

# HOME OWNER AND DEBTOR PROTECTION (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### THE ACT

#### **Part 2 – Sequestration and Trust Deeds**

45. **Part 2** of the Act amends the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”).
46. The 1985 Act is the principal statute dealing with personal insolvency in Scotland. There have been several amendments to the 1985 Act. The most extensive amendments were made by the Bankruptcy (Scotland) Act 1993 and the Bankruptcy and Diligence etc. (Scotland) Act 2007 (“the 2007 Act”). Section 40 of the 1985 Act, which is referred to in the commentary below, was substantially amended by the Civil Partnership Act 2004.
47. A text of the 1985 Act showing amendments made to date is published on the Accountant in Bankruptcy’s website at: <http://www.aib.gov.uk/guidance/Legislation/legislationpostapril08/act1985amended08>.

#### **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 Section 9(1)(a) contains a consequential amendment which removes a cross-reference to the repealed section 5(2A).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,

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- 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,
    - 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.

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60. Regulations made under section 5B(5) are subject to the affirmative resolution procedure of the Scottish Parliament (see section 13 of the Act).

**Section 10 – trust deeds**

61. **Section 10** amends the definition of trust deed in section 5(4A) of the 1985 Act (originally inserted by section 3(4) of the Bankruptcy (Scotland) Act 1993).
62. The current definition is restricted to trust deeds which convey the whole of the debtor's estate to their trustee, except for assets which would not vest in a trustee in sequestration under section 33(1) of the 1985 Act.
63. The new definition is extended to include trust deeds which exclude whole or part of the debtor's dwellinghouse from being conveyed to the trustee, where a secured creditor holds a security over it and has agreed not to claim under the trust deed.
64. The debtor's 'dwellinghouse' is defined as a dwellinghouse including any yard, garden, outbuilding or other pertinents, which, on the day immediately preceding the date the trust deed was granted, is the sole or main residence of the debtor, and either owned by the debtor (whether alone or in common) or let under a long lease (a lease exceeding 20 years). This is irrespective of whether it is used to any extent by the debtor for the purposes of any profession, trade or business.
65. The extended definition of trust deed will apply to those provisions in the 1985 Act which apply to trust deeds generally, that is sections 34 (gratuitous alienations), 36 (unfair preferences) and 70 (supply of utilities) and Schedule 1 (determination of creditors' claims) under Schedule 5, paragraph 4.
66. The extended definition will also apply to protected trust deeds. Discharge of debts under a protected trust deed which excludes a secured creditor or an asset which is subject to a security will not affect the rights of the secured creditor – see regulation 19(2) of the **Protected Trust Deeds (Scotland) Regulations 2008 (S.S.I. 2008/143)**.

**Section 11 – power in relation to debtor's family home**

67. **Section 11** amends section 40 of the 1985 Act. Under section 33(1) of that Act the debtor's estate as at the date of sequestration vests in their trustee, and this will include interest in a family home which is registered in the debtor's name. It is part of the trustee's function under section 3(1)(a) of that Act to "recover, manage and realise the debtor's estate". The Accountant in Bankruptcy's Notes for Guidance of Trustees (see <http://www.aib.gov.uk/guidance/DAS>) states that if a trustee has identified that it would be in the financial interests of creditors to realise any equity in the family home, the trustee must take appropriate action to secure or realise that asset (Note 6.10.3). Section 39A of the 1985 Act, inserted by section 19 of the 2007 Act, provides that any right or interest in the debtor's family home is reinvested in the debtor three years after the date of sequestration if no action is taken by the trustee. "Family home" is defined in section 40(4)(a) of the 1985 Act.
68. Section 40 of the 1985 Act currently provides that before a trustee in sequestration sells or disposes of any right or interest in the debtor's family home, the trustee must obtain the consent of an occupant spouse, civil partner, former spouse, or former civil partner. If there is no such person and the debtor occupies the house with a child of the family, the trustee has to seek the debtor's consent. "Child of the family" is defined in section 40(4)(b) of the 1985 Act. If consent cannot be obtained, the trustee must apply to the sheriff for permission to sell a family home. The sheriff, having considered the circumstances of the case, may refuse the trustee's application, grant the application, or postpone granting it for up to one year.
69. **Section 11(a)** amends section 40 of the 1985 Act so that it applies to trust deeds as it applies to bankruptcies. Under section 4(1)(a) of the Trusts (Scotland) Act 1921,

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a trustee has a general power to sell the trust estate. The amendment to section 40 will require trustees under trust deeds which fall within the new definition to seek the relevant consent or the permission of the sheriff in the same way as a trustee in bankruptcy.

70. [Section 11\(b\)](#) amends section 40(2) of the 1985 Act to increase from one year to three years the maximum period that a sheriff can postpone the granting of an application by a trustee (in sequestration or under a trust deed) to sell a debtor's family home without the relevant consent.
71. [Section 11\(c\)](#) inserts new subsections (3A) and (3B) into section 40 of the 1985 Act. Section 11 of the Homelessness (Scotland) Act 2003 provides that when a landlord raises repossession proceedings, the landlord must give notice to the local authority. The schedule to the 2003 Act imposes a similar duty on creditors taking steps to enforce standard securities. The form of notice for section 11 of the 2003 Act is prescribed in the [Notice to Local Authorities \(Scotland\) Regulations 2008 \(S.S.I. 2008/324\)](#).
72. The new subsection (3A) imposes a similar duty on the trustees of bankrupt estates or under trust deeds. The new subsection (3B) provides that Scottish Ministers may prescribe the form used by trustees to notify local authorities. Regulations made under section 40(3B) will be subject to the negative resolution procedure of the Scottish Parliament under section 72(1) of the 1985 Act.
73. [Section 11\(d\)](#) inserts a definition of "local authority" and modifies the definition of "relevant date" in the list of definitions in section 40(4) of the 1985 Act.

***Section 12 – abolition of certain requirements to advertise in Edinburgh Gazette***

74. [Section 12](#) repeals sections 15(6) and 25(6) of the 1985 Act. Section 15(6) requires a trustee in sequestration to advertise the award of sequestration in the Edinburgh Gazette. The advert must contain the information prescribed by regulation 11 of the [Bankruptcy \(Scotland\) Regulations 2008 \(S.S.I. 2008/82\)](#). Section 25(6) requires a replacement trustee to advertise their appointment in the Edinburgh Gazette in the form prescribed as Form 5 to the those Regulations.
75. There are other requirements to advertise in the Edinburgh Gazette which are not affected by section 12 of the Act in sections 16(3), 29(2), 45(3) and Schedule 4 of the 1985 Act. There is also a requirement to advertise trust deeds in the Edinburgh Gazette before they become protected trust deeds (regulation 7 of the [Protected Trust Deeds \(Scotland\) Regulations 2008 \(S.S.I. 2008/143\)](#)). The Scottish Government has indicated its intention to amend [S.S.I. 2008/143](#) so that publicity requirements for protected trust deeds are in line with those applying to sequestrations following the section 12 amendments.

***Section 13 – regulations under the 1985 Act***

76. [Section 13](#) makes provision about the Parliamentary procedure for regulations made under the provisions of the 1985 Act modified by Part 2 of the Act and modifies the power in the 1985 Act to make regulations in relation to protected trust deeds.
77. [Section 13\(1\)](#) amends section 72 of the 1985 Act to provide that the following regulations made by Scottish Ministers will be subject to affirmative parliamentary procedure—
  - section 5B(5) of the 1985 Act (as inserted by section 9(3) of the Act), and
  - paragraph 5(2)(aa) of Schedule 5 to the 1985 Act (as inserted by section 13(2)).
78. [Section 13\(2\)](#) amends the regulation making power in paragraph 5 of Schedule 5 to the 1985 Act. The amendment allows regulations made in relation to protected trust deeds to make different provisions for different cases or classes of case. This reflects

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the amendment to section 5(4A) of the 1985 Act made by section 10 of this Act in recognition of the additional types of trust deed which regulations about protected trust deeds will have to cover.