 56D – Timing of application for order

12. Section 56D details the time limits within which an application for a BRO can be made. The application must be made after the date of sequestration and before the date of the debtor's discharge from bankruptcy. Any applications submitted after the date of the debtor's discharge will be allowed only with the sheriff's permission.

New section 56E – Duration of order and application for annulment

13. Section 56E provides details of the start and end dates of any BRO. Subsection (2) states that the minimum time a BRO can run is 2 years and the maximum time is 15 years from the date of the order. Subsection (3) provides that the sheriff may annul or vary a BRO if the debtor applies for it. No provision is made for the grounds on which a sheriff may annul or vary a BRO, it is left to the sheriff to consider whether such action is appropriate in all the circumstances.

New section 56F – Interim bankruptcy restrictions order

14. Subsections (1) to (3) of section 56F provide for the application for and the making of interim BROs.
15. Interim BROs can be made by the sheriff at any time between the making of an application for a full BRO and the decision on the application for the full BRO. The sheriff would have to be satisfied that, based on the case presented by the AiB, the full BRO application is likely to be successful and that making an interim order is in the public interest.
16. Subsections (4) to (6) provide for the effect and duration of an interim order. An interim order has effect as if it was a full BRO and restrictions will apply on the making of the interim BRO. Where an interim order is followed by a full BRO, the duration of the full order set out under section 56E starts from the date the interim order was made.

New section 56G – Bankruptcy restrictions undertaking

17. Section 56G provides for bankruptcy restrictions undertakings (BRUs). A BRU is an agreement between the debtor and the AiB whereby the debtor is bound by specified restrictions without the need for an application to the sheriff. BRUs can last for the same length of time as BROs and have the same force and effect.

New section 56H – Bankruptcy restrictions undertakings: application of section 67(9)

18. Section 56H provides for section 67(9) of the 1985 Act to apply to a debtor who is subject to a BRU if the debtor has specified in the undertaking that it is to apply and the AiB has approved the undertaking on those terms. Section 67(9) states that a debtor,

who has obtained credit in excess of £500 in a single transaction without informing the lender of the debtor's status as an undischarged bankrupt or as someone subject to a BRO or BRU made in England and Wales, will have committed an offence. This offence will also apply to any debtor who, over a number of transactions, obtains any amount of credit above a maximum level of £1,000. The effect of section 56H is to apply these restrictions to a debtor subject to a BRU entered into in Scotland under section 56G.

New section 56J– Effect of recall of sequestration

19. Section 56J addresses what will happen to a BRO or BRU that is in force when a debtor's sequestration is recalled. The sheriff has discretion to recall any BRU or BRO in place. If the sheriff does not recall the BRO or BRU, the debtor has 28 days to appeal. After a sequestration has been recalled, no new BRO or BRU can be made even if, in the case of a BRO, an application had been made and was pending before the sheriff.

New section 56K – Effect of discharge on approval of offer of composition

20. Section 56K provides for the continuation of a BRO or BRU if a debtor obtains a discharge by way of an offer of composition.
21. Section 2(2) of this Act amends section 1A(1)(b) of the 1985 Act with the effect that the AiB is placed under a duty to include BRUs and BROs in the register of insolvencies.

Effect of bankruptcy restrictions orders and undertakings

Section 3 – Disqualification from being appointed as receiver

22. This section extends the restriction on those who are allowed to be a receiver in Scotland, to include those debtors who are subject to a BRO or BRU made under the new provisions in the 1985 Act or under the equivalent regime in England and Wales.

Section 4 – Disqualification for nomination, election and holding office as member of local authority

23. This section extends the restriction on those who are allowed to hold office as a member of a local authority, by inserting section 31(1)(ba) into the Local Government Scotland Act 1973, to include those debtors who are subject to a BRO or BRU made under the 1985 Act or under the equivalent regime in England and Wales.

Section 5 – Orders relating to disqualification

24. This section inserts new section 71B into the 1985 Act which gives the Scottish Ministers power to make an order that can modify or amend the effect of a provision which restricts or prevents debtors (or particular categories of debtors) from holding particular offices or positions or from being members of particular bodies or groups. Such provisions are given the label “disqualification provisions”. One of the things which an order under section 71B can do is extend a disqualification provision to persons subject to a BRO or BRU. Orders under section 71B are subject to the affirmative resolution procedure of the Scottish Parliament.

The trustee in the sequestration

Section 6 – Amalgamation of offices of interim trustee and permanent trustee

25. This section amends sections 2 and 3 of the 1985 Act. It has the effect, when read together with the repeal of section 2(4) of the 1985 Act (see Part 1 of schedule 6 to this Act), that in a sequestration where an interim trustee has been appointed, he or she is no longer required to—

- ascertain the reasons for and circumstances surrounding the insolvency; or

- ascertain the state of the debtor's liabilities and assets.
26. Those functions will instead be carried out by the trustee in sequestration who is appointed when sequestration is awarded and who combines the existing roles of the interim trustee and permanent trustee from the date of the award.
 27. The interim trustee now has the sole function of safeguarding the debtor's estate pending a decision on the award of sequestration. The interim trustee can now be in place only for the limited period between the creditor presenting the petition for sequestration and the award of (or refusal to award) sequestration.
 28. The interim trustee is obliged to co-operate with the AiB and supply whatever information the AiB may need to carry out the AiB's functions (in particular the AiB has a general supervisory function in relation to all interim trustees (see section 1A(1)(a)(i) of the 1985 Act)). The obligation to supply information applies to both interim trustees who are in office and who have left office, either because the case was dismissed or another trustee has replaced them. If an interim trustee's obligation under this provision was extinguished after they left office, the AiB's ability to supervise and investigate the way in which a sequestration was managed would be restricted. The AiB would not be able to rely on getting information from an interim trustee unless they remained in office.
 29. Subsection (3) provides for all references to interim trustees and permanent trustees in other legislation to be read as references to the new style trustee in sequestration unless it is clear from the context that a reference to the interim trustee should continue to be a reference to the new style of interim trustee.

Section 7 – Repeal of trustee's residence requirement

30. **Section 7** removes the requirements in sections 2(3)(a) and 24(2)(d) of the 1985 Act that all trustees must live within the jurisdiction of the Court of Session.

Section 8 – Duties of trustee

31. **Section 8(1)** inserts new subsections (3A) and (8) into section 3 of the 1985 Act, which as amended by this Act provides for the functions of the trustee in sequestration.
32. Section 3(3A) of the 1985 Act clarifies that the trustee has a duty to report any behaviour of the debtor to the AiB, if the trustee considers that the behaviour would merit a bankruptcy restrictions order or undertaking. Any such report will be absolutely privileged.
33. Section 3(8) of the 1985 Act qualifies the responsibility of the trustee to adhere to some of the requirements of section 3. In particular, the trustee is now given leeway to depart from functions of:
 - recovering, managing and realising the debtor's estate;
 - distributing the estate amongst the creditors according to their respective entitlements;
 - ascertaining the reasons for the debtor's insolvency, and the circumstances surrounding it; and
 - ascertaining the state of the debtor's liabilities and asset,if the trustee thinks that doing so is in the best interests of the creditors and would be financially beneficial to the estate.
34. In a similar vein, subsection (2) inserts new subsection (9) into section 39 of the 1985 Act, which provides that the trustee need not do anything permitted by section 39 nor

comply with the requirements about realising secured property unless that is in the best interests of the creditors and would be financially beneficial to the estate.

35. Subsection (3), by inserting a new subsection (2A) into section 49 of the 1985 Act, also imposes an obligation on the trustee to circulate details of the creditors' claims and the amount accepted to the debtor and all known creditors.

Section 9 – Grounds for resignation or removal of trustee

36. This section deals with the reasons for which an interim trustee or a trustee can resign or be removed from office.
37. Subsection (1) makes amendments to section 13 of the 1985 Act removing the interim trustee's right to resign "for any reason whatsoever". The interim trustee must now be incapable of acting, as defined by section 1(6) of the [Adults with Incapacity \(Scotland\) Act 2000 \(asp 4\)](#), or be incapacitated in some other way.
38. Subsection (2) inserts words into section 28(1) of the 1985 Act making it clear that the trustee in sequestration continues to be permitted to resign if he or she is unable for any reason to act as trustee.

Section 10 – Termination of interim trustee's functions

39. This section inserts new sections 13A and 13B into the 1985 Act.

New section 13A – Termination of interim trustee's functions where not appointed as trustee

40. Section 13A provides for the termination of an interim trustee's functions when a sequestration petition is dismissed or sequestration is awarded and someone other than the interim trustee is appointed as trustee in sequestration. The interim trustee must, within 3 months of the determination of the petition, submit his or her accounts along with any claim for remuneration to the AiB for audit (this does not apply under section 13B where the AiB is the interim trustee). The interim trustee is also obliged to circulate copies of the accounts to the debtor, the creditors and the new trustee. All of these people are permitted to appeal to the sheriff against the AiB's determination fixing the fees and outlays payable to the interim trustee.
41. The sheriff may make such determination of who is liable for the fees and outlays of the interim trustee appointed under section 2(5) of the 1985 Act as may be appropriate, with the determination of that amount to be by AiB, whose decision is final.
42. The amendments of the 1985 Act made by schedule 1 to this Act mean that there would be no mechanism for discharging interim trustees, within the new meaning of that term. Sections 13A(6) to (11) provide that mechanism.
43. Subsections (11), (12), (13) and (14) of section 13A clarify what happens when the AiB grants, or refuses to grant, a discharge to an interim trustee. The debtor, the creditors, the interim trustee or the new trustee can appeal to the sheriff against the decision of the AiB. If the appeal is successful the sheriff can order the AiB to either issue a certificate of discharge that has been refused, or withdraw one that has been granted.

New section 13B – Termination of Accountant in Bankruptcy's functions as interim trustee where not appointed as trustee

44. New section 13B of the 1985 Act is similar to section 13A but caters for the case where the AiB was the interim trustee but does not become the replacement trustee when sequestration is awarded.

Section 11 – Statutory meeting and election of trustee

45. An interim trustee, other than the AiB, is currently obliged to call and hold a statutory meeting of creditors within 60 days of the date of the award of sequestration. Subsections (1) and (2) of section 11 repeal section 21 and amend section 21A of the 1985 Act so that the trustee in sequestration may hold a statutory meeting at such time and place as the trustee may determine, and shall give notice to the creditors of any such meeting not later than 60 days after the date of award of the sequestration (and not the date of the sequestration which, in a creditor petition, is the date of the warrant for service on the debtor and which is currently the starting point for the time limit when the AiB is the trustee).
46. Subsections (4) and (5), combined with various amendments made by schedule 1, make alterations to the 1985 Act dealing with the process of voting for a trustee when a statutory meeting is called. Under the new process the creditors can vote to retain the trustee in sequestration who was appointed on the award being made or they can vote to replace that person with a new trustee in sequestration.

Section 12 – Replacement of trustee acting in more than one sequestration

47. Currently, the AiB must make applications for each case and in every sheriff court in which an insolvency practitioner was appointed as trustee, when that trustee is no longer qualified to act. This section inserts a new section 28A into the 1985 Act which simplifies this procedure to allow the AiB to make one application, to the Court of Session, covering all cases and seeking a court order filling the vacated offices of the original trustee with a new trustee.
48. An Act of Sederunt (that is to say court rules) may provide that intimation of the appointment of a new trustee under section 28A is made to the sheriff who awarded the sequestration or to the sheriff to whom it is transferred.

Section 13 – Requirement to hold money in interest bearing account

49. Section 43 of the 1985 Act provides that monies received by a trustee must be deposited in an appropriate bank or institution, as defined in section 73(1) of the Act. This section amends section 43 to introduce a requirement for monies to be deposited in an interest bearing account.

Debtor applications

Section 14 – Debtor applications

50. Section 14(1) of this Act extends section 1A of the 1985 Act to add determining debtor applications for sequestration to the other functions of the AiB.
51. A “debtor application” is the name given to the new process by which a debtor applies to the AiB for his or her estate to be sequestrated. This replaces the current process where a debtor has to petition the court. Creditors seeking sequestration of a debtor’s estate will continue to have to petition the sheriff (see the changes made by section 16 of this Act).
52. Subsections (2) to (8) make a number of amendments of the 1985 Act setting up the procedure for debtor applications.
53. Subsection (2) inserts new subsections (1A) to (1C) into section 2 of the 1985 Act giving the AiB power to appoint a trustee in sequestration following a debtor application or deeming the AiB to be the trustee if no-one else is appointed. In a case where the debtor meets the criteria for being a low income, low asset debtor (under new section 5A of the 1985 Act, inserted by section 15(2) of this Act) subsection (1C) provides that the AiB is to be the trustee.

54. Subsections (3)(a) and (4) make amendments setting out who can make debtor applications and who must proceed by petition to the sheriff.
55. Subsection (3)(b) inserts new subsections (4B) and (4C) into section 5 of the 1985 Act, providing that debtor applications are to be made to the AiB, and giving the Scottish Ministers power to make regulations setting out the procedure in and form of debtor applications, and setting the fees that the AiB may charge in relation to those applications.
56. Subsection (5) inserts new section 6B into the 1985 Act which provides that a debtor making a debtor application has to state whether the debtor's main place of business is in the UK or elsewhere in the EU or whether the debtor has an establishment in the UK or elsewhere in the EU. If the debtor is already subject to proceedings elsewhere in the EU and those proceedings are regarded under EU law as main proceedings for insolvency then the debtor has to send a copy of the debtor application to the person in charge of those proceedings.
57. Subsection (6) inserts new section 8A into the 1985 Act which makes provision for debtor applications in similar terms to the provisions relating to petitions in section 8 of that Act.
58. Subsection (7) makes amendments to section 9 of the 1985 Act. It provides that the AiB may determine debtor applications from debtors who live in Scotland, have an established place of business in Scotland or, if the debtor is not a natural person, who were constituted under Scots law and carried on business in Scotland at any time.

Section 15 – Debtor applications by low income, low asset debtors

59. Section 15(1) of this section inserts into section 5(2B)(c) of the 1985 Act an additional criteria under which a debtor can apply to the AiB for sequestration. The new criterion is that the debtor is unable to pay his or her debts and meets the conditions listed in new section 5A of the 1985 Act. Note, however, that the new criteria is additional to the existing requirements of sub-section (2B) of section 5 of the 1985 Act, and debtor will therefore still have to satisfy the qualifying debt limit threshold and the bar on being sequestrated twice in any 5-year period as set out in paragraphs (a) and (b) of that subsection.
60. Subsection (2) inserts new section 5A into the 1985 Act.

New section 5A – Debtor applications by low income, low asset debtors

61. Section 5A sets out the conditions under which the new criteria in section 5(2B)(c) will be met. The conditions are set out in subsections (2) to (4) and generally relate to the debtor having a low level of income and a minimal amount of assets. Subsection (5) gives the Scottish Ministers the power to make regulations setting out what income and assets are to be included and how they are to be determined for the purposes of subsections (2) to (4). It also provides the power to add further conditions and to vary or remove those further conditions. The power in subsection (5) is subject to the affirmative resolution procedure of the Scottish Parliament (see new section 72(2) and (3) of the 1985 Act as inserted by section 35 of this Act).

Jurisdiction

Section 16 – Sequestration proceedings to be competent only before sheriff

62. This section provides for the removal of the jurisdiction of the Court of Session in respect of petitions for sequestration or for recall of sequestrations, which are to be heard by the sheriff alone. Actions of reduction and suspension in relation to a sequestration will continue to be dealt with by the Court of Session.

63. This section amends several sections of the 1985 Act, including section 15 which makes further provisions relating to sequestrations. It should be noted that appeals against the AiB's refusal to award sequestration on a debtor application will also be heard by the sheriff (see section 15(3A) of the 1985 Act, inserted by paragraph 13 of schedule 1 to this Act), and appeals against a decision of the sheriff to transfer a sequestration to any other sheriff will be heard by the sheriff principal (see section 15(2A) of the 1985 Act, inserted by subsection (2)(c) of this section).
64. There are a number of amendments of the 1985 Act contained in schedule 1 which are consequential on the changes made by this section.

Vesting of estate and dealings of debtor

Section 17 - Vesting of estate and dealings of debtor

65. This section amends sections 31 and 32 of the 1985 Act. These changes arise from issues which first came to light in the case of *Sharp v Thompson*, 1997 SC (HL) 66. Although that case concerned a person who had purchased property from a debtor subject to a floating charge, it highlighted issues relevant to sequestration. The Scottish Law Commission issued a discussion paper (No. 114) in 2001 dealing with these issues and proposing some changes to the law relating to sequestration. Then in 2004 the case of *Burnett's Tr. v Grainger*, 2004 SC (HL) 19, which concerned a sequestrated debtor, clarified the position of a purchaser whose title was unregistered and reinforced the need for some of the reforms proposed by the Law Commission. This section makes a number of those proposed changes in light of the decision in *Burnett's Tr.*
66. This section does four things (all of which are connected by a general theme of protecting a person who has for value purchased heritable property from a debtor, whether before or after the debtor goes bankrupt).
67. First, it provides that a trustee in sequestration is precluded from registering title to heritable property of a debtor for 28 days after the award of sequestration is itself registered. That enables a third party who has purchased property in good faith from a debtor to complete title by registration provided it is done with expedition (see new section 31(1A) and (1B) of the 1985 Act inserted by subsection (1)(a)).
68. Secondly, it makes clear that heritable property which a debtor has sold or otherwise transferred remains part of the debtor's estate which is given over to the trustee in sequestration if the person to whom the property is transferred has yet to complete title by registration (this is linked to the first purpose in that a trustee's rights can be defeated by the other person if that person registers first, and that person has a 28 day head start). This is considered to be the existing position in law but it is considered that this is based on the fact that section 31 of the 1985 Act treats sequestration as if it was an adjudication. The diligence of adjudication is abolished by this Bill so the position needs to be clarified (see new section 31(8)(aa) of the 1985 Act inserted by subsection (1)(b)).
69. Thirdly, this section makes clear that dealings with a debtor after the date of sequestration are void in any question with the trustee where they relate to property which the trustee gets at the date of sequestration **and** where they relate to property the debtor acquires after sequestration but which is passed to the trustee (the position regarding the latter is currently unclear, this provision resolves that uncertainty) (see the amendment of section 32(8) of the 1985 Act made by subsection (2)(a)).
70. Finally, the amendments make it clear that where a person deals with a debtor after the date of sequestration the dealing is not void if it relates to incorporeal (i.e. intangible) or heritable property, was done in good faith and for an adequate value, was done during the period of 7 days after the sequestration is registered (which allows for the period, sometimes called a "registration gap", when a sequestration has been granted but there has not been enough time for it to appear in any register) and the person

had no knowledge (and ought not to have had knowledge) of the sequestration. This change to the law on dealings with a debtor protects persons who deal with the debtor right around the time a sequestration is awarded and who could not know about the sequestration even if they take all the normal steps (i.e. they search the appropriate registers) (see the amendment of section 32(9) made by, and new section 32(9ZA) inserted by, subsection (2)(b) and (c)).

Income received by debtor after sequestration

Section 18 – Income received by debtor after sequestration

71. This section amends section 32 of the 1985 Act introducing income payment orders (IPOs) and income payment agreements (IPAs). An IPO is an order requiring the debtor to pay to the trustee a proportion of any income the debtor receives after the award of sequestration. The order may require a third party to pay income due to the debtor straight to the trustee instead. It must, subject to one exception (see paragraph 72 below), be applied for by the trustee before the date of the debtor's discharge. It can run for a maximum period of 3 years and the application must state what period is being applied for. Debtors may be subject to criminal penalties if they default on payments (see new subsection (2ZA) of section 32).
72. An IPA is a formal written agreement between the debtor and the trustee in the same terms as an IPO, but without the requirement of court involvement, and without the possibility of criminal sanctions for defaulting (see new subsection (4F) of section 32). Section 32(4L) of the 1985 Act provides for one exception to the rule that an IPO cannot be applied for after the debtor has been discharged from sequestration. If a debtor has failed to maintain payments agreed under an IPA the trustee can apply to the sheriff to have the remaining payments due converted to an IPO. The application can be made before or after the date of the debtor's discharge.

Debtor's home and other heritable property

Section 19 – Debtor's home and other heritable property

73. Subsection (1) amends section 32 of the 1985 Act by inserting new subsections (9A) and (9B) into that section. Subsection (9A) provides that, when a trustee gives heritable property back to a debtor, written notification by the trustee is evidence that the debtor is now the owner of the property. Subsection (9B) provides that the trustee must register the notice of abandonment in the Register of Inhibitions. This ensures that anyone dealing with the debtor can see from a search of that register that the debtor is the owner. A search of that register would reveal the existence of the sequestration and without evidence of the notice of abandonment it would appear to a searcher that the property was still owned by the trustee for the creditors in the sequestration. The form of the notice will be prescribed by the Scottish Ministers.
74. Subsection (2) inserts new section 39A into the 1985 Act.

New section 39A – Debtor's home ceasing to form part of sequestrated estate

75. Section 39A provides for the ownership or other right in a debtor's family home, which is part of the sequestrated estate, to be returned to the debtor if the trustee has not taken any action in relation to that property within 3 years of the date of sequestration. If the trustee discovers the interest in the property at a later date, the 3-year period runs from the date the trustee became aware of the property.
76. Subsection (3) of section 39A lists the types of action the trustee may take which would prevent the home being returned to the debtor. The Scottish Ministers may modify that list by regulations.

77. Subsection (8) of section 39A gives the Scottish Ministers power to make regulations setting out circumstances in which the 3-year period may be shortened or where section 39A will not apply or where the sheriff may decide that the section does not apply. The regulations can also make provision for compensation. These regulations are subject to negative resolution procedure.

Protected trust deeds

Section 20 – Modification of provisions relating to protected trust deeds

78. This section amends Schedule 5 to the 1985 Act to provide the Scottish Ministers with a regulation-making power setting out what conditions are required in order for a trust deed to become protected and the extent to which a debtor may be discharged, by virtue of a protected trust deed from all or part of his or her liabilities.

Modification of composition procedure

Section 21 – Modification of composition procedure

79. This section amends Schedule 4 to the 1985 Act which sets out the procedure for an offer of composition (which is a settlement offer made by a sequestrated debtor to the creditors which, if accepted, results in the debtor being discharged). Offers of composition will now be made by the debtor to the trustee and passed for approval to the AiB rather than to the court.
80. The previous requirement for active agreement by the creditors is changed so that those creditors who do not actively object and have been notified of the offer will be considered to have agreed to the offer of composition.

Status and powers of Accountant in Bankruptcy

Section 22 – Status of Accountant in Bankruptcy as officer of the court

81. This section makes it clear that the AiB has duties to the court in the same way as a solicitor or advocate would have.

Section 23 – Accountant in Bankruptcy’s power to investigate trustees under protected trust deeds

82. This section amends section 1A of and Schedule 5 to the 1985 Act to extend the powers of the AiB in respect of protected trust deeds. The AiB will now be able to audit the trustee’s accounts and fix the trustee’s remuneration in protected trust deeds without the requirement of a request from creditors to do so.

Offences

Section 24 – Modification of offences under section 67 of the 1985 Act

83. This section amends section 67 of the 1985 Act. It widens the grounds of the offence in subsection (2) of that section to include the disposal of assets. It repeals subsection (8) so that a failure to keep records is no longer an offence under section 67.
84. The limit set out in subsection (9) on credit that can be applied for, without disclosing the information required about the debtor’s circumstances, is increased to £500. A further requirement to disclose the required information is added to subsection (9), and applies where a debtor already has debts of at least £1,000 (or another amount which is substituted for the £1,000 by the Scottish Ministers in regulations made under the power now contained in subsection (9)) the debtor has to disclose the required information when applying for any amount of credit.

These notes relate to the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) which received Royal Assent on 15 January 2007

85. New subsection (9A) provides that, in calculating the amount of credit in relation to the limits in subsection (9), any liability for utility supplies or council tax can be ignored.
86. The amendments of subsection (10) provide that a failure to disclose a BRO or BRU made in England or Wales amounts to a failure to provide the information required in subsection (9). The same provision is made for BROs and BRUs made in Scotland by new sections 56C and 56H of the 1985 Act respectively (see paragraphs 1111 to 1818 above).
87. The addition of new subsection (11A) clarifies that an act prohibited by section 67 of the 1985 Act will still be an offence in Scotland even if it takes place elsewhere in the UK.

Miscellaneous and general

Section 25 - Debt limits in sequestrations

88. This section amends the qualifying debt limit threshold, which sets out the minimum amount of debt that must be owed in order for a person to be sequestrated (see paragraph 59 above). It provides that a debtor must have debts of £3,000 or more. The amount of the qualifying debt limit can be amended by regulations (subject to affirmative resolution procedure).

Section 26 – Creditor to provide debt advice and information package

89. This section amends section 5 of the 1985 Act to introduce a requirement for creditors to have provided debtors with a copy of a debt advice and information package before the creditor can petition for sequestration. The debt advice and information package is the same package required, in the case of attachment of moveables, by section 10 of the 2002 Act.

Section 27 – Continuation of sequestration proceedings

90. [Section 27](#) makes amendments to section 12 of the 1985 Act.
91. Under new subsection (3B) of that section, the sheriff can continue a creditor petition for sequestration for any period up to a maximum of 42 days if the debtor is able to demonstrate to the court that they will be able to pay or satisfy the petitioning creditor's debt, and any other debts due to creditors concurring in the petition, within that time.
92. [Section 27](#) also inserts a new subsection (3B) into that section which gives a sheriff the option of continuing a creditor petition for sequestration if the sheriff is satisfied that a debt payment programme (DPP) is pending under the debt arrangement scheme (set up under the 2002 Act).
93. If a debtor attends court to show cause why sequestration should not be awarded, and can provide sufficient evidence that a DPP application is ongoing or is about to be made, the sheriff has the power under subsection (3C) to delay awarding sequestration for as long as the sheriff thinks is necessary. Under section 4(3) of the 2002 Act a creditor is barred from petitioning for sequestration in respect of a debt which is covered by a DPP. So if the DPP is approved during the period of continuation granted by the sheriff under new subsection (3C) it would then be incompetent to sequestrate the debtor on that petition.

Section 28 – Abolition of summary administration

94. This section repeals various provisions of the 1985 Act with the effect that the Certificate of Summary Administration (COSA) procedure is abolished.

Section 29 – Non-vested contingent interest reinvested in debtor

95. This section inserts new section 31(5A) into the 1985 Act. Section 31(5) of that Act gives the trustee the right to non-vested contingent interests (potential assets) as if an assignation (transferring rights to those assets) of the interest had been executed by the debtor and intimation of the assignation made at the date of sequestration. This meant that the trustee continued to hold the right to these interests even after the debtor was discharged. The most common example would be where the debtor was the beneficiary under a will at sequestration, and the testator was still alive when the debtor was discharged. In such a case, if the debtor subsequently inherited an asset under the will, it would vest in the trustee.
96. This was not the case prior to section 97(4) of the Bankruptcy (Scotland) Act 1913. New section 31(5A) returns the law to the position as it was prior to the 1913 Act; non-vested contingent interests will no longer remain vested in the trustee after the debtor is discharged.

Section 30 – Debtor’s requirement to give account of state of affairs

97. This section inserts new section 43A into the 1985 Act which impose a duty on the trustee to require any debtor who is not discharged or who is subject to an IPO or IPA to give the trustee an account in writing providing details of income and expenditure every 6 months.

Section 31 – Restriction of debtor’s rights to appeal under sections 49(6) and 53(6) of the 1985 Act

98. Section 49(6) of the 1985 Act allows the debtor or any creditor to appeal against an adjudication by the trustee in sequestration on claims. Section 53(6) of that Act allows the same parties to appeal against the trustee’s remuneration and outlays.
99. This section inserts a new subsection (6A) into both sections introducing a restriction on the right of appeal by the debtor. The debtor can now appeal only if the debtor has a financial interest in the outcome of the appeal, such as a right to a reversion of funds after dividend.

Section 32 – Status of order on petition to convert protected trust deed into sequestration

100. This section inserts a new subsection (2A) into section 59C of the 1985 Act. It applies to the situation where a sheriff grants an application by a person in charge of proceedings akin to sequestration commenced in another EU country which requests the conversion of a protected trust deed granted by the debtor into sequestration of the debtor’s estate. The sheriff’s order granting that conversion is to be treated as if it is an award of sequestration granted by the AiB following a debtor application.

Section 33 – Power to provide for lay representation in sequestration proceedings

101. **Section 33** inserts a new paragraph (m) into section 32(1) of the Sheriff Courts (Scotland) Act 1971 (which deals with the regulation of civil procedure in the sheriff courts). This new paragraph gives power to the Court of Session by Act of Sederunt (that is to say court rules) to permit a debtor to be represented by a person who is not a qualified advocate or solicitor at the hearing where the sheriff decides whether or not to award sequestration following a petition by the creditor (see section 12 of the 1985 Act). The Act of Sederunt may specify particular circumstances where a debtor can be represented by a non-lawyer at such hearings (for example, the debtor may have to satisfy particular criteria).

These notes relate to the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) which received Royal Assent on 15 January 2007

Section 34 – Treatment of student loans on sequestration

102. Debtors who are sequestrated in Scotland are currently discharged from their liabilities in respect of student loans. This section amends the enabling power in the Education (Scotland) Act 1980 to allow regulations made under that Act to exclude from discharge loans under that Act. It also directly excludes from discharge loans which have been made under the Education (Student Loans) Act 1990.

Section 35 – Certain regulations under the 1985 Act: procedure

103. This section provides that any regulations made by the Scottish Ministers under sections 5(2B)(a) or (4), 5A or 39A(4) of the Bankruptcy (Scotland) Act 1985 shall be subject to affirmative parliamentary procedure. In addition, the first regulations under paragraph 5 of Schedule 5 to the 1985, made after the amendments of that schedule by this Act are brought into force, are also subject to affirmative procedure.