

# Final Business and Regulatory Impact Assessment

## **Title of Proposal**

The Bankruptcy (Scotland) Regulations 2016  
The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016  
The Protected Trust Deed (Forms) (Scotland) Regulations 2016  
The Protected Trust Deed (Amendment) Regulations 2016  
The Bankruptcy (Scotland) Act 2016 (Commencement) Regulations 2016

## **Purpose and intended effect**

### **Background**

In August 2011, the Scottish Law Commission (SLC) published a Consultation Paper *The Consolidation of the Bankruptcy Legislation in Scotland*, inviting views on a draft Consolidation Bill and a number of proposed amendments from the regime in the Bankruptcy (Scotland) Act 1985 (the 1985 Act) designed to facilitate consolidation. Consultees were also invited to make suggestions as regards other changes that should be made to that Act.

The SLC received a substantial number of responses that were taken into account in the formulation of final recommendations and drafting of the Bill.

In February 2012, the Scottish Government published a separate consultation on Bankruptcy Law Reform setting out proposals for significant reform of bankruptcy legislation. In its Programme for Government 2012-2013, published in September 2012, the Scottish Government announced its intention to introduce a Bill to modernise bankruptcy law and this was enacted through the Bankruptcy and Debt Advice (Scotland) Act (the 2014 Act).

Almost all of the SLC's recommendations for consolidation were also enacted in the 2014 Act enabling the SLC's Consolidation Bill to be taken forward subsequently as an almost "straight" consolidation (without substantial amendments to give effect to Commission recommendations). Other technical suggestions made to the SLC by stakeholders in their consultation on the Consolidation Bill were also able to be included in the 2014 Act.

The Bankruptcy (Scotland) Bill was introduced to Scottish Parliament on 30 October 2015 by the Lord Advocate, Frank Mulholland QC.

The Bill was passed by the Parliament on 22 March 2016 and received Royal Assent on 28 April 2016. The Bankruptcy (Scotland) Act 2016 (the 2016 Act) is expected to come into force on 30 November 2016.

### **Objective**

The next step in the consolidation exercise is to consolidate the regulations that accompany the primary legislation with the intention of commencing these at the

same time. The policy objective behind the consolidation of the regulations is to make Scotland's bankruptcy legislation more accessible for those practitioners who use it and for those who are affected by it.

There are currently 11 sets of regulation which underpin the primary legislation:-

1. The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014
2. The Bankruptcy (Scotland) Regulations 2014
3. The Common Financial Tool etc. (Scotland) Regulations 2014
4. The Common Financial Tool etc. (Scotland) Amendment Regulations 2015
5. The Bankruptcy and Debt Advice (Scotland) Act 2014 (Consequential Provisions) Order 2014
6. The Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010
7. The Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014
8. The Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2015
9. The Protected Trust Deeds (Scotland) Regulations 2013
10. The Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No.1 and Saving) Order 2014
11. The Bankruptcy Fees (Scotland) Regulations 2014

The proposed consolidation will reduce these to 4 sets for sequestration and PTDs under the new Bankruptcy (Scotland) Act 2016, which will be:-

1. **The Bankruptcy (Scotland) Regulations 2016** – All the main provisions in relation to bankruptcy will be included within these regulations.
2. **The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016** – These regulations set out the procedure for the making of applications to, and decisions by, the AiB.
3. **The Protected Trust Deed (Forms) (Scotland) 2016** – The provisions in relation to Protected Trust Deeds have now been incorporated into primary legislation, however, the forms are still to be in secondary legislation.
4. **The Bankruptcy Fees (Scotland) Regulations 2014** – will be reviewed and replaced from 2017.

Short commencement regulations, the Bankruptcy (Scotland) Act 2016 (Commencement) Regulations 2016 will bring in the new Act on 30 November 2016.

The Protected Trust Deed (Scotland) Amendment Regulations 2016 replicate minor changes to Forms 4, 5, 6 & 7 to the information captured within the forms used in the protected trust deed process in the Protected Trust Deeds (Scotland) Regulations 2013 and will apply to Protected Trust Deeds (PTDs) granted on or after 28 November 2013 but before 30 November 2016.

### **Rationale for Government intervention**

**Business** – A culture of entrepreneurialship, leadership, creativity and international

ambition

**Inequalities** – We have tackled the significant inequalities in Scottish society

**Employment opportunities** – Realising our full economic potential with more and better employment opportunities for our people

**Communities** – We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others.

## **Consultation**

### **Within Government**

Accountant in Bankruptcy (AiB) officials have worked with colleagues across the Scottish Government to develop these regulations.

### **Public Consultation**

In February 2012, the Scottish Government published its consultation on Bankruptcy Law Reform setting out proposals for significant reform of bankruptcy legislation. The feedback from this consultation has informed the drafting of the Consolidation Bill and associated regulations.

A number of stakeholders, including ICAS, R3 and Money Advice Scotland, also provided evidence during the Delegated Powers and Law Reform Committee's (DPLRC) scrutiny of the Bill. The feedback from stakeholders has been broadly positive.

By way of further consultation the draft regulations were published on our website and feedback invited from stakeholders to inform the final drafting.

It is important to highlight that the draft Regulations put out to consultation included one small change to existing policy at regulation 14 of the main Bankruptcy (Scotland) Regulations 2016. Although this is almost entirely a consolidation exercise, we felt it prudent to take the opportunity to improve and clarify Regulations where appropriate and taking on views expressed in our consultation. We propose to lower the total value of assets a debtor can have at which the Accountant in Bankruptcy is to consider whether the simplified bankruptcy procedure for those who have few assets (the Minimal Asset Process) ceases to apply. We proposed amending the figure from £5,000 to £2,000. This addresses anomalies that have been identified in bankruptcy administration and a discrepancy in the way newly identified assets (predominantly PPI compensation) have been treated in Minimal Asset Process and Full Administration bankruptcy cases.

Regulation 21 which covers claims in foreign currency has also been amended. We have modernised the approach to the conversion of claims in currency in line with the draft England and Wales corporate Insolvency Rules. The intention is that this will be easier to apply than the current provision and reflects modern availability of exchange rates.

Having received two detailed consultation responses (Stepchange Debt Charity and ICAS) the following further changes are being introduced - these do not involve any significant change to policy and mainly provide for clarification to assist practitioners. Further amendments, taking account of these responses, include:

- A change to reg 5(3) of the Bankruptcy (Scotland) Regulations 2016 to recognise expressly the notification of a decision to revoke a money adviser's approval to the money adviser which would be required legally (as well as to the debtor).
- Two minor changes to the Applications and Decisions Regulations 2016 at reg 11(4) to set a time-scale "without delay" for AiB to make a decision to sustain an objection to the appointment of a replacement trustee (per section 61(3)(b) of the 2016 Act), and at reg 6(12) for copies of first instance applications to AiB to be able to be sent to "any place of business" of a partnership where it appears service will be effective instead of "the principal address" as this can prove problematic for practitioners (an issue raised by ICAS).
- There are minor changes to statutory forms to address some existing errors and anomalies and to make forms covering income and expenditure consistent with the Common Financial Statement

## **Business**

The debate and discussion around consolidation has been on-going since the AiB's consultation of bankruptcy law reform in 2012. Since then, AiB has engaged continuously with stakeholders, including those who represent businesses. ICAS, R3 and Money Advice Scotland provided evidence to the (DPLRC).

## **Options**

### **Option 1 - No change**

The first option is to 'do nothing'. That is to make no change to the current regulations. The existing Regulations would have legal effect under the consolidation Bill, however, the references in existing regulations need to be updated to reflect the new Act and this would lead to further complication in an already complex suite of legislation.

### **Benefits**

The benefits in keeping the status quo are that there would be no need to change the legislation. There would be no need for stakeholders to make potential system changes, or train their staff in new procedures.

### **Cost**

There would be no costs in maintaining the status quo (save for continued difficulty reading heavily amended legislation).

## **Sectors and Groups affected**

No change to individuals, creditors and the broader Scottish economy.

## **Option 2 – Consolidation of existing regulations**

### **Benefits**

The 2016 Act brings together existing legislation in a more logical and coherent manner and the consolidation of the associated regulations aim to improve accessibility for those who use the legislation on a regular basis and to make the law generally easier to understand.

### **Costs**

The financial implications associated with these regulations are minimal. There may be limited costs for businesses in making minor adaptations to reflect the changed legislative references, however, it is considered that these costs will be off-set over time by the reduction in complexity. This was also acknowledged by the DPLRC during their detailed scrutiny of the Bill.

## **Sectors and groups affected**

Insolvency Practitioners, the Legal profession and Money Advice sector (public and private), as well as those affected by the legislation (debtors and creditors) are likely to be affected by these regulations. The regulations will improve accessibility for all who use the legislation and will make it easier to understand. The need for consolidation has been acknowledged by all stakeholder groups.

## **Scottish Firms Impact Test**

AiB have, from the inception of the programme of bankruptcy reform in Scotland, engaged with stakeholders, including businesses, on a continuous basis through face to face meetings, seminars, workshops and stakeholder events. The foundation of these discussions were formed by the questions posed in the Consultation on Bankruptcy Law Reform.

## **Competition Assessment**

The changes brought about by these regulations will apply equally to all who engage with the legislation. There should be no competitive advantage to any particular individual or group as a consequence of the introduction of this legislation.

## **Test run of business forms**

No new business forms have been introduced.

## **Legal Aid Impact Test**

Scottish Legal Aid Board has confirmed that there will not be any additional impact on the legal aid fund.

### **Enforcement, sanctions and monitoring**

This exercise is a pure consolidation of existing legislation, however, we will continue to review our policies and engage with stakeholders to ensure that the legislation continues to be fit for purpose.

### **Implementation and delivery plan**

The regulations are expected to come into force at the same time as the Bankruptcy (Scotland) Act 2016, on 30 November 2016. The Scottish Government have a timetable in place to ensure the timeously delivery and implementation of the regulations.

- **Post-implementation review**

We are committed to reviewing the legislation within the next 10 years.

### **Summary and recommendation**

The recommendation is for Option 2, consolidation of existing regulations.

Stakeholders have highlighted the need for consolidation and these regulations will improve accessibility for all who use the legislation by reducing the number of regulations from ten sets to three. The costs involved are minimal and are far outweighed by the benefits of consolidating the regulations.

Option 1 is not really an adequate option as the references in existing regulations need to be updated to realise the benefits of the new Act – not doing so (although the secondary legislation would continue in effect legally) would lead to further complication in an already complex suite of legislation.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	No Change	None
2	Consolidation of existing regulations	Minimal

**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:**

**Date:**

**Minister's name:** Paul Wheelhouse MSP

**Minister's title:** Minister for Business, Innovation and Energy

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