

# HOME OWNER AND DEBTOR PROTECTION (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### THE ACT

#### Part 2 – Sequestration and Trust Deeds

##### *Section 9 – certificate for sequestration*

48. [Section 9](#) amends the 1985 Act by introducing a new route into bankruptcy on the basis of a certificate completed by an authorised person. It also removes the existing route into bankruptcy by debtor application with concurring creditors.
49. [Section 9\(1\)\(b\)](#) repeals section 5(2A) of the 1985 Act to remove the provision that allows a debtor to apply for an award of sequestration on the basis of creditor concurrence (i.e. that a creditor concurs to a debtor’s application for sequestration). Section 9(1)(a) contains a consequential amendment which removes a cross-reference to the repealed section 5(2A).
50. [Section 9\(1\)\(c\)](#) amends section 5(2B) of the 1985 Act to provide that a debtor may apply to the Accountant in Bankruptcy for an award of sequestration if they have been granted a certificate for sequestration. There may be a prescribed period for a valid application following the grant of a certificate (see new section 5B(5)(c) of the 1985 Act). The existing section 5(2B) requirements for a debtor application for sequestration, together with other requirements of the 1985 Act, will apply in addition to the requirement for a certificate.
51. The effect of the new certificated route and the repeal of the creditor concurrence route is that, under the amended provisions of the 1985 Act, a debtor will be able to apply for their own bankruptcy if they meet the following conditions—
- they were habitually resident or had an established place of business in Scotland in the 1 year period preceding the date of their application – see section 9(1A) of the 1985 Act,
  - they owe debts totalling at least £1,500 – see section 5(2B)(a) of the 1985 Act and the non-commencement of section 25 of the 2007 Act in article 3(1)(a)(iii)(aa) of the [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(Commencement No. 3, Saving and Transitionals\) Order 2008 \(S.S.I. 2008/115\)](#),
  - no award of bankruptcy has been made against them in the previous 5 years – see section 5(2B)(b) of the 1985 Act, and
  - either—
    - they are “apparently insolvent” as defined in section 7 of the 1985 Act,
    - they have granted a trust deed which has been rejected as a protected trust deed,

*These notes relate to the Home Owner and Debtor Protection (Scotland)  
Act 2010 (asp 6) which received Royal Assent on 18 March 2010*

- they meet the low income low asset conditions in section 5A of the 1985 Act, or
  - they have a certificate for sequestration issued within the prescribed period, confirming that they are insolvent and completed by an authorised person (this is the new certificated route).
52. [Section 9\(1\)\(d\)](#) inserts a new subsection (2F) in section 5 of the 1985 Act. This enables Scottish Ministers by secondary legislation to prescribe the maximum period allowed between the date on which an authorised person signs a certificate for sequestration and the date on which an application is made.
53. [Section 9\(2\)](#) inserts a new section 5B into the 1985 Act which introduces a certificate for sequestration (see below).
54. [Section 9\(3\)](#) amends section 12(1)(b) of the 1985 Act to remove the reference to section 5(2A) which is repealed by section 9(1)(b) of this Act.

**New section 5B – Certificate for sequestration**

55. Section 5B(1) defines a certificate for sequestration. A certificate for sequestration must be completed by an authorised person. The form of certificate will be prescribed but must state that the debtor can demonstrate that they are unable to pay their debts as they become due.
56. Section 5B(2) provides that an authorised person may not grant a certificate for sequestration unless the debtor has applied to the authorised person for such a certificate. “Debtor” is defined for these purposes by section 73(1) of the 1985 Act and includes both natural persons and entities such as trusts and partnerships which may be sequestrated under section 6 of that Act.
57. Section 5B(3) provides that the authorised person must grant a certificate for sequestration on behalf of a debtor if, and only if, the debtor is able to demonstrate that they are unable to pay their debts as they become due.
58. Section 5B(4) provides for the definition of authorised person by secondary legislation.
59. Section 5B(5) gives Scottish Ministers the power to make regulations in relation to certificates for sequestration in order to—
- prescribe the classes of people who may grant a certificate for sequestration,
  - make provision about certification by an authorised person, including the form and manner of certificates and the fees, if any, which an authorised person is entitled to charge for granting a certificate or in connection with granting a certificate,
  - prescribe a period for the purpose of section 5(2)(c)(ib) (the period following the grant of a certificate during which a debtor can make an application), and
  - provide different rules in different cases or classes of case.
60. Regulations made under section 5B(5) are subject to the affirmative resolution procedure of the Scottish Parliament (see section 13 of the Act).