Notes for Guidance - Bankruptcy (Scotland) Act 2016 (as amended)

This guidance describes the general functions of Accountant in Bankruptcy, interim trustees, trustees and commissioners in relation to their responsibilities regarding bankruptcies which started on or after 30 November 2016.

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# Role of The Accountant in Bankruptcy

This section provides information on the role of Accountant in Bankruptcy (AiB) as an agency of the Scottish Government. It also describes the general functions of Scottish Government officials, the Accountant in Bankruptcy and Depute Accountant in Bankruptcy in relation to the bankruptcy process. AiB operates independently and impartially whilst remaining directly accountable to Scottish ministers.

For the purposes of clarity the following terminology is used throughout these Notes for Guidance.

#### AiB

AiB refers to the organisation which is an agency of the Scottish Government.

#### The Accountant

The Accountant refers to the individual appointed by Scottish ministers under section 199(1) of the Bankruptcy (Scotland) Act 2016 and who acts as an officer of the court with responsibilities including determining debtor applications, granting awards of bankruptcy and the additional functions conferred in legislation of April 2015. These additional functions are listed under the officer of court heading below. The Accountant also performs supervisory and regulatory roles which are also described in further detail.

#### The Depute Accountant

The Depute Accountant refers to an individual appointed by the Scottish ministers, in terms of Section 199(2)(b) of the Act. The Depute Accountant is empowered under that provision to exercise any and all of the functions of the Accountant in terms of the Act at any time the Accountant is unable to do so.

#### The Accountant in Bankruptcy

The Accountant in Bankruptcy refers to the role undertaken by the Accountant as trustee in the administration of bankruptcies.

The Accountant/Accountant in Bankruptcy is independent as regards the exercise of their statutory functions although their decisions and determinations can generally be reviewed and ultimately appealed to the court.

The Scottish ministers, after consultation with the Lord President of the Court of Session, may give the Accountant/Accountant in Bankruptcy general directions as to the performance of their functions in relation to all bankruptcies or specific types of bankruptcies but they may not give directions in respect of any particular case.

## AiB – general functions

AiB supports ministers to develop the policy for:

* personal insolvency
* corporate insolvency (where devolved to the Scottish Parliament)
* the Debt Arrangement Scheme (DAS)
* diligence in Scotland

## The Accountant – general functions

#### Supervisory

The Accountant supervises the performance of interim trustees, trustees and commissioners in the exercise of their statutory duties and regulates the bankruptcy process generally.

#### Regulatory

The Accountant is required to report to the sheriff any trustee, or commissioner, when it appears they have failed without reasonable excuse to perform a duty imposed on them. When there are reasonable grounds to suspect an offence has been committed the Accountant is required to report the matter to the Lord Advocate.

#### Statutory

The Accountant is responsible for maintaining the public Register of Insolvencies (ROI). This contains details of bankruptcies, protected trust deeds and corporate insolvencies. The Accountant is required to produce annual accounts and an annual report to Scottish ministers and the Court of Session giving statistical information about bankruptcies and of the performance of the Accountant’s functions under The Bankruptcy (Scotland) Act 2016.

#### Officer of the court

The Accountant is responsible for determining debtor applications for bankruptcy and, when appropriate, granting the award of bankruptcy (section 22 of the Act refers). Page 12 of 270 the Accountant can grant, or refuse to grant, recall of the award of bankruptcy under certain circumstance (sections 34 and 35 of the Act refers).

The Accountant can issue directions on application by a trustee (section 52 of the Act refers). The Accountant can appoint a replacement trustee who has been elected at a statutory meeting of creditors (section 60 of the Act refers). The Accountant can determine a trustee is removed from office when they have ceased to be qualified to act and can appoint a replacement trustee, under this circumstance when the trustee is appointed in more than one bankruptcy (section 66 of the Act refers).

The Accountant can determine a trustee is removed from office when they are deceased or have ceased to be qualified to act, and can appoint a replacement trustee under this circumstance in a single bankruptcy (section 69 of the Act refers). The Accountant can declare the post of trustee vacant on application of the commissioners or a person representing not less than one quarter in value of the creditors, or when satisfied there are reasons to do so, and make arrangements for the continuation of the bankruptcy (section 70 of the Act refers).

The Accountant is responsible for making Debtor Contribution Orders (section 90 of the Act refers). The Accountant can grant, or refuse to grant, the discharge of the debtor (section 137 of the Act refers). The Accountant can grant, or refuse to grant, the deferral of the debtor’s discharge (section 141 of the Act refers).

The Accountant can grant, or refuse to grant, the discharge of the trustee (section 148 of the Act refers). The Accountant can re-appoint a trustee when assets are discovered after the discharge of the trustee (section 152 of the Act refers). The Accountant can make, apply for, or annul a Bankruptcy Restriction Order (sections 155 – 161 of the Act refers).

The Accountant can make an order granting the conversion of a Protected Trust Deed to bankruptcy (section 190 – 192 of the Act refers). Page 13 of 270 the Accountant can cure a defect, rectify an error in the administration of a bankruptcy or waive a time limit specified for any action in the Act (section 212 refers).

#### Review

The Accountant is responsible for reviewing decisions made by their staff, or a trustee. The role of the independent review team is carried out by the Operational Policy and Compliance team (OPC). The review team is responsible for investigating the request and providing a fully informed outcome. This team will always be independent of the Accountant, Depute Accountant, AiB team, or trustee responsible for the original decision.

An application for a review may be made:

* for the 23 circumstances prescribed in the Act
* by a party, prescribed in the Act. Normally a combination of the debtor, trustee, creditors, interested party
* before the expiry of 14 days (28 days in respect of a review regarding a creditor claim for the purpose of payment of a dividend) beginning with the day on which notice of the decision by the Accountant, or trustee, is given

A review should be submitted on a Form 3 of the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016. The review team must take into account any submissions made by the parties, as prescribed in the appropriate sections of the Act, before the expiry of the period of 21 days beginning with the day on which the application is made.

The review team must confirm, amend or revoke the decision before the expiry of the period of 28 days beginning with the day on which the application is made.

An appeal against a review decision may be made to the sheriff by those parties prescribed in the appropriate sections of the Act before the expiry of the period of 14 days beginning with the day of the review decision.

An appeal can be made on:

* a matter of fact
* a point of law
* the merits

The sheriff’s decision is final.

## The Accountant in Bankruptcy – general functions

The Accountant in Bankruptcy will act as trustee in the following
circumstances:

* in all bankruptcies when the court does not appoint a person to be
trustee (section 51(7) of the Act refers)
* in all bankruptcies awarded by the Accountant, when the Accountant does not appoint a person to be the trustee (section 51(12) of the Act refers)
* when appointed by the court, will act as interim trustee in a bankruptcy (section 54(2) of the Act refers)
* on the resignation, or death, of the original trustee when no
replacement trustee is elected or appointed (sections 69(6)(a) and
66(2)(b) of the Act refers)

## Legislation and other guidance

For the purposes of this guidance reference will be made to:

[The Bankruptcy (Scotland) Act 2016](http://www.legislation.gov.uk/asp/2016/21/contents) (The Act)

[The Bankruptcy (Scotland) Regulations 2016](http://www.legislation.gov.uk/ssi/2016/397/contents/made) (The Regulations)

[The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016](http://www.legislation.gov.uk/ssi/2016/295/contents/made) (Applications and Decisions Regulations)

[The Bankruptcy Fees (Scotland) Regulations 2014](http://www.legislation.gov.uk/ssi/2014/227/contents/made) (Fees Order)

Guidance to trustees on the accounts process - November 2016

BASYS user guide for trustees

[BASYS user guide - Adjudication and Supervision team](https://www.aib.gov.uk/publications/basys-user-guide-adjudication-and-supervision/)

BASYS user guide – Bankruptcy Restriction team

[Notes for Guidance - Common Financial Tool](https://www.aib.gov.uk/publications/notes-for-guidance-common-financial-tool)

## Electronic signatures

The [Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021](https://www.legislation.gov.uk/ssi/2021/148/note/made) have amended the Bankruptcy (Scotland) Regulations 2016 to introduce the use of electronic signatures on a number of forms issued by the trustee and the Accountant.

Within this document this amendment will cover:

* Form 14 – Trustee Application for Authority to Resign Office as Trustee in Sequestration (see [section 5.3](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/5-replacement-trustee/53-resignation-or-death-of-the-trustee))
* Form 15 – Notice of Abandonment of Heritable Property in
Sequestration where the Accountant in Bankruptcy is not the Trustee (see [section 10.2.7](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/10-administration-of-the-estate/102-heritable-property))
* Form 19 – Deduction from Income – Debtor’s payment instruction to employer or third party (see [section 8.5.1](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/8-debtor-contributions/85-deductions-from-debtor-s-earnings-and-other-income))
* Form 20 – Deduction from Income – Trustee’s payment instruction to employer or third person (see [section 8.5.2](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/8-debtor-contributions/85-deductions-from-debtor-s-earnings-and-other-income))
* Form 21 – Deduction from Income – Payment variation instruction to employer or third person (see [section 8.6.1](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/8-debtor-contributions/86-variation-to-the-amount-of-the-dco))
* Form 30 – Certificate of Deferral of Discharge (see [section 14.2.4](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/14-discharge/142-deferral-of-discharge-of-debtor))

For these purposes an ‘electronic signature’ will be construed in accordance with section 7(2) of the [Electronic Communications Act 2000](https://www.legislation.gov.uk/ukpga/2000/7/contents) but does include a version of an electronic signature which is reproduced on a paper
document.

## Bankruptcy administration system

The bankruptcy administration system (BASYS) is the computer system developed by AiB for recording the administration of a bankruptcy case.

Trustees are encouraged to utilise BASYS. It is a web-based system which has provision to alert trustees when statutory documents must be submitted.

It allows secure access via the AiB website and standard web browsers such as Internet Explorer, Chrome, Safari, and Firefox provide appropriate access in accordance with the role of a BASYS user to complete and submit forms and/or documents online. Once a form or document is submitted on BASYS there is no requirement to send a paper copy to AiB.

User accounts are created by system administrators, either AiB or specific users in organisations, with the correct permissions.

A regular review of BASYS users should be undertaken and any user accounts that are no longer required removed.

To undertake their duties under the Act the Accountant may require to make contact with the debtor and/or creditors in a bankruptcy. Therefore it is important the information held on the system is up to date and accurate.

Trustees should take into account the requirements of the Data Protection Act 2018 when uploading or entering information on BASYS.

BASYS can be used for various elements of the bankruptcy process including:

* viewing statutory and non-statutory documentation issued by AiB
* maintaining debtor details
* maintaining creditor details
* providing documents to AiB
* applying for a direction
* making a general application
* making an application for recall
* maintaining the record of a debtor contribution order
* applying for deferral of a debtor discharge
* making a recommendation regarding debtor discharge
* submitting accounts for determination
* applying for discharge of the trustee
* maintaining an electronic Sederunt Book
* communicating with AiB

Reference will be made throughout this document to specific guides which should be referred to when appropriate.

# Bankruptcy award and recall

This section refers to Part 2 of the Act, sections 22 to 38.

## Recording a notice with Registers Of Scotland

It is the responsibility of the sheriff court, or AiB, to notify the Keeper of the Register of Inhibitions and Adjudications for recording in that register.

### Award by a sheriff

On the sheriff granting warrant upon the presentation of a petition the sheriff clerk must send a certified copy of the Warrant To Cite to the Keeper. A check should be made of the Register of Inhibitions and Adjudications to ensure the order has been registered. If required the trustee should contact the relevant court to request the paperwork is sent for registration immediately.

### Award by the Accountant

On awarding bankruptcy on a debtor application the Accountant must send a certified copy of the determination of the application to the Keeper. This role is undertaken by the Insolvency Registrations team (IRT) on behalf of the Accountant. A check of the inhibition tab of the case on BASYS should be made to ensure the order has been registered. If required the trustee should contact IRT to request the paperwork is sent for registration immediately.

## Recording of an award by the Accountant

When an award is made by the sheriff, or the Accountant, the details are recorded on the Register of Insolvencies (ROI). See Appendix A for the information shown.

This role is undertaken by IRT on behalf of the Accountant.

Section 200(8) of the Act makes provision for AiB to not include information in the ROI if, in the opinion of AiB, inclusion of the information would be likely to jeopardise the safety or welfare of an individual.

AiB has published guidance for trustees and money adviser on the process and criteria AiB will apply when asked to consider excluding information about an individual from the ROI.

## Advertising the award

The entry on the ROI is considered sufficient to inform all interested parties of the award of bankruptcy.

Any trustee, or replacement trustee, who publishes a notice in the Edinburgh Gazette advising of their appointment may not charge the debtor’s estate for the cost of the advertisement.

For the cost of an advertisement in any other publication to be a cost of the debtor’s estate an explanation must be provided to the commissioner, or the Accountant, when requesting the determination of the outlay.

## Recall of sequestration

Sections 29 and 31 of the Act allows the following to present a petition to court, or make an application to the Accountant, for recall of an award of bankruptcy under certain circumstances:

* a debtor
* any creditor
* any other person having an interest
* the trustee
* the Accountant

The effect of recall is, so far as practicable, to restore the debtor and any other person affected by the bankruptcy to the position the debtor or, as the case may be, the other person would have been in if the bankruptcy had not been awarded.

A recall is not to affect the interruption of prescription caused by:

* the presentation of the petition for sequestration
* the making of the debtor application
* the submission of a claim under section 46 or 122 of the Act
* invalidate any transaction entered into before such recall by the interim trustee, or trustee, with a person acting in good faith
* affect a Bankruptcy Restriction Order (BRO) which has not been annulled under section 161(1)(a) of the Act

The Accountant recommends the debtor is directed to, or provided with, a copy of the AiB publications the Debtors’ Guide and/or the Bankruptcy Recall Guide at the earliest opportunity.

It should be noted the administration of a bankruptcy should proceed as if the petition/application had not been made until the outcome of the petition/application, is determined.

## Recall petition to court

A petition for recall to the court is presented under section 29 of the Act and the procedure to be followed by the sheriff is laid down in section 30 of the Act.

The petition cannot be presented if the only ground is that the debtor has paid, or is able to pay, their debts in full unless the bankruptcy was awarded following a petition to court by a qualified creditor(s) and includes the ground that the debtor was not apparently insolvent.

Section 29(4) of the Act requires the recall petitioner to serve notice and a copy of the petition upon:

* the debtor
* any person who was a petitioner for bankruptcy
* the trustee
* the Accountant

The notice should state the recipient may lodge answers at the court within 14 days of service.

### Actions of AiB upon receipt of the petition

This function is carried out by the Adjudication and Supervision Team (AST) on behalf of the Accountant.

Upon receipt AST must enter particulars of the petition for recall on the Register of Insolvencies. This replaces the requirement to advertise a recall petition in the Edinburgh Gazette.

### Actions of the trustee

In the opinion of the Accountant the trustee has a duty to the general body of creditors to consider and represent their interests. Also in the trustee’s capacity as an officer of the court they should ensure the court has all relevant information before it when it considers the petition.

While under no statutory obligations to do so the trustee may wish to consider advising the whole body of creditors of the circumstances and of their right to lodge answers individually.

### Actions of the court

The sheriff may order such intimation of the petition as they consider necessary.

A sheriff may recall the award if satisfied:

* after considering the circumstances of the case, including prior to the award, it is appropriate to do so
* the majority of the creditors reside in a country other than Scotland and the estate should be administered in that country
* another award of bankruptcy as defined by section 17(8) of the Act has been granted
* the debtor has paid their debts in full

On or before recalling the bankruptcy, the sheriff:

* must make provision of payment of the outlays and remuneration of the trustee
* may make provision for the payment of a petitioning creditors expenses
* may make provision in relation to the expenses of the petition for recall
* may make any other order as they consider necessary or reasonable

If the sheriff does not grant recall:

* the bankruptcy is to continue but is to be subject to such conditions as the sheriff thinks fit
* they may make an order in relation to the expenses of the petition for recall

The sheriff clerk must send:

* a copy of any interim or final order to the trustee and AiB
* a certified copy of any order to the Keeper of the Register of Inhibitions and Adjudications

### Actions of AiB on receipt of a recall interlocutor

AST will register the details of the interlocutor in the Register of Insolvencies.

When ordered, the Bankruptcy Accounts team will issue a determination of the trustee’s fees and outlays.

The date of recall will also be the date of the trustee discharge. The trustee should ensure all relevant documents are uploaded to the electronic Sederunt Book on BASYS.

## Recall application to The Accountant

An application for recall to the Accountant is made under section 31 of the Act and the procedure to be followed is laid down in sections 32 to 34 of the Act.

The application may only be made on the ground that the debtor has paid, or is able to pay, their debts in full.

This function is carried out by AST on behalf of the Accountant.

An application must be made on a Form 1 of the [Applications and Decisions](http://www.legislation.gov.uk/ssi/2016/295/contents/made) [Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made).

An application can be made by:

* a debtor
* the trustee
* any creditor
* any other person having an interest (i.e. representative of the debtor such as a solicitor or accountant)

At the same time as applying to the Accountant the applicant must give a copy of the application to:

* the debtor
* the trustee
* any person who was a petitioner for or concurred in a debtor application for the bankruptcy

A notice with the application must inform the recipient of their right to make written representations to AST before the expiry of the period of 21 days beginning with the day on which the notice is given.

### Initial actions of the trustee

When the application is made by the trustee they must notify every known creditor within seven days of the application being made, or when the application is made by another person, within seven days of notice being given to the trustee.

The notification should advise the creditor they must, if they have not already done so, submit a claim within 14 days of the notification in order to be included in the Statement on the Debtor’s Affairs (the statement) made by the trustee and paid through the recall process.

When the trustee is unable to make the notification within the required period they must make an application under section 212 of the Act (See [section 18.3)](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/18-miscellaneous/183-power-to-cure-defects).

The trustee must prepare and submit to AST the statement at the same time as they makes the application under section 31, or when the application is made by another person, before the expiry of the period of 21 days beginning with the day on which the notice is given.

The statement must contain the following information:

* the date the application was received by the trustee
* a declaration that the debtor has agreed to the interim trustee and trustee’s claim for outlays and remuneration. This will include those incurred and yet to be incurred. The Accountant will not accept the trustee’s statement if it does not include this declaration
* details of any payments that have been made from the estate
* state whether or not the debtor’s debts have been paid in full (including the above)
* when the debts have not been paid indicate whether, in the opinion of the trustee, the debtor’s assets are likely to be sufficient to pay the debts in full within eight weeks from the date of the statement
* details of the debts that have not been paid
* details of all creditors (including addresses and reference numbers) who have made a claim prior to, or within 14 days beginning with the day on which the notification of the recall application was issued by the trustee
* when appropriate, details of the payments made to the creditors who had submitted claims

When the trustee is unable to submit the statement within the required period they must make an application under section 212 of the Act (See [section 18.3)](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/18-miscellaneous/183-power-to-cure-defects).

The trustee should continue to administer the bankruptcy until a decision on the application is made or they are notified it has been withdrawn.

### Trustee's remuneration and outlays not agreed

When the trustee and debtor have been unable to agree the amount of the outlays and remuneration the Accountant will determine the amount to be paid.

The debtor should be advised the determination fee set by [The Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made) will be charged and must be paid by the debtor as an outlay of the bankruptcy before recall is granted.

This function will be carried out by the Bankruptcy Accounts Team and the audit and determination will be carried out in accordance with section 133 of the Act. See [section 13](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/13-accounts) and Accounts Guide for more information.

At the same time as submitting the statement, the trustee should provide the Accounts Team with:

* the receipts and payments account under dispute with any claim for remuneration and outlays (including anticipated remuneration and outlays)
* invoices in support of those outlays
* detailed timesheets
* the trustee’s case and correspondence files
* any other information the team should be made aware of

Trustees should ensure any contingency fees and outlays recorded in the accounts, for example, distribution of funds and case closure action can be justified and an explanation with a calculation of the amount(s) claimed are provided.

If the expenses of the petitioning creditor are to be determined this should be requested and evidence in support of the expenses provided.

The Bankruptcy Accounts team must, before the expiry of 28 days from date the statement was due, issue a determination fixing the amount of the outlays and remuneration payable to the trustee and the determination is subject to usual appeal process. See [section 13.13](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/13-accounts/1313-entitlement-to-remuneration).

### Actions of AST

AST will issue an invoice to the applicant. The fee to be applied can be found in [The Fees Order.](http://www.legislation.gov.uk/ssi/2014/227/contents/made)

They will notify the trustee of receipt of the application at AiB and advise the date on which the first statement is due. However, the trustee should not wait for receipt of this notification before undertaking their responsibilities as prescribed in section 32 of the Act.

They may, at any time before determining an application for recall, remit the application to the sheriff.  When an application is remitted all relevant parties will be notified.

Upon receipt of the first statement, if recall cannot be granted at that time, AST will notify the trustee and the applicant of the actions required to be undertaken and the date they must be completed for recall to be granted.

They may make any necessary enquiries of the applicant, or any person making representation. Any request will be made in writing and specify the time period under which the information, evidence or documentation must be provided.

They may, if satisfied there is a good reason, require any person making an application, or making representations:

* to provide any document or information as may be reasonably required
* to attend a hearing, at such time and place as may be specified for the purposes of giving evidence

### Further action required by the trustee

When the application is made by the trustee and a creditor submits a claim within the specified period they must update and resubmit the statement within 21 days of the notice being issued.

The trustee must also update and resubmit their statement when the previous statement did not advise all debts had been paid in full. This second statement must be made before the day on which the application is determined by AST.

The second statement should contain the following information:

* confirmation the debts have been paid in full (including the interim trustee and trustee outlays and remuneration)
* details of any payments made from the estate
* details of the payments made to the creditors who had submitted claims

### Actions of the Accountant

Recall may be granted by the Accountant only within the eight weeks after the day on which the statement was first submitted under section 2.6.1 of these notes, and when no appeal is made against any determination by AiB of the trustee’s outlays and remuneration. When such an appeal is made the Accountant may grant recall within 14 days of the day on which the appeal is finally determined or abandoned.

The Accountant may grant recall if they are satisfied that:

* the trustee has notified in a Statement all debts have been paid in full (including the trustee’s/interim trustee’s outlays and remuneration)
* any representation has been considered
* in all the circumstances it is appropriate to do so

If the Accountant does not grant recall the bankruptcy is to continue but is to be subject to such conditions as the Accountant thinks fit.

Upon the determination of the application AST will notify:

* the debtor
* any person who was a petitioner for, or concurred in a debtor application for, the bankruptcy
* the trustee
* any other person having an interest

AST will place a copy of the determination in the electronic Sederunt Book.

If granted, AST will:

* send a copy of the notice to The Keeper of the Register of Inhibitions and Adjudications
* place a copy of the notice in the electronic Sederunt Book

The date of recall will also be the date of the trustee discharge. The trustee should ensure all relevant documents are uploaded to the electronic Sederunt Book on BASYS.

### Recall - review and appeal

A review application can be made to the Accountant’s independent review team following a decision made by the Accountant to grant, or refuse to grant, a recall of bankruptcy by:

* the debtor
* any creditor
* the trustee
* any interested person

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

A copy of the review application will be sent to any person having an interest. They will be advised they may make submissions before the expiry of 21 days from the date the review application was received.

The team must take into consideration any submissions made by the applicant, or interested parties, before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, was made. The sheriff’s decision is final.

## Effect of recall on a Bankruptcy Restrictions Order

A Bankruptcy Restrictions Order (BRO) can be revoked on the recall of a bankruptcy.

### Recall by the sheriff

If an award of bankruptcy has been recalled by the court the sheriff may revoke any BRO, or interim BRO, which is in force, and no further BRO can be applied for.

If the sheriff refuses to revoke a BRO or interim BRO the debtor may, no later than 28 days after the date of the recall, appeal to the Sheriff Appeal Court against a refusal. The Sheriff Appeal Court’s decision is final.

### Recall by the Accountant

If an award of bankruptcy has been recalled by the Accountant they can revoke a BRO, or interim BRO, which is in force and cannot make any new applications for BRO.

When the Accountant refuses to revoke a BRO, or interim BRO, the debtor may apply to the Accountant’s independent review team.

An application must be received before the expiry of 14 days from the date of the recall was made by the Accountant.

The team must take into consideration any submissions made by any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the BRO, or interim BRO, before the expiry of 28 days from the date the application for review was made.

The debtor may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

# Initial stages of bankruptcy

This section refers to Part 3 of the Act, sections 39 to 49.

An interim trustee may be appointed to safeguard the debtor’s estate. See section 4.4 for further information.

## Interim preservation of the estate

The functions of an interim trustee pending the award of bankruptcy can be found at section 4.4.1.

All monies received by the interim trustee in the exercise of their functions over the debtor’s estate shall be deposited in an interest bearing account in the name of the debtor. The interim trustee may retain a sum not exceeding £200 from the debtor’s estate and should ensure they comply with their recognised professional body’s money regulations.

See section 12.7.3 for details on personal liability and rights of relief of interim trustees in respect of fees due to the Accountant.

The interim trustee may give general or particular directions to the debtor relating to the management of the estate under sections 39(2) and 53(1) of the Act.

An interim trustee can:

* require the debtor to deliver any money, valuables and documents relating to their business or financial affairs which belong to, or are in the possession of, the debtor or under their control
* place in safe custody anything obtained as detailed above
* require the debtor to deliver any perishable goods which are under their control and may arrange for the sale or disposal of these goods
* make an inventory and/or valuation of all property known to belong to the debtor (see section 3.2)
* require the debtor to implement any transaction entered into by the debtor
* effect or maintain insurance policies in respect of the business or property of the debtor
* carry on any business of the debtor or borrow money in so far as is necessary to safeguard the debtor's estate

The interim trustee must take care to clarify any funds received from the debtor are not derived from social security benefits or tax credits as these do not vest in the interim trustee under section 187(1) of the Social Security Administration Act 1992 and the Tax Credits Act 2002.

If a debtor inadvertently pays money from this type of source the interim trustee must return the funds. This applies even if the payment is made voluntarily and in full knowledge of the rules on the inalienability of these funds.

On application by the interim trustee a sheriff may:

* on cause shown, grant a warrant authorising the interim trustee to enter the debtor’s house or their business premises, open locked doors as required and search for and take possession of assets
* make any other order they think is required to safeguard the debtor's estate

If an interim trustee requires possession of records to carry out their functions they are entitled to have them under sections 39(2)(a) & (b) of the Act. If there is any difficulty the interim trustee should apply to the sheriff for an order or a warrant to search and take possession under section 39(4) of the Act.

If the debtor thinks the direction is unreasonable they may apply to the sheriff to request it is set aside. If the sheriff agrees they may also issue a new order giving such directions to the debtor regarding the management of their estate as the sheriff considers appropriate.

If an appeal is made the debtor must comply with the direction pending the final determination of the appeal.

There are penalties provided under Section 40(2) of the Act when the debtor does not comply with the directions or requirements of the interim trustee, or obstructs the interim trustee in their entry and search of the debtor’s house or business premises.

A debtor’s failure to co-operate with the interim trustee is grounds to make a referral to The Accountant for consideration of imposing a BRO under Section 156(2)(n) of the Act. See section 16 for further information.

## Continuation of debtor’s business by the interim trustee

Sections 39(2)(h) of the Act allows the interim trustee to continue the debtor’s business.

There is a statutory duty on the interim trustee to preserve the debtor’s estate pending the appointment of the trustee under Section 53(1) of the Act. The interim trustee must take all reasonable steps to prevent additional loss to the creditors, prior to appointment of the trustee.

When an interim trustee decides to take responsibility to carry on the debtor’s business in terms of section 39(2)(h) of the Act, they should be clear their position is no different from that of a trustee as stated in section 10.5.

## Recording of the estate by the trustee

When the award has been made by the court the debtor should be provided with a copy of the Statement of Assets and Liabilities (Form 10) and a Statement of Undertakings (Form 13), as prescribed in [The Regulations](http://www.legislation.gov.uk/sdsi/2016/9780111033159/contents?regulation-12-1-b)and informed to return the completed and signed forms to the trustee not later than seven days from their issue.

If a debtor fails to provide the trustee with a complete and accurate statement of all their assets and liabilities (wherever they are kept and situated) including a signed statement of undertakings, the actions that can be taken by the trustee are detailed at section 11 and section 16.

The documents should be uploaded to BASYS four days before the date of the statutory meeting or within 60 days from the date of award.

When a debtor applies for their own bankruptcy the debtor application contains the information held in a Statement of Assets and Liabilities.

The trustee can obtain a copy of this document from BASYS by selecting print debtor application details on the relevant case. A signed copy of the Statement of Undertakings will also be available in the documents tab, named document type : Part 2 of the Bankruptcy Application Pack.

### Statement of Affairs

Upon receipt of the debtor’s Statement of Assets and Liabilities and the Statement of Undertakings, the trustee must prepare a Statement of Affairs which should indicate whether, in the opinion of the trustee, the debtor’s assets will be able to pay a dividend.

When the debtor does not provide the relevant documentation the trustee must prepare a Statement of Affairs with the information they do hold and advise creditors by way of a note.

The Accountant requests the Statement of Affairs is provided in the format shown in the example Statement of Affairs template.

A copy should be uploaded to BASYS to be placed in the electronic Sederunt Book.

### Inventory and valuation

The trustee must make up and maintain an inventory and valuation of the estate. The Accountant requests that the document is provided in the format shown in the example inventory and valuation template.

A copy should be uploaded to BASYS to be placed in the electronic Sederunt Book.

### Ascertain the reasons for insolvency

The trustee is required to ascertain the reasons for the debtor’s insolvency and the circumstances surrounding it under Section 50(1)(c) of the Act.

It is recommended the debtor is interviewed by the trustee, or a suitably qualified member of staff, and the interview takes place after receipt of the debtor’s Statement of Assets and Liabilities.

The interview may take place at the debtor’s home, place of business, trustee’s office, or over the telephone as deemed most appropriate by the trustee.

A supplementary questionnaire designed to aid and provide a record of the interview is available. Please note this is not a statutory document that is required to be completed and signed by the debtor under the legislation.

However, if available a copy should be uploaded to BASYS but should not be included in the Sederunt Book.

If the debtor fails to participate in an interview the trustee can consider taking action as detailed at section 11 and section 16. The trustee should also use alternative sources to ingather the information and/or evidence by contacting relevant organisations or individuals directly.

The trustee should use the evidence gathered from the debtor to form an opinion as to the reasons for the insolvency. The trustee must consider if the debtor’s behaviour prior to, and immediately after, award requires the submission of a BRO application. See section 16 for more information.

This information should be provided to the Accountant in accordance with section 42(3)(c) of the Act as follows:

* the trustee’s opinion of the cases of the insolvency;
* to what extent the conduct of the debt may have contributed to the insolvency.

The information provided by the trustee will be absolutely privileged.

The document should be uploaded to BASYS four days before the date of the statutory meeting or within 60 days from the date of award. It should not be included in the electronic Sederunt Book.

## Statutory meeting

This meeting is held for the purpose of providing creditors with information on the debtor’s assets and liabilities or to provide creditors with the opportunity to provide the trustee with information. A vote must also be undertaken confirming or replacing the appointed trustee and to elect commissioners.

The trustee must give notice to every creditor known to them whether or not they intend to call a statutory meeting. This notice must be issued no later than 60 days after the date on which bankruptcy was awarded. The trustee must send with this notice a copy of the Statement of Affairs and request claims.

Under section 44(3) of the Act the time to hold the meeting may be extended by the sheriff if cause is shown. The estate will not bear the cost of the application to the court unless the trustee can demonstrate the circumstances were out with their control and the sheriff orders the expenses to be paid.

A copy of the following should be uploaded to BASYS to be placed in the electronic Sederunt Book:

* the notice to creditors
* a list of creditors notified
* a certificate of posting
* any court application and subsequent order

### Notification of no meeting to be held

If the trustee advises a meeting will not be held creditors must be told they may, within seven days of the notification, request a statutory meeting be convened.

Such a request can only be made by a creditor(s) with not less than one quarter in value of the creditors. If requested, the trustee must call the statutory meeting not later than 28 days after the issue of the original notice.

If no request is received within the relevant time scale the trustee must submit a report to the Accountant.

The report can be submitted on the Notification To AiB No Statutory Meeting Held form. It should be uploaded to BASYS to be included in the electronic Sederunt Book.

### Notification of Meeting To Be Held

The trustee must, not less than seven days before the meeting, notify every creditor known to them of the date, time and place of the meeting. The meeting may be held at such time and place as the trustee determines.

The creditors may ask to have the date of the meeting changed to a date not later than seven days after the end of the 28 day period, or longer, if they make a successful application to a sheriff under section 44(9) of the Act. If an order is granted a copy should be uploaded to BASYS and placed in the electronic Sederunt Book.

### Proceedings At The Statutory Meeting

The proceedings are as follows:

* the trustee must arrange for a record of the proceedings to be kept
* the trustee takes the chair at the start of the meeting
* for voting purposes at the meeting the trustee must accept or reject, in whole or in part, the claim of each creditor under Section 48(1) of the Act:
	+ the usual requirement for acceptance of the entitlement of a creditor to vote will be production of a Statement of Claim in the prescribed[Form 11](https://www.aib.gov.uk/bankruptcy-scotland-regulations-2016-form-11-statement-claim)of[The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)and prima facie evidence of the debt e.g. account or other voucher of debt in terms of Section 46(2) of the Act. However, the trustee may dispense with any requirement for a form or evidence of the debt to be provided which should be recorded in the minutes
	+ it is permissible for a creditor to appoint a representative to act on their behalf at any meeting of creditors. A mandate form must be received
	+ when the creditor is not a living individual the mandate form must be signed by a person with appropriate authority in order to be accepted as valid
* the trustee will invite the election by the creditors of one of their number as chairperson. If no chairperson is elected the trustee remains in the chair throughout the meeting
* the trustee must make the debtor’s Statement of Assets and Liabilities and the Statement of Affairs available for inspection under section 48(4)(a) of the Act. This gives the creditors the opportunity to draw attention to any errors, discrepancies, etc. The trustee shall answer, as best they can, any questions and consider any representations put to them by the creditors.
* the trustee shall, having considered any representation made by creditors, determine whether the debtor’s assets are likely or unlikely to be sufficient to pay any dividend to creditors and determine whether it is necessary to revise any of the statements
* if the trustee decides to review the Statement of Affairs they must do so either at, or as soon as possible after, the statutory meeting and provide a copy of the revised statement to every known creditor. A copy should be uploaded to BASYS to be placed in the electronic Sederunt Book

### Trustee vote

The chairperson should invite creditors to proceed to a vote at which they shall:

* confirm the appointment of the trustee (original trustee) or elect another person as the trustee (replacement trustee)
* elect no more than five commissioner(s) from among the creditors or their mandatories. See section 6 of these notes for further information

Under section 49(3) to (5) of the Act the following persons are not eligible for election as replacement trustee:

* the debtor
* a person not qualified to act as an insolvency practitioner
* a person who, though qualified to act as an insolvency practitioner, is not qualified to act as such in relation to the debtor, i.e. conflict of interest
* a person who holds an interest opposed to the general interest of the creditors
* a person who has not given an undertaking to act in writing
* the Accountant in Bankruptcy

Under section 49(6)and 49(7) of the Act the following persons are not entitled to vote:

* a person who acquires a debt after the date of bankruptcy, other than by succession
* any creditor who has a postponed debt

Under section 49(5) of the Act the following persons are not entitled to be elected as a commissioner:

* the debtor
* a person who holds an interest opposed to the general interest of the creditors
* an associate of the debtor
* an associate of the trustee

### Procedure following the statutory meeting

If no creditor entitled to vote attended the meeting, or no replacement trustee is elected, the original trustee shall continue to act.

The original trustee shall report the proceedings of the meeting to the sheriff in terms of Section 49(9) of the Act, using Form 7.5, as prescribed in the [Act](http://www.legislation.gov.uk/ssi/2016/313/contents/made) [of Sederunt (Sheriff Court Bankruptcy Rules) 2016](http://www.legislation.gov.uk/ssi/2016/313/contents/made).

The following productions must also be submitted to the court:

* a copy of the minutes of the statutory meeting signed by the person who chaired the meeting
* a copy of the trustee’s Statement of Affairs
* when the award of bankruptcy was made by the Accountant
	+ a copy of the debtor application
	+ a copy of the award of bankruptcy

The original trustee will also upload the following information to BASYS:

* a letter confirming the report has been made to the court
* a copy of the report (to be placed in the electronic Sederunt Book)
* a copy of the minutes of the meeting of creditors signed by the person who chaired the meeting (to be placed in the electronic Sederunt Book)
* the name, address, and if applicable the creditor represented, of any elected commissioner(s)

When a replacement trustee is elected reference should be made to section 5.1.

# Trustee

## Functions of the trustee

It is the duty of the trustee to ingather the debtor’s estate and to manage and realise that estate for the benefit of the creditors. It is implicit the trustee should be efficient and economical in the exercise of their functions in order to optimise the return to the unsecured creditors.

### General functions of the trustee

A trustee’s general functions are specified in Section 50 of the Act and include a duty to:

* recover, manage and realise the debtor’s estate, whether situated in Scotland or elsewhere
* distribute any funds paid or realised from the debtor’s estate amongst the debtor’s creditors according to their respective entitlements
* ascertain the reasons for the debtor’s insolvency and the circumstances surrounding it
* ascertain the state of the debtor’s assets and liabilities
* maintain a Sederunt Book during the term of office for the purpose of providing an accurate record of the bankruptcy process
* keep regular accounts for the debtor’s estate, such accounts being available for inspection at all reasonable times by the commissioners (if any), the creditors and the debtor
* supply the Accountant with such information as they may consider is necessary to enable the Accountant to discharge their functions under section 50(1)(g) of the Act, whether or not the trustee is still acting in the bankruptcy (see Appendix H)

In addition to the documents the trustee must supply to the Accountant to discharge their functions under the Act the Accountant can specify other documents be provided at various stages in the process.

The trustee must have regard to advice offered by the commissioners, if there are any.

A trustee is not required to undertake functions 1 to 4 above, if in their view, it would not be of financial benefit to the estate and in the interests of the creditors to do so.

A debtor, creditor or any interested person who is dissatisfied with any act, omission or decision of the trustee may apply to the sheriff. The sheriff can confirm, annul or modify any act or decision of the trustee or give a direction if they think necessary.

### Additional functions

If the trustee has reasonable grounds to suspect an offence has been committed in relation to a bankruptcy by:

* the debtor in respect of their assets, their dealings with the trustee or their conduct in relation to their business or financial affairs
* a person other than the debtor in that person's dealings with the debtor, the interim trustee or the trustee in respect of the debtor's assets, business or financial affairs

They are required to report the matter to the Accountant.

If a trustee has reasonable grounds to believe any behaviour on the part of the debtor is of a kind that could result in a BRO being granted, the trustee is required to submit a report to the Accountant for investigation and consideration. See section 16 for more information.

Either report shall be absolutely privileged and details should not be disclosed to any party.

## Appointment of a trustee

A trustee is appointed by:

* a sheriff
* the Accountant

### Appointment by a sheriff

A sheriff may appoint a person who has been nominated to act if:

* they acted as interim trustee
* the person is qualified to act
* a copy of the undertaking to act has been

When a sheriff does not appoint a trustee they must appoint the Accountant in Bankruptcy as trustee.

### Appointment by the Accountant

The Accountant may appoint a person as trustee who has been nominated to act if:

* the person is qualified to act
* a copy of the undertaking to act has been

When the Accountant does not appoint a trustee the Accountant in Bankruptcy is deemed to be trustee.

### 4.2.3 Notifying the appointment

Following an award made by the court the trustee must:

* as soon as practicable notify the debtor of the appointment
* send a copy of the Form 10 - Statement Of Assets and Liabilities for completion and the Form 13 - Statement Of Undertakings of[The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)for completion and signature

## Application to the Accountant for a direction

A trustee may apply to the Accountant for a direction in relation to any particular matter arising in the bankruptcy.

This role is undertaken by the AST on behalf of the Accountant.

### Application process

The application should be made:

* by creating the application on BASYS (see the [AST User Guide;](https://www.aib.gov.uk/aib-basys-user-guide-adjudication-and-supervision-may-2017) or
* on a Form 2 as prescribed in [The Applications and Decisions Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made)

A copy of the application should be sent to any other interested party i.e. the debtor and/or specific or all creditors, advising of their right to make representation to AST within 14 days of the date of the application.

### Receipt of the application

AST may make any necessary enquiries of the applicant or any person making representation. Any request will be made in writing and specify the time period under which the information, evidence or documentation must be provided.

AST, if satisfied there is a good reason, may require any person making an application, or making representations:

* to provide any document or information as may be reasonably required
* to attend a hearing, at such time and place as may be specified for the purposes of giving evidence

### Actions of the Accountant

The Accountant must (within 28 days of the day on which the application is made):

* give a direction
* refer the matter to the sheriff by making an application for a direction in relation to that matter

Following the determination of the application AST will:

* issue a copy of the direction
* place a copy in the electronic Sederunt Book
* issue an invoice to the trustee. The fee to be applied can be found in[The Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made).

### Direction - review and appeal

A trustee may apply to the Accountant’s independent review team for a review of a direction given by the Accountant. However such an application may not be made by an interim trustee or in relation to a matter on which the Accountant has applied to the sheriff for a direction.

An application must be received before the expiry of 14 days from the date the direction was made by the Accountant.

The team must take into consideration any submissions made by the applicant and any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision must be made before the expiry of 28 days from the date the application for review was made.

The trustee may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision was made. The sheriff’s decision is final.

## Interim trustee

An interim trustee is only appointed pending determination of the petition for bankruptcy and remains in office between the presentation of the petition and the award, or refusal, of the bankruptcy.

### Functions of an interim trustee

The interim trustee’s sole function is to safeguard the debtor’s estate pending a decision on the award of bankruptcy. The role of an interim trustee can be found at section 3.1.

The interim trustee shall supply the Accountant with such information as the Accountant considers necessary to discharge their duties. See Appendix A.

### Appointment of an interim trustee

When a petition for bankruptcy is presented a sheriff may appoint an interim trustee if:

* the debtor consent
* the person presenting the petition shows cause

A sheriff may appoint a person who has been nominated to act and:

* the person is qualified to act
* has given an undertaking to act
* a copy of the undertaking has been provided

Following the appointment the interim trustee must:

* as soon as practicable notify the debtor of the appointment
* send a copy of the Form 13 - Statement Of Undertakings of[The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)for completion and signature.

### Removal, resignation of an interim trustee

A sheriff can remove from office an interim trustee and appoint a replacement if they are satisfied on application by the interim trustee, the debtor, a creditor or the Accountant that the interim trustee:

* is no longer able to act as interim trustee
* has failed without reasonable excuse to perform their duties
* has conducted themselves in such a way they should no longer continue to act

If the interim trustee dies, an application to appoint a new interim trustee can be made to the sheriff by:

* the debtor
* a creditor
* the Accountant

### Termination of an interim trustee’s functions when not appointed trustee

This section applies when a sheriff either:

* awards bankruptcy but appoints a trustee other than the interim trustee
* refuses to award bankruptcy

When a sheriff awards bankruptcy but appoints another person as trustee, the interim trustee shall hand over to the new trustee everything in their possession which relates to the bankruptcy, and cease to act.

The sheriff may make a determination of who is liable for the fees and outlays of the interim trustee with determination of the amount to be decided by the Accountant.

### Interim trustee accounts

The interim trustee is not entitled to take any remuneration until a determination has been issued by the Accountant.

This role is undertaken by the Trustee Accounts team (Accounts Team) on behalf of the Accountant.

Within three months of the sheriff appointing another trustee, the interim trustee shall submit to AiB:

* the accounts (if any) relating to the debtor’s estate
* a claim for outlays and remuneration

The trustee shall also send a copy of the accounts and the claim to:

* the debtor
* the petitioner
* if bankruptcy was awarded, to the trustee and all known creditors

The Accounts team will audit the accounts and determine the amount of the outlays and remuneration payable to the interim trustee.

The Accounts team will issue the determination to:

* the interim trustee
* the trustee

A copy will also be placed in the electronic Sederunt Book.

The interim trustee will send a copy of the determination to all other persons who received a copy of the accounts as detailed above.

All persons receiving a copy of the interim trustee’s accounts may appeal the determination to the sheriff within 14 days of the notification.

The decision of the sheriff is final.

### Discharge of an interim trustee

This role is undertaken by the Adjudication and Supervision Team (AST) on behalf of the Accountant.

On receipt of the determination the interim trustee may apply to The Accountant for their discharge and shall send notice of their application to the following :

* the debtor
* the petitioner
* if bankruptcy was awarded to the trustee and all creditors

The notice shall advise they may make written application to AST within 14 days or discharge may be granted and the terms of discharge that will apply.

On the expiry of the 14 day period AST will, if satisfied the interim trustee has completed all their duties, and after considering any representations made, grant or refuse to grant the certificate of discharge and notify the persons mentioned above.

### Discharge of an interim trustee – review and appeal

An application can be made to the Accountant’s independent review team for a review of a decision made by the Accountant to grant, or refuse to grant, the discharge of the interim trustee.

This can be done by:

* the interim trustee
* the debtor
* the petitioner
* the trustee and all creditors known to the interim trustee (if the bankruptcy was awarded)

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

The team must take into consideration any submissions made by the applicant and any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, was made.

The sheriff’s decision is final.

### Effect of granting a certificate of discharge

The granting of a certificate of discharge by the Accountant shall have the effect of discharging the interim trustee from all liability (other than any liability arising from fraud) to the debtor, to the petitioner and to the creditors in respect of any act or omission of the interim trustee in exercising their duties under the Act.

If the interim trustee does not apply for a certificate of discharge the effect of discharge will happen when the trustee is discharged (see [section 14.3](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/14-discharge/143-discharge-of-trustee)).

# Replacement trustee

This section refers to Part 4 of the Act, section 60 to 75.

This role is undertaken by the Adjudication and Supervision Team (AST) on behalf of the Accountant.

A trustee can be replaced by:

* a vote at a statutory meeting
* appointment by the Accountant when the original trustee in more than one bankruptcy applies to the Accountant to resign or dies
* a vote at a meeting convened for this purpose following an application to the Accountant for the resignation of the original trustee or following the death of a trustee in one bankruptcy
* appointment by the Accountant following an application to the Accountant for the resignation of the original trustee, or following the death of a trustee when no replacement trustee was elected at a meeting convened for this purpose
* a vote by the creditors at a meeting called for the purpose, if they also elect a new trustee
* order of the Accountant either following an application by commissioners, or a person representing not less than one quarter value, or when the Accountant is satisfied, on the basis of the circumstances there are reasons to remove the trustee from office
* declaration of the Accountant that the office of trustee has become vacant when the trustee is unable to act or should no longer continue to act.

## Election of a replacement trustee

If a statutory meeting, or meeting of creditors, has been held and a replacement trustee was elected, the original trustee shall immediately:

* complete a Form 4 of the [Applications and Decisions Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made)
* upload a copy of the form to BASYS (to be included in the electronic Sederunt Book)
* upload a copy of the minutes of the statutory meeting/meeting of creditors, signed by the person who chaired the meeting together with the attendance sheet (to be included in the electronic Sederunt Book)

### Election of a replacement trustee - right of objection

The Accountant recommends the debtor and creditors are notified immediately after the election of a replacement trustee, in order to inform them of their right to object to the election of the replacement trustee.

Any objection should be made:

* on a Form 1 of the [Applications and Decisions Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made)
* before the expiry of the period of four days beginning with the day of the statutory meeting, or meeting of creditors
* specify the grounds on which the objection is being made

An objection to any matter connected to the election can be made to AST by:

* the debtor
* a creditor
* the original trustee
* the replacement trustee

A copy of the Form 1 must be issued to any interested party.

The Accountant also has the right to make an objection. This would be made by way of a summary application to the sheriff, under section 60(3)(b) of the Act, specifying the grounds on which the objection is taken.

It should be noted such an application is rare but may occur when the elected trustee is not qualified to act or when The Accountant knows of, or is made aware of, a conflict of interest.

### Election of a replacement trustee - no objection received

If there are no timeous objections The Accountant must without delay declare the elected person to be the trustee in the bankruptcy.

AST will:

* update the Register of Insolvencies
* notify the original and replacement trustee
* issue an invoice to the replacement trustee. The fee to be applied can be found in [The Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made)

### Election of a replacement trustee - objection received

If there is a timeous objection made AST will write to the former trustee, the replacement trustee, the objector and any other interested person to provide an opportunity to make written representation on the application within 14 days of the date of notification.

No expense in objecting under this section can be claimed from the debtor’s estate under section 60(6) of the Act.

### Election of a replacement trustee - actions of the Accountant following objection

If the Accountant decides to reject the objection, they must without delay declare the elected person to be the trustee in the bankruptcy.

AST will:

* update the Register of Insolvencies
* notify the former and replacement trustee
* issue an invoice to the replacement trustee. The fee to be applied can be found in [The Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made)

To sustain the objection, they must order the former trustee to arrange a new meeting at which a new trustee vote must be held. The meeting should be held in accordance with section 18.5.

### Election of a replacement trustee - actions of the replacement trustee

Once appointed the replacement trustee must notify the appointment to every creditor known to them for each case to which they are appointed.

The appointed replacement trustee may require from the former trustee:

* delivery of all documents relating to each bankruptcy in which the former trustee was acting and in their possession or their representatives
* delivery of a copy of the former trustee’s accounts
* the former trustee, or their representatives, to submit the accounts for audit to the commissioners, or if there are no commissioners, to AiB for audit and determination of their outlays and remuneration in accordance with section 132 of the Act

### Election of a replacement trustee – review

An application can be submitted to review a decision made by the Accountant to:

* appoint a replacement trustee
* reject an objection to the appointment of a replacement trustee
* sustain an objection to the appointment of a replacement

This can be made to the Accountant’s independent review team by:

* the former trustee
* the replacement trustee
* the objector
* any interested person

An application must be received before the expiry of 14 days from the date the appointment was made by the Accountant.

No expense in objecting under this section can be claimed from the debtor’s estate under with section 61(9) of the Act.

The team must take into consideration any submissions made by any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

### Election of a replacement trustee – appeal

If there is a timeous objection by the Accountant under section 60(3)(b) or an appeal of a review decision of the Accountant by the trustee, the objector or any other interested party, the sheriff shall without delay give the parties an opportunity to be heard on the application, and make a decision.

If the sheriff decides:

* to reject an objection to the appointment of an elected person the sheriff must without delay declare the elected person to be the trustee in the bankruptcy
* to sustain the objection to the appointment of an elected person the sheriff must order the former trustee to arrange a new meeting at which a new vote must be held. The meeting should be held in accordance with section 18.5

The sheriff’s declaration or decision will be final.

### Discharge of the original trustee

This role is undertaken by AST on behalf of the Accountant.

On receipt of the determination the original trustee may apply to the Accountant for their discharge and shall send notice of their application to the following:

* the debtor
* the replacement trustee
* all creditors

The notice shall advise they may:

* make written representations to AST against the discharge within 14 days
* that the audited accounts of the original trustee (if any) are available for inspection at the original trustee’s office
* that a copy of the audited accounts (if any) have been sent to the replacement trustee
* the effect of the discharge

On the expiry of the 14 day period AST will, if satisfied the original trustee has completed all their duties, and after considering any representations made, grant or refuse to grant the certificate of discharge and notify the persons mentioned above.

### Discharge of the original trustee – review and appeal

An application can be made to the Accountant’s independent review team for a review of a decision made by the Accountant to grant, or refuse to grant, the discharge of the original trustee.

This can be made by:

* the original trustee
* the replacement trustee
* the debtor
* any creditor who made representations under section 5.1.8

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

The team must take into consideration any submissions made by the applicant and any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, was made.

The sheriff’s decision is final.

### Effect of granting a certificate of discharge

The granting of a certificate of discharge by the Accountant shall have the effect of discharging the original trustee from all liability (other than any liability arising from fraud) to the debtor and creditors in respect of any act or omission of the original trustee in exercising their duties under the Act.

If the original trustee does not apply for a certificate of discharge the effect of discharge will happen when the replacement trustee(s) is discharged (see section 14.3).

## Replacement of a trustee acting in more than one bankruptcy

This section applies when a trustee is acting in two or more bankruptcies and circumstances prevents the trustee from carrying out their functions, or makes it impracticable for the trustee to carry out those functions. These include:

* death of the trustee
* ceases, by virtue of section 49(4) of the Act to be qualified to continue to act as trustee
* conflict of interest affecting the trustee
* change in the personal circumstances of the trustee

### The application process

The application must be made on a Form 1 of the [Applications and](http://www.legislation.gov.uk/ssi/2016/295/contents/made) [Decisions Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made).

The following information should be included in the application:

* the reason for the application
* a list of cases to be transferred (including AiB reference number)
* a list of all creditors for each case to be transferred (including addresses and reference numbers)
* the name and address of the proposed replacement trustee
* confirmation the proposed replacement trustee consents to act
* a copy of the proposed replacement trustee’s insolvency permit and bond (if not already held by AiB)

A copy of the application must be sent to every interested party for each of the cases listed on the application. The parties should be informed of their right to make representation to the Accountant within 14 days of the date of the application.

They should also be informed of any potential changes to the fee rates and outlays to be charged by the proposed replacement trustee and if there is expected to be any change to the administration of the bankruptcy.

The Accountant considers it is very important creditors are made fully aware of any impact a change of trustee may have on the administration of the bankruptcy to allow creditors to make an informed decision on whether to lodge a representation.

### Actions of AST

AST may make any necessary enquiries of the applicant, or any person making representation. Any request will be made in writing and specify the time period under which the information, evidence or documentation must be provided.

AST, if satisfied there is a good reason, may require any person making an application, or making representation to:

* provide any document or information as may be reasonably required
* attend a hearing, at such time and place as may be specified for the purposes of giving evidence

AST may refer the matter to the sheriff by making an application for a direction in relation to that matter.

### Actions of the Accountant

The Accountant may only appoint a person who is qualified to act and who has consented to the appointment.

However, the Accountant may determine no person is to be appointed. It is the expectation that the Accountant will first try and appoint a qualified insolvency practitioner to be the replacement trustee. However, if no insolvency practitioner wishes to take the appointment, or the Accountant deems it necessary, the Accountant in Bankruptcy will be appointed as trustee.

Upon the expiry of the representation period the Accountant will consider the application, together with representations received.

Within 14 days AST must:

* notify the determination or appointment to the former trustee, the debtor, the replacement trustee, each sheriff who awarded the bankruptcy or to whom the sequestration was transferred
* update the Register of Insolvencies (if appropriate)
* advise the applicant of any actions to be taken when an appointment is not made
* issue an invoice to the applicant. The fee to be applied can be found in [The Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made)

The fee charged will cover all cases transferred under the application. It is not anticipated this cost will be an outlay of any individual case.

### Actions of the replacement trustee

The replacement trustee must notify their appointment to every creditor known to them for each case to which they are appointed and advise of the right of review.

The replacement trustee may require from the former trustee:

* delivery of all documents relating to the each bankruptcy in which the former trustee was acting and in the possession of the former trustee or of the former trustee’s representatives
* delivery of a copy of the former trustee’s accounts
* the former trustee, or the former trustee’s representatives, to submit the trustee’s accounts for audit to the commissioners, or if there are no commissioners, to AiB for audit and a determination to be issued fixing the amount of the outlays and remuneration payable to the former trustee, or representative, in accordance with section 132 of the Act.

### Replacement trustee more than one bankruptcy- review and appeal

An application can be made by the former trustee (or if appropriate their representative), the debtor or any creditor to the Accountant’s independent review team for a review of a decision or appointment made by the Accountant.

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

The team may refer a case to the court, either to the sheriff or to the Court of Session, for a direction before undertaking a review.

The team must take into consideration any submissions made by the applicant and any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the determination must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

Any appeal must be made by single petition to the Court of Session when the appeal relates to two or more cases, or in any other case to the sheriff.

## Resignation or death of the trustee

This section should be applied for the transfer of a single case.

If a trustee is unable to act in a bankruptcy they may apply to the Accountant to resign as trustee. An application to resign is to be made using Form 14 of [The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)(see section 1.5).

### Actions of the Accountant

The Accountant will grant an application to resign if satisfied:

* the trustee is unable to act whether under a provision of the Act, by virtue of a provision of the Act or from any other cause
* the trustee’s conduct has been such that the trustee should no longer continue to act

The Accountant will always require a meeting of creditors to be called for the purpose of holding an election of a replacement trustee by the resigning trustee, commissioners, or if appropriate the Accountant.

### Actions of the resigning trustee

The trustee, or if appropriate the commissioner or the Accountant, should notify all known creditors to invite them to attend the meeting of creditors. The meeting should be held in accordance with section 18.5.

The trustee should, at this time, inform creditors if there is expected to be any change to the administration of the bankruptcy as a result of their resignation and the appointment of a replacement trustee.

This should highlight the name and address of any person seeking to be elected as the replacement trustee and any potential for changes to the fee rates and outlays to be charged by the proposed replacement trustee.

The Accountant considers it is very important that creditors are made fully aware of any impact a change of trustee may have on the administration of the bankruptcy, to allow creditors can make an informed decision on whether to attend the meeting of creditors and vote to appoint a replacement trustee.

A copy of the notification to creditors must be uploaded to BASYS, together with a list of the creditors who have been circularised.

If the required meeting of creditors is not held, or is not held within the stated time period, the trustee will not have met the conditions for approval to resign and the Accountant will not appoint a replacement trustee.

### Procedure following the meeting of creditors

Following the meeting the resigning trustee should upload to BASYS a copy of the following documents:

* the minutes, signed by the person who chaired the meeting, with the attendance sheet (to be included in the electronic Sederunt Book)
* when a new trustee has been elected a copy of their consent to act

When a replacement trustee is elected the Accountant and the resigning trustee will follow the procedure at section 5.1.

When no replacement trustee is elected the Accountant may appoint as the new trustee:

* any person who wishes to be appointed (see section 5.3.4)
* any other person as may be determined by the Accountant and who consents to the appointment

When no person is to be appointed the Accountant in Bankruptcy will be deemed to be the new trustee.

### Request for appointment as replacement trustee

A request should be completed within 14 days, beginning with the day of the meeting of creditors, by the person seeking to be appointed.

The Accountant will make the appointment if:

* all creditors have been appropriately notified and a copy of the circular has been received by the Accountant
* a copy of the minutes confirming a trustee was not elected has been received
* the person requesting appointment is eligible to be appointed as the replacement trustee
* they are content for the person seeking appointment to be appointed as replacement

When satisfied the appointment should be made AST will:

* notify the former and replacement trustee of the decision
* record the details of the change on the Register of Insolvencies
* issue an invoice to the replacement trustee. The fee to be applied can be found in [The Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made)

### Actions of the replacement trustee

The replacement trustee must notify the appointment to every known creditor and advise of the right of review.

The replacement trustee may require:

* delivery of all documents relating to the bankruptcy and in their possession or their representatives
* delivery of a copy of the former trustee’s accounts
* the former trustee, or the former trustee’s representatives, to submit the trustee’s accounts for audit to the commissioner(s), or if there are no commissioners, to the Accountant in Bankruptcy

The commissioner(s), or the Accountant in Bankruptcy, will issue a determination fixing the amount of the outlays and remuneration payable to the former trustee, or representative, in accordance with section 133 of the Act.

Further details on the determination process can be found in the Accounts Guide.

The determination can be appealed, within 14 days after being issued, by:

* the trustee, or trustee’s representative
* the replacement trustee
* the debtor
* any creditor

Any appeal should be made against:

* a determination by the commissioner to The Accountant
* a determination by the Accountant to the sheriff
* a decision on an appeal by the Accountant is appealable to the sheriff and the decision of the sheriff is final

### Resignation or death of a trustee – review and appeal

An application can be made by the former trustee (or if appropriate their representative), the debtor or any creditor to the Accountant’s independent review team for a review of a decision or appointment made by the Accountant.

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

The team may refer a case to the court, either to the sheriff or to the Court of Session, for a direction before undertaking a review.

The team must take into consideration any submissions made by any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

## Removal of a trustee other than when unable to act

A trustee may be removed from office:

* by the creditors at a meeting called for that purpose
* by order of the Accountant, if the Accountant is satisfied, on the basis of circumstances, there are reasons to remove the trustee from office

### Meeting of creditors

A meeting called for this for this purpose would be convened in accordance with Schedule 6, Part 1 of the Act (see section 18.5).

Within 14 days of the meeting the trustee should upload to BASYS a copy of the following documents:

* the letter issued to convene the meeting (to be placed in the electronic Sederunt Book)
* the minutes, signed by the person who chaired the meeting, with the attendance sheet (to be placed in the electronic Sederunt Book)
* when a new trustee has been elected a copy of their consent to act

When a replacement trustee is elected the Accountant and the previous trustee will follow the procedure at section 5.1.

### By order of the Accountant

The Accountant can also issue an order, without an application, when they are satisfied there are reasons for the trustee to be removed.

An order may also be made on the application of:

* the commissioner(s)
* a person representing not less than one quarter in value of the creditors.

The application should be made on a Form 1 of the [Applications and](http://www.legislation.gov.uk/ssi/2016/295/contents/made) [Decisions Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made).

AST will :

* record the particulars of the application on the Register of Insolvencies
* order the application to be served on the trustee
* allow the trustee 21 days from the date on which the copy application is served to make representations

The Accountant will:

* within 14 days of the end of the representation period decide whether to remove the trustee, or make any other order under section 70(1)(b) or 70(5) of the Act
* when appropriate issue a Form 5 of the[Applications and Decisions Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made)declaring the position of trustee vacant and a meeting of creditors must be held for the election of a new trustee
* the meeting should be held in accordance with Schedule 6, Part 1 of the Act and the trustee should follow the procedure as shown at section 5

### Removal of the trustee other than unable to act - review and appeal

When the replacement was made at a meeting of creditors an appeal can be made by the trustee, a creditor or any other person have an interest to the sheriff within 14 days after the date of the meeting.

When the removal is made by virtue of an Order by the Accountant an application can be made by the trustee, the commissioner or any creditor to the Accountant’s independent review team for a review of a decision made by the Accountant to:

* make the order
* make any such further, or other order, as they thinks fit in accordance with section 70(5) of the Act

An application must be received before the expiry of 14 days from the date the order was notified by the Accountant.

The team must take into consideration any submissions made by the applicant and any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

## Removal of a trustee when unable to act or no longer able to continue to act

A trustee can be removed from office on the application of a commissioner(s), the debtor or a creditor if the following circumstances apply:

* a trustee is unable to act, either in accordance with the Act or from any other cause shown, other than death
* it is considered that the trustee’s conduct should not allow them to continue to act

The application should be made on a [Form 1](https://www.aib.gov.uk/sites/default/files/the_bankruptcy_applications_and_decisions_scotland_regulations_2016_-_form_1.pdf)of the [Applications and](http://www.legislation.gov.uk/ssi/2016/295/contents/made) [Decisions Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made).

AST must order the intimation of any application as they consider necessary.

The Accountant can also issue an order, without an application, when the Accountant is satisfied there are reasons for the trustee to be removed.

If the Accountant is satisfied it is appropriate they will:

* declare the office vacant
* make any necessary order to enable the bankruptcy to proceed and to safeguard the estate pending the election of a new trustee

### Meeting of creditors

AST will advise the commissioner(s), or when there is no commissioner(s) AiB, to call a meeting of creditors within 28 days of the of the decision for the purpose of election of a new trustee.

The meeting should be held in accordance with Schedule 6, Part 1 of the Act and should follow the procedure as shown in section 18.5.

Following the meeting the commissioner(s) should upload to BASYS, or send to AiB, a copy of the following documents:

* the letter issued to convene the meeting (to be placed in the electronic Sederunt Book)
* the minutes, signed by the person who chaired the meeting, with the attendance sheet (to be placed in the electronic Sederunt Book)
* when a new trustee has been elected a copy of their consent to act

When a replacement trustee is elected the commissioner(s) and the Accountant will follow the procedure at section 5.1.

When no replacement trustee is elected the Accountant may appoint as the new trustee:

* any person who wishes to be appointed (see section 3.4)
* any other person as may be determined by the Accountant and who consents to the appointment

Where no person is to be appointed the Accountant in Bankruptcy will be deemed to be the new trustee.

### Removal of the trustee – unable to act – review and appeal

An application can be made by the trustee, the commissioner(s), the debtor

or any creditor to the Accountant’s independent review team for a review of a decision made by the Accountant to:

* declare the office to have become, or to be vacant
* make any necessary order under section 72(2)(b)

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

The team must take into consideration any submissions made by the applicant or any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

# Commissioners

This section refers to Part 4 of the Act, section 76 to 77.

New or additional commissioners can be elected at the statutory meeting, or any subsequent meeting of creditors under section 49(7) of the Act. No more than five commissioners shall hold office in a bankruptcy at any one time.

The trustee should ensure creditors are aware of the role and responsibilities of a commissioner before they agree to be put forward for election (see section 16).

## General functions of a commissioner

The commissioners role is to advise the trustee in the administration of the bankruptcy and to audit and determine the fees and outlays of the trustee. Further information regarding the role can be found in section 19.

## Election of commissioners

No person listed below is eligible for election as commissioner:

* the debtor
* a person who holds an interest opposed to the general body of creditors
* a person who is an associate of the debtor
* a person who is an associate of the trustee in the sequestration

## Resignation of commissioners

A commissioner may resign office at any time.

A commissioner who, after election, becomes ineligible to continue to act must resign.

A commissioner who is acting as a mandatory of a creditor and ceases to act for the creditor must resign.

If there are no other commissioners the trustee should either call a meeting of creditors, or advise the creditors of their right under Schedule 6, Part 1 of the Act to request a meeting for the purpose of electing a new commissioner.

If requested by creditors representing one tenth in number, or one third in value, the trustee should convene a meeting in accordance with Schedule 6, Part 1 of the Act (see section 18.5).

When no commissioner is in post AiB will assume these duties.

## Removal of commissioners

A commissioner can be removed:

* by the creditors at a meeting called for this purpose
* by order of the sheriff if they are satisfied that the commissioner is no longer acting in the interests of the efficient conduct of the sequestration
* if their debt is settled out with the bankruptcy
* if the commissioner is acting as a mandatory of a creditor and the creditor intimates in writing to the trustee that the mandate has been recalled

### Debt settled/mandate recalled

If there are no other commissioners the trustee should either call a meeting of creditors, or advise the creditors of their right under Schedule 6, Part 1 of the Act to request a meeting for the purpose of electing a new commissioner.

The trustee should convene a meeting at the request of creditors representing one tenth in number or one third in value of the creditors. The meeting should be held in accordance with Schedule 6, Part 1 of the Act (see [section 18.5](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/18-miscellaneous/185-meetings-of-creditors-and-commissioners)).

When no commissioner is in post AiB will assume these duties.

### Application to the sheriff

An application to the sheriff may be made by:

* the trustee
* a person representing not less than one quarter value of the creditors
* the Accountant

The sheriff must:

* order intimation of the application to be served on the commissioner and any creditor who gave a mandate to the commissioner
* provide the commissioner the opportunity to make representations

The sheriff may:

* remove the commissioner from office
* make an order as they think fit

When no commissioner is in post AiB will assume these duties.

## Removal of commissioners – appeal

An appeal can be made against the sheriff’s decision by the trustee, any commissioner, any creditor or the Accountant within 14 days to the Sheriff Appeal Court.

The Sheriff Appeal Court’s decision is final.

# Vesting of the estate

This section refers to Part 5 of the Act, sections 78 to 88.

The whole estate of the debtor vests in the trustee for the benefit of the creditors as at the date of bankruptcy.

## Continuation of debtor’s business by trustee

Section 109(5) of the Act allows a trustee to carry on or close down the debtor’s business.

However, the trustee is required to consult with and comply with general or specific directions from creditors, the Accountant and the sheriff following an application by the commissioners.

The trustee must consider the financial benefits to the estate of any actions they may take over the debtor’s business, under section 50(9) of the Act.

Since it will be probably be the failure of the business which has led to the debtor’s bankruptcy, the business will be by definition unprofitable, and the trustee should consider if it is in the interests of the creditors to continue trading.

Nevertheless, it is recognised circumstances may arise when continuing to trade is either unavoidable, because of the nature of the business, or is judged likely to be ultimately beneficial to the estate. Another circumstance which might lead to a decision to trade-on, is when the debtor is not insolvent and a petition for recall is deemed likely to succeed. Finally a decision to trade-on might be a matter of necessity, if the business involves a livestock enterprise or a nursing home for example.

There are accordingly three basic options in a trading case:

* to close down the business and realise the assets
* to trade to a close, for example, when the stock is perishable or when it is judged a better realisation will be achieved if the assets are sold in the normal course of business than if they were separately disposed of
* to trade-on pending a sale of the business as a going concern, or its reversion to the debtor

If the decision is to trade to a close, or to trade-on to disposal, it will clearly be in the best interest of the trustee that such period of trading is the minimum time possible. In any circumstances, the continuation of an already failed business is a highly speculative venture and should a trustee wish to do so, they must be clear in their own mind that it is their personal responsibility.

The trustee, in such circumstances, is in a delicate position because they will incur personal liability in respect of contracts adopted or made by them, though they will have a right of recourse against the estate (but in no circumstances from public funds).

However unfortunate it may be for a trustee who makes that decision and subsequently incurs losses for which they are personally liable, whether through initial misinformation or whatever, that is a risk they take, even though they do so in furtherance of their statutory duties and obligations.

Although not legally binding it is nevertheless of interest to note a decision of the HMRC Commissioners which found a trustee personally responsible for PAYE liabilities incurred during a sustained period of trading on. The trustee’s defence that it was the debtor’s responsibility was not accepted.

## Heritable property which has been conveyed to a third party

This does vest in the trustee, see Burnett’s trustees v Grainger 2002 SLT 699. If a seller dispones a property to a third party and subsequently becomes bankrupt before the third party registers title the property will still vest in the trustee.

Section 79(1)(b) of the Act, makes it clear a debtor’s estate includes any property of the debtor, title to which has not been completed by another person deriving right from the debtor.

However, sections 78(3) and (4) of the Act afford a measure of protection to the third party purchaser, in that:

It shall not be competent for:

* the trustee; or
* any person deriving title from the trustee

to complete title to any heritable estate in Scotland vested in the trustee by virtue of his appointment before the expiry of the period mentioned in subsection (4) below.

(4) That period is the period of 28 days (or such other period as may be prescribed) beginning with the day on which:

* the order of the sheriff granting warrant is recorded under subsection (1)(a) of section 26 of this Act
* the determination of The Accountant awarding bankruptcy is recorded under subsection (2) of that section, in the register of inhibitions

On the date of settlement the buyer may be excusably unaware of the bankruptcy and yet the bankruptcy will mean the seller's power to alienate assets is terminated. Section 89(10) of the Act extends the provision so that if someone buys from a person who has just been made bankrupt and, acting in good faith, completes title promptly, the title will be good.

## Property held on trust

This does not vest in the trustee. If the debtor has assets which are held on behalf of a third party, or if the debtor has assets which they have received from a trust by a third party, they do not vest under section 33 (1)(b) of the Act.

## Property subject to a restraint order

This does not vest with the trustee under section 420 of The [Proceeds of](http://www.legislation.gov.uk/ukpga/2002/29/contents) [Crime Act 2002](http://www.legislation.gov.uk/ukpga/2002/29/contents)(2002 Act).

The following property is excluded from the debtor’s estate in terms of the Act:

* property subject to a restraint order made under section 41, 120 or 190 of the 2002 Act
* property subject to an order under section 50 (confiscation orders) of the 2002 Act
* property for which an enforcement administrator has been appointed to deal

If a restraint order has been made in relation to heritable property the property will only not vest if the restraint order is registered in the Sasines or Land Register before the award of bankruptcy.

## Income

Income of the debtor, as at the date of bankruptcy, does vest with the trustee.

Income the debtor receives during the period of bankruptcy does not vest. However the trustee is entitled to seek a contribution from the income (see section 8).

## Repayments and refunds – post bankruptcy

It is the Accountant’s view that repayments and refunds can and should be regarded as acquirenda and section 78(11) of the Act is available to any party who holds a dissenting view to make an application to the sheriff.

The Act does not define what is meant at Section 85(1) of the Act by income of whatever nature. What is known, however, is that it does not include any estate, property or right which has vested in the trustee.

When deductions have been made, or expenditure incurred, e.g. payment to a post-bankruptcy creditor, from a debtor’s income and it later becomes known the deductions were too great or that certain sums were overpaid to a creditor, a right arises in the person of the debtor - a right of recovery. It is The Accountant’s view that this right of recovery is acquirenda, i.e. estate vesting in the trustee under Section 86(11) of the Act.

For estate to vest under Section 86(11) of the Act it is necessary that:

* is acquired by the debtor on a relevant date and;
* it would have vested in the trustee if it had been part of the debtor’s estate on the date of bankruptcy

It is the opinion of the Accountant if, at the date of bankruptcy, the debtor had a right of recovery in respect of overpaid tax, or miss-sold or miss- applied bank policies or charges, the right would vest in the trustee and remains vested in the trustee until the expiry of four years after the date of bankruptcy, see section 78(10) of the Act.

The right is not a right to income as such. It is a distinct right relating to the repayment of excess deductions made by, for example, HMRC or a bank. The nature of that right does not vary with the time at which it arises.  Thus, if the excess deductions of tax, or charges, have been made after the date of bankruptcy, the debtor’s right remains just that, a right to repayment not a right to income. This right to repayment appears to the Accountant to satisfy Section 86(11) of the Act for the purposes of estate vesting in the trustee.

It is the Accountant’s view that the same principle applies to any post- bankruptcy creditor who had been overpaid by the debtor. A right of recovery would arise.

HMRC are in a different position from other post-bankruptcy creditors in that they can make deductions directly from the source of the debtor’s income whereas other post-bankruptcy creditors are paid by the debtor.

## Pensions

Following a Sheriff Court ruling in the case of Gary John Cook v AiB [2019] SC GLA 82 the position is that where the debtor is in receipt of any form of pension or annuity at the date of bankruptcy, such payments are classed as income which does not vest in the trustee.

It is of course open to the trustee to seek a contribution from such income through a Debtor Contribution Order, including a one-off contribution from any lump sum payment received by the debtor.

Unapproved personal pensions continue to vest in the trustee, although there are provisions to allow the trustee to come to an agreement with the debtor that an unapproved scheme will not vest when it is the debtor’s sole or main pension, or the debtor makes application to the court for an exclusion order in relation to part or all of the pension (see the [Occupational and Personal Pension Schemes (Bankruptcy) Regulations](http://www.legislation.gov.uk/uksi/2002/427/contents/made) [2002](http://www.legislation.gov.uk/uksi/2002/427/contents/made)).

### The Accountant’s view

The Accountant’s policy on the treatment of personal pensions in bankruptcies is set out below

As the policy objective is to protect approved pension schemes from the normal consequences of bankruptcy, it follows logically that payments by the debtor to produce those pensions benefits should be treated as allowable expenditure when calculating surplus income for the purpose of assessing a Debtor Contribution Order.

Payments by the debtor to a non-approved scheme need not be so treated, unless the court has agreed that the non-approved pension does not vest in the trustee.

If the pension from the approved scheme comes into payment during the period of bankruptcy, then all pension benefits, including the lump sum, shall be taken into account for the purpose of calculating a contribution (see [section 8](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/8-debtor-contributions)).

The trustee should consider challenging ‘excessive contributions’ to an approved scheme. They may also be able to use these provisions to challenge a debtor’s decision to contribute to a new approved personal pension scheme or to increase their contributions to an existing scheme (see [section 9.4](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/9-safeguarding-the-interest-of-creditors/94-excessive-pension-contributions)).

Section 16 of the [Welfare Reform and Pensions Act 1999](http://www.legislation.gov.uk/ukpga/1999/30/contents)will allow the trustee to seek a court order to recover excessive contributions.

Contributions are defined as such if they were made for the purpose of putting assets beyond the reach of creditors

### Employee pension schemes operated by the debtor

The attention of trustees is drawn to the provisions of section 57C of the [Social Security Pension Act 1975](https://www.legislation.gov.uk/ukpga/1975/60/contents), as inserted by Schedule 4 of the [Social](https://www.legislation.gov.uk/ukpga/1990/27/contents) [Security Act 1990](https://www.legislation.gov.uk/ukpga/1990/27/contents).

This section imposes a duty on the trustee to an individual or partnership and when the debtor operated a pension scheme for their employees, to ensure at all times at least one of the trustees of the scheme is an independent person.

The section further provides that if there is no such independent trustee, the trustee in bankruptcy shall take steps to appoint or secure the appointment of an independent person.

## Child support maintenance

When there is a Deduction of Earnings Order (DEO) in effect prior to an award of bankruptcy that order ceases to have effect upon such an award. Unlike other forms of arrestment any deductions made after the date of bankruptcy are not repayable to the estate, under section 24(9) of the Act.

Once bankruptcy has been awarded, the Child Maintenance Service (CMS) cannot enforce a pre-bankruptcy DEO nor take any other steps to recover pre-bankruptcy arrears. The CMS may claim in the bankruptcy but upon discharge the debtor will be discharged of personal liability for such arrears under section 145(4)(b) of the Act.

The debtor is liable to continue to make payments of the DEO after the award of bankruptcy. There is nothing to prevent the CMA from obtaining a DEO in respect of debtors’ post-bankruptcy earnings and any such obligation must be taken into account by The Accountant in considering an application by a trustee for a Debtor Contribution Order (see section 8).

Trustees should bear this in mind when considering a contribution and also be aware that the CMS central office may be prepared to discuss the question of modifying the terms of an existing DEO.

## Claims for patrimonial loss and compensation

Claims for damages as a result of personal injury can generally be split into two elements – patrimonial loss (e.g. loss of earnings) and compensation (solatium). Compensation is the element of a claim relating to pain and suffering.

It is the Accountant’s view that a trustee should not involve themselves in speculative proceedings and should be very reluctant to insert themselves into damages actions commenced by the debtor in case they find themselves personally liable for the costs of the action.

Where the debtor’s estate includes a right to make a claim for patrimonial loss it vests in the trustee on the date of sequestration as part of the debtor’s estate.

Where the debtor’s estate includes a right to a claim for compensation for personal injury, unlike a claim for any patrimonial loss, the right does not vest in the trustee at the date of sequestration and so the trustee is prevented from raising an action seeking damages. This is because a claim for compensation is considered a personal right to the debtor such that only the debtor themselves should have the right to say whether proceedings should be initiated or not.

When a debtor’s estate has been sequestrated, the trustee can commence proceedings for any patrimonial loss but does not have the right to raise an action for compensation (Muir’s Trustee v Braidwood, 1958 SC 169).

The position changes for compensation if the debtor has already raised an action. In Watson v Thompson (1991 SC 447) it was held that the nature of the right to claim compensation changed after the debtor raised an action to recover it so that it ceased to be a personal right. As such the trustee is entitled to be sisted as a party to the action.

The Inner House of the court of Session has also said, in the case of Coutts Trustee v Coutts (1998 SCLR 729), that the right to the proceeds of the action vests in the trustee at the date the action was raised by the debtor.

The main point being that it is not a requirement that the trustee is sisted in place of the debtor, once an action has been raised the right to the proceeds automatically vests in the trustee.

In any event if the debtor decides to pursue an action for compensation and is successful, any sum awarded during the acquirenda period will fall to the estate for the benefit of the creditors. In Jackson v M’Kechnie (1875 3 R130) the debtor raised an action for slander after the date of bankruptcy but prior to the end of the acquirenda period. It was held the claim for damages formed part of the estate.

In personal injury claims it is common for the injured party to settle a claim with the insurer before it reaches court. The fact that an agreement is reached gives rise to contractual rights that vest in the trustee. Where the debtor agrees to settle a claim during the acquirenda period the claim vests in the trustee under section 86(4) of the Act. Similarly, damages recovered in any successful action or settlement for compensation prior to the bankruptcy would fall into the estate for the benefit of the creditors under section 79(1) of the Act.

Therefore, a claim for compensation for personal injury vests in the trustee where, prior to the end of the acquirenda period, whether an action for damages has been raised by the debtor or settlement has been reached.

## Redundancy payment

When a debtor is made redundant and receives a severance payment from their employer the question arises as to whether this payment, or part of it, vests in the trustee under Section 86(4) of the Act.

This question was considered in an application by Patrick McGrail under section 78(11) of the Act (Sheriff Murphy, Glasgow Sheriff Court, 10 August 1990). The sheriff did not issue a written judgement but the Accountant understands the facts of the case to be as follows.

During the relevant period, as defined by Section 79(5) of the Act, Mr McGrail was made redundant and received a severance payment of £5050. This sum was made up of four elements:

|  |  |
| --- | --- |
| Statutory redundancy payment | £810 |
| Payment in lieu of notice        | £810 |
| Company ex gratia payment | £1000 |
| Additional payment based on years of service & wages | £2430 |
| Total | £5050 |

The trustee conceded the payment in lieu of notice was income but claimed the remaining £4240 as acquirenda.

This approach was later approved by the sheriff. The debtor disputed this approach and applied to the sheriff for this amount be excluded from vesting in the trustee under Section 78(11) of the Act.

The sheriff held that:

* the statutory redundancy payment of £810 fell to be regarded as alimentary in nature and therefore as income which did not vest in the trustee
* the other payments made by the company which were voluntary did vest in the trustee

When dealing with payments made on redundancy, it will be necessary for trustees to identify the part which represents the debtor’s statutory entitlement and care will be required in those cases, such as McGrail, when it is company policy to pay an enhanced sum. In some cases such an enhanced sum might be loosely termed the redundancy payment.

In summary, the various elements of payment which can be received on redundancy should be treated as follows:

|  |  |
| --- | --- |
| Statutory Pay In Lieu Of Notice (PILON) | Income |
| Enhanced or voluntary PILON | Acquirenda vested in the trustee Statutory |
| Statutory redundancy pay | Income |
| Enhanced or voluntary redundancy pay | Acquirenda vested in the trustee |
| Other ex-gratia payments | Acquirenda vested in the trustee |

Once a debtor has received their statutory redundancy payment the trustee should consider whether a contribution or increased contribution should be sought.

The trustee should bear in mind receipt of a redundancy payment does not immediately debar the debtor from receiving unemployment benefit under Section 20(3A) of the Social Security Act 1975.

## Criminal injuries compensation

Section 7(2) of the [Criminal Injuries Compensation Act 1995](http://www.legislation.gov.uk/ukpga/1995/53/section/7)states an award made under the Criminal Injuries Compensation Scheme to a debtor shall not vest in the trustee.

However, a trustee can arrange a Debtor Contribution Order under section 90 of the Act (see section 8).

## Critical illness cover

A critical illness policy would be treated as an asset in the same way as any other type of policy under section 78 of the Act.

When the policy becomes payable prior to, or during the relevant period of the bankruptcy, the trustee would be entitled to the proceeds.

If there was also an element of regular income this amount should be included when a Debtor Contribution Order is made, or if a variation was required, in accordance with section 90 or 95 of the Act. (see section 8).

## Partnerships & limited companies

Under Scots Law a partnership has a separate legal persona; the assets and liabilities of a partnership being separate from those of the individual partners who agree on their capital contribution to the firm.

To protect creditors of the firm, however, and to ensure there is no limited liability in the case of the partnership, the partners are jointly and severally liable for all debts and obligations of the firm incurred while they were partners. This liability, however, is in relation to creditors. The partners are not liable as principals; they are liable rather as guarantors.

Their liability is therefore a secondary liability, effectively guaranteeing the firm’s obligations to its creditors. (See Bell’s Commentaries II, 507-508).

The trustee on the bankrupt estate of the firm can rank on the partner’s estate for debts due by the partner to the firm on capital account. It is their duty to do so in order to ingather the whole of the firm’s estate for distribution to its creditors. A firm is only a creditor of its partners in respect of a debt due by the partners to the firm, namely any debit on their capital account. Likewise, a firm is only a debtor of its partners in respect of a debt due by the firm to the partners.

While a solvent partner may appear to be able to walk away from the firm’s debts, the duty of the trustee on the estate of the firm is to ingather the estate of the firm.

The whole point of joint and several liabilities of partners are to enable a creditor to pursue any one partner for the whole of the debt due by the firm to them.

In so far as a creditor of a firm is not paid in full out of the bankrupt estate of a firm they are entitled to pursue any one or more partners for the balance of the debt due to them. If a creditor chooses not to do so that is up to them.

The trustee’s role is not to step into the shoes of the creditors in this respect, but to ingather and distribute the firm’s estate to its creditors. They only act as a creditor in relation to the partners insofar as there is a balance owing by them on their capital account.

It is on this basis that, once the firm’s assets have been distributed, even though the firm’s creditors have not been paid in full, the trustee on the bankrupt estate of the firm is exonerated, leaving the creditors to seek the unpaid balance of their debts from the separate estate of the partners (Bell’s Commentaries II, 561-562).

There are two situations clearly set out in Goudy and in other authoritative textbooks, e.g. Millar on Partnership. In the first situation, the firm’s trustee may rank on a partner’s separate estate, but only for a debt due by the partner to the firm on their capital account. (See Dunlop v Speir (1756) M. 14610).

This is to be distinguished from a case when the partners have all paid up their capital accounts in full, but the firm’s estate is insufficient to pay its creditors in full. A claim on a partner’s estate in relation to the deficiency of the firm’s funds can be made only by proper creditors of the firm. It cannot be made by a creditor who was also a partner. Nor can it be made by the trustee of the estate of the firm, as the title to sue a partner on their obligation as guarantor of the firm’s debts is in the individual creditors. It is not an incident of the firm’s estate. A partner’s liability to make up any deficiency is based on their liability as guarantor. (See Laing Brothers & Company’s Trustee v Low (1896) 23R.1105).

Estates of an individual debtor may be made bankrupt for partnership debt possibly because the petitioning creditor has dealt solely with that individual and is unaware of the existence of a partnership.

Subsequently, the trustee finds that the bulk of assets revealed to them by the debtor are, in fact, partnership assets which, being assets of a separate legal person, do not vest in the trustee by virtue of their appointment.

No specific duty is imposed upon a trustee when this type of situation comes to their notice. The creditors may indeed mistakenly believe that these assets are protected. It appears to the Accountant that when a trustee becomes aware of such a situation they should send a notice to all creditors advising them:

* that as the trustee on the estate of the individual partner they cannot realise or otherwise deal with the partnership assets
* that they have no title to petition the courts for bankruptcy of the partnership to secure protection for those assets but creditors of the partnership may
* and point out that, unless action is taken by a partnership creditor, those partnership assets are at risk and may disappear

Despite the above, if all the partners of the firm have been made bankrupt and the firm is apparently insolvent, and either the individual partners are creditors of the firm or if the partnership was dissolved by the bankruptcy of one or all of the partners, it would in these circumstances be open to the trustee(s) of the individual partners to petition for the bankruptcy of the partnership, with the concurrence of a qualified creditor.

The trustee can seek to petition for appointment as a liquidator to a company in which the debtor was a majority shareholder. In this case it is quite clear that the debtor’s shares in the company vest in the trustee; accordingly the trustee steps into the shoes of the debtor and has the same right to petition for appointment of a liquidator on the same grounds on which the debtor themselves could have petitioned.

## Bankruptcy of practising solicitors

Practitioners who are appointed or elected, in succession to a judicial factor, as trustee on the estate of a practising solicitor should be aware of the terms of the Inner House Opinion on a report by the Accountant of Court in the case of I.J.W. McKinnie.

The effect of the judgement is that:

* whole estate as it stands at the date of bankruptcy but only a right to an accounting from the judicial factor for the general funds remaining after the appropriate proportion of the factors remuneration and funds held on behalf of the clients of the solicitor are ‘trust funds’ which do not, in the event of bankruptcy, vest in the trustee who accordingly has no title to receive or intromit with such funds. Section 88(1)(c) of the Act
* the judicial factor is entitled to and should apportion their costs appropriately and charge their expenses proportionately to both the client and the general funds of the estate
* what vests in the trustee in a bankruptcy which follows upon a judicial factory is not the debtor’s outlays has been determined and met from that general estate

Despite these conclusions, the leading opinion (of Lord Penrose) allowed:

“that a trustee might still competently take on the administration of the estate, including the realisation of the work in progress, subject to his acceptance and recognition of the judicial factor’s prior rights.”

This is a matter for the trustee, but it is the Accountant’s opinion that the most prudent course is to decline to accept the estate or to assume its administration until the judicial factor is in a position to provide a final accounting in respect of their own intromissions and costs, and to convey any remaining assets without reservation.

In all bankruptcies involving practising solicitors, including those when there was no preceding judicial factory, trustees should observe the principle now established that costs should be appropriately apportioned between the client and general funds.

## Effect of the Debt Arrangement and Attachment (Scotland) Act 2002

Trustees should have regard to the effects of the Debt Arrangement and Attachment (Scotland) Act 2002.

Section 11(1) lists those items kept out with a dwelling house which are exempted from attachment which is shown at section 7.15.1.

Such articles are expressly exempted from vesting in terms of Section 88(1) of the Debt Arrangement and Attachment (Scotland) Act.

### Articles kept outside a dwelling house

* any implements, tools of trade, books or other equipment reasonably required for the use of the debtor in the practice of the debtor’s profession, trade or business and not exceeding in aggregate value £1,000 or such amount as may be prescribed in regulations made by the Scottish Ministers
* any vehicle, the use of which is so reasonably required by the debtor, not exceeding in value £3,000
* a mobile home which is the debtor’s only or principal residence
* any tools or other equipment reasonably required for the purpose of keeping in good order and condition any garden or yard adjacent to, or associated with, a dwelling house in which the debtor resides

### Articles kept in a dwelling house

* articles with sentimental value the aggregate of which do not exceed £150
* articles exempted under Section 88(1)(a) of the Act, listed above
* clothing reasonably required for the use of the debtor or any member of the debtor’s household
* implements, tools of trade, books or other equipment reasonably required for the use of any member of the debtor’s household in the practice of such member’s profession, trade or business, not exceeding in aggregate value £1000
* medical aids or medical equipment reasonably required for the use of the debtor or any member of the debtor’s household
* books or other articles reasonably required for the education or training of the debtor or any member of the debtor’s household not exceeding in aggregate value £1000
* articles reasonably required for the care or upbringing of a child who is a member of the debtor’s household
* toys for the use of any child who is a member of the debtor’s household

The following articles belonging to a debtor shall be exempt from attachment if they are at the time of the attachment for the use of the debtor or a member of their household:

* beds or bedding
* household linen
* chairs or settees
* tables
* food
* lights or light fittings
* heating appliances
* curtains
* floor coverings
* furniture, equipment or utensils used for storing, cooking or eating food
* refrigerators
* articles used for cleaning, drying, mending, or pressing clothes
* articles used for cleaning the dwelling house
* furniture used for storing clothing, bedding or household linen
* articles used for cleaning the dwelling house
* utensils used for cooking or eating food
* articles used for safety in the dwelling house
* tools used for maintenance or repair of the dwelling house or of household articles
* computers and accessory equipment
* microwave ovens
* radios
* telephones
* televisions

# Debtor contributions

This section refers to Part 6 of the Act, sections 89 to 97.

Section 85 of the Act states the income of a debtor, other than income arising from the estate which is vested in the trustee, belongs to the debtor. However, section 90(1) of the Act states the Accountant must make a Debtor Contribution Order (DCO) following the award of a bankruptcy.

The Accountant must make an order fixing a DCO for all bankruptcy cases of a living debtor for a period of 48 months, or the equivalent weekly period, from the date of the first payment or deemed first payment. The DCO must not take effect before the expiry of 14 days from the date of the notification of the order.

The Accountant will use the Common Financial Tool (CFT) to assess the amount payable under a Debtor Contribution Order (DCO) and will consider if:

* all the debtor’s income has been taken into account
* the debtor’s relevant obligations have been considered

The DCO must be made for the full amount of any surplus income.

When there is no available surplus income, or the income is from benefits only, the DCO will be made at zero and the Accountant will determine a deemed first payment date.

Further information regarding the assessment of a contribution should be obtained from the [Notes for Guidance- Common Financial Tool](https://www.aib.gov.uk/publications/notes-for-guidance-common-financial-tool).

## Effect of a DCO

The debtor must pay the contribution:

* at the amount set by the Accountant (if not nil)
* at the amount as varied in accordance with section 95 of the Act (if not nil)
* irrespective of their discharge

The DCO will cease to have effect if the trustee ingathers sufficient assets, or income, to meet the distribution in full under section 129 of the Act.

## Debtor application

This role is undertaken by the Insolvency Registrations Team (IRT) on behalf of the Accountant.

IRT must make an DCO on a Form 17 of [The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)at the same time as awarding bankruptcy and will notify:

* the debtor
* the trustee
* any third person who has been ordered to make the payments for the debtor i.e. an employer

When IRT has made a DCO the trustee is not required to re-assess the debtors income and expenditure using the CFT unless there are significant changes to the debtor’s circumstances, or a Current State of Affairs has been completed (see section 8.6).

## Creditor petition

This role is undertaken by the Adjudication and Supervision Team (AST) on behalf of the Accountant.

AST must make a DCO after the award of bankruptcy, following consideration of a proposal from the trustee. The proposal must be submitted regardless of whether a nil contribution is to be assessed. The trustee must use the CFT to calculate the amount payable.

A trustee should not submit their proposal until all the requirements for assessing the debtor’s income and expenditure have been completed in accordance with Part 3 of the [Bankruptcy Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made). If a trustee cannot evidence the proposed DCO amount has been calculated using the CFT, the Accountant cannot make a DCO.

A debtor is required to co-operate with their trustee and provide full information and evidence relating to their income and expenditure to allow an accurate CFT calculation to be completed.

The Accountant will expect the trustee to have made reasonable efforts to obtain co-operation and evidence prior to submission of the proposal. They should inform the debtor, in writing:

* of their obligations
* of the consequences of not co-operating and providing their trustee with requested information and documents
* that an assessed DCO may be made using information obtained by the trustee which may mean they are required to pay a higher amount than would have been calculated if they had co-operated
* of the consequences of not paying the DCO and not co-operating

If the debtor still does not co-operate the trustee should consider submitting an assessed DCO proposal, if they believe it is in the best interest of the creditors to do so.

Trustees can assess and record amounts for the debtor’s income and expenditure that cannot be verified, by obtaining available information, accessing guidance and making reasonable assumptions.

Examples of information sources that may establish a debtor’s income and expenditure are:

* employers and payslips
* bank statements
* information from creditors
* information from credit reference agencies
* information from reliable and reputable websites e.g. council and energy company

The trustee must:

* inform the Accountant if the DCO proposal has been assessed
* demonstrate they have considered and included in their proposal an amount for aliment for the debtor, if identified as being required, and sufficient amount to meet the debtor’s known obligations
* provide a record of the supporting evidence, information and assumptions that support the income and expenditure amounts used in the calculation
* re-assess and vary the DCO amount, if the debtor later provides acceptable evidence and information to satisfy the trustee that any income and/or expenditure amount used in the assessed DCO, was not accurate

Within 12 weeks of the date of the award, (six weeks for cases awarded prior to 29 March 2021), the trustee must:

* submit the proposal
* provide a copy of the CFT calculation
* provide any evidence, or relevant information, when trigger figures have been breached together with an explanation why the expenditure allowed is reasonable
* any other relevant evidence or information to allow the Accountant to make a decision

The Accountant acknowledges that in some cases this will mean it will not be possible for a trustee to comply with the 12 week statutory period for submission of a proposal, for example, if a debtor cannot be contacted, or is not co-operating.

When the trustee is unable to submit the proposal within this period they must apply for waiver under section 212 of the Act prior to submission (see section 18.3).

The Accountant will be agreeable to grant such a waiver if the trustee can demonstrate that they were unable to present their DCO proposal within the 12 week period and that they have taken reasonable steps, to contact the debtor and to obtain the required income and expenditure information.

The cost of the section 212 application will only be an allowable expense of the estate if the trustee can demonstrate the delay was due to debtor non- cooperation.

After considering the proposal AST will make the DCO on a [Form 18](https://www.aib.gov.uk/bankruptcy-scotland-regulations-2016-form-18-debtor-contribution-order-petition-sequestration-draft)of [The](http://www.legislation.gov.uk/ssi/2016/397/contents/made) [Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)and notify:

* the debtor
* the trustee
* any third person who has been ordered to make the payments for the debtor i.e. an employer

### Original DCO - review and appeal

An application can be made by the debtor, the trustee or any interested person to the Accountant’s independent review team for a review of a decision made by the Accountant to make the DCO.

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

When an application is received the order is suspended until the determination of the review.

The team must take into consideration any submissions made by any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to make representation may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

## Variation of payment period and intervals

After the Accountant has made a DCO for a period of 48 months the trustee may determine a shorter, or longer, period of payment.

A shorter period may be considered if the contribution payments during the shorter period and/or any other estate realised by the trustee, e.g. heritable or moveable assets will be sufficient to pay in full:

* the outlays and remuneration of any interim trustee and the trustee
* petitioning creditor expenses
* all preferred debts
* all ordinary debts
* statutory interest on all preferred and ordinary debts

A longer period may be considered if:

* the debtor has failed to pay the full 48 monthly, or equivalent weekly, contributions
* the debtor and the trustee agree to a longer period

It is not expected that a trustee would consider extending the period of the DCO until a period of 42 months after the original DCO was made.

### Actions of the trustee

The trustee should upload to BASYS:

* notification of the variation to the length of the DCO
* evidence to support the change of length, for example:
* copy of Estimated Outcome Statement to show sufficient monies received to pay creditors in full
* copy of Scheme of Division or Final Account to show all creditors have been paid
* account cards showing record of payments
* sequestration bank statements showing record of payments
* a copy of the Debtor Contribution Order Variation Form

When the Accountant considers that the variation was not appropriate, or the information provided is insufficient, or incorrect, a notification will be issued providing the reasons and the steps to be taken to remedy the situation.

### Variation of payment period and intervals – review and appeal

An application can be made by the debtor, any creditor or any interested person to The Accountant’s independent review team for a review of a decision made by the trustee to vary the payment period or intervals.

An application must be received before the expiry of 14 days from the date the decision was made by the trustee.

When an application is received the order is suspended until the determination of the review.

The team must take into consideration any submissions made by any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to make representation may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

## Deductions from debtor’s earnings and other income

The debtor may choose to make payments from earnings, or other income, directly from a third person who is due to make the payment to the debtor.

A third person may be:

* a person by whom the debtor is employed
* a person who is required to pay the earnings or income to the debtor
* a person who is required to pay the income to the debtor

### Actions of the debtor

The debtor must provide the third person a Form 19 of [The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made), with an instruction to:

* deduct a specified amount from their earnings or other income
* make payments of this amount to the trustee

### Actions of the trustee

The trustee may give a third person a Form 20 of [The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made), (see section 1.5) if:

* the debtor fails comply with the requirements to provide a Form 19
* the debtor fails to make two payments towards the DCO

### Actions of the third person

Upon delivery the recipient of the instruction must:

* deduct the sum specified in the instruction on every pay day, or day on which the payment is due
* pay the sum to the trustee as soon as reasonably practicable

The third person may charge a fee, equivalent to the fee chargeable under section 71 of the [Debtors (Scotland) Act 1987](https://www.legislation.gov.uk/ukpga/1987/18/contents), from the balance due to the debtor.

When the third person fails, without good cause, to make the payment they are:

* liable to make the payment on demand by the trustee
* not entitled to recover the amount from the debtor

## Variation to the amount of the DCO

The trustee may increase, or decrease, the amount of the DCO under section 95 of the Act for the following reasons:

* section 95(1)(a) on the application of the debtor, following a change of circumstance
* section 95(1)(a) if they consider it appropriate, following a change of circumstance or upon receipt of the Current State of Affairs
* section 95(1)(a) when sending to AiB a Debtor Discharge Report.

### Actions of the trustee

It is the expectation of the Accountant that the trustee will make a decision on a whether a variation is appropriate within 14 days of becoming aware the change is requested or required.

The trustee must use the CFT to calculate the variation to the amount.

When the trustee has made the decision to vary under section 95(1)(b) it cannot take effect before 14 days beginning with the day on which the decision is made.

The trustee must notify, in writing, their decision to vary, or refuse to vary, the DCO:

* the debtor
* any person required to make a payment under a Form 19 or 20 using a Form 21 of [The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)(see [section 1.5](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/1-role-of-the-accountant-in-bankruptcy/15-electronic-signatures))
* any other interested person e.g. all creditors
* AiB

The parties should be notified of their right of review.

All parties should be given a copy of the Debtor Contribution Order Variation Form.

The trustee must upload to BASYS:

* the notification of the variation to the amount of the DCO
* copy of the new CFT calculation
* evidence to support the change, for example:
	+ copy of Current State of Affairs
	+ wage slips
	+ evidence that the debtor is now only in receipt of benefits
	+ new tenancy agreement
	+ letter to advise of change to rent or utility payments
	+ copy of receipts over a three month period to record increase/decrease of expenditure (i.e. fuel costs)
	+ bank statements
	+ if applicable, evidence and explanation to support a breach of a trigger figure

When the Accountant considers the variation is not appropriate or the information provided is insufficient, or incorrect, a notification will be issued providing the reasons and the steps to be taken to remedy the situation.

### Variation to the amount of a DCO – review and appeal

An application can be made by the debtor or any interested person to the Accountant’s independent review team for a review of a decision made by the trustee to vary the amount of the DCO.

An application must be received before the expiry of 14 days from the date the decision was made by the trustee.

When an application is received against a decision when the trustee considered it appropriate to vary the DCO following a change of circumstances the order is suspended until the determination of the review.

The team must take into consideration any submissions made by any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to make representation may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

## Quashing a DCO

The trustee may bring the DCO to an end before the completion of the 48 months:

* on the application of the debtor, following a change of circumstance
* if they consider it appropriate, following a change of circumstance or upon receipt of the Current State of Affairs
* when sending to AiB a Debtor Discharge Report

It is expected that a DCO will only be quashed before it expires when it has been set at nil, or very small contribution amount is being paid and it is the trustee’s belief that the debtor’s financial circumstances are unlikely to change during the remaining DCO term, in a way that may bring any financial benefit to the estate, e.g. there is no expectation an unemployed debtor will re-enter employment.

### Actions of the trustee

The trustee must:

* complete a CFT calculation
* record the change that justifies quashing the DCO, for example:
	+ Increase or decrease in benefits or wages
	+ Increase or decrease in expenditure (e.g. council tax or housekeeping)

The trustee must notify, in writing, their decision to quash, or refuse to quash, the DCO to:

* the debtor
* any person required to make a payment under a Form 19 or 20
* any other interest person e.g. all creditors
* AiB

The parties should be notified of their right of review.

The debtor and any person required to make a payment under a Form 19 or 20 should be given a copy of the Debtor Contribution Order variation form.

The trustee must update BASYS with the new amount and upload:

* notification to quash the DCO
* copy of the new CFT calculation
* evidence to support the change, for example:
	+ copy of the Current State of Affairs
	+ wage slips
	+ evidence that the debtor is now only in receipt of benefits
	+ new tenancy agreement
	+ letter to advise of change to rent or utility payments
	+ copy of receipts over a three month period to record increase or decrease of expenditure (i.e. fuel costs)
	+ bank statements
	+ if applicable, evidence and explanation to support a breach of a trigger figure
* a copy of the Debtor Contribution Order Variation Form

When the Accountant considers that the action was not appropriate, or the information provided is incorrect, a notification will be issued providing the reasons and the steps to be taken to remedy the situation.

### Quashing a DCO – review and appeal

An application can be made by the debtor, any creditor or any interested person to the Accountant’s independent review team for a review of a decision made by the Accountant to grant or refuse a recall of bankruptcy.

An application must be received before the expiry of 14 days from the date the decision was made by the trustee.

When an application is received the order is suspended until the determination of the review.

The team must take into consideration any submissions made by any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to make representation may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

## Payment break

The trustee, on the application of a debtor, may extend the payment period of a DCO by granting a payment break.

The debtor must specify the period during which they wish payments to be deferred. This period cannot exceed six months and can only be applied for once during the term of the DCO.

A debtor may apply for a payment break if there has been a reduction of at least 50% in the debtor’s disposable income as a result of any of the following circumstances:

* a period of unemployment or change in employment
* a period of leave from employment because of the birth or adoption of a child or the need to care for a dependant
* a period of illness of the debtor
* a divorce or dissolution of civil partnership
* a separation from a person to whom the debtor is married or is the civil partner
* the death of a person who, along with the debtor cared for a dependant of the debtor

### Actions of the trustee

The trustee must assess if the cause of the reduction meets the requirements and use the CFT to assess if the disposable income has reduced by at least 50%.

When the payment break does not meet the requirements they must notify the debtor, in writing, and provide reasons for the decision.

If the trustee is satisfied that a payment break would be fair and reasonable they may grant a payment break on such conditions and for a period the trustee thinks fit, not exceeding six months.

The trustee must notify:

* the debtor
* any person required to make a payment under a Form 19 or 20
* AiB

Although there is no statutory requirement to notify creditors the Accountant considers this would be good practice as they would be entitled to request a review of the decision under section 97 of the Act.

The trustee must upload to BASYS:

* notification the payment break has been approved
* copy of the new CFT calculation
* evidence to support the change in circumstances

When the Accountant considers that the payment break was not appropriate, or the information provided is incorrect, a notification will be issued providing the reasons and the steps to be taken to remedy the situation.

### Payment Break - review and appeal

An application can be made by the debtor or any interested person to the Accountant’s independent review team for a review of a decision made by the trustee to grant or refuse a payment break.

An application must be received before the expiry of 14 days from the date the decision was made by the trustee.

The team must take into consideration any submissions made by any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

The trustee, or the debtor, may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

# Safeguarding the interest of creditors

This section refers to Part 7 of the Act, sections 98 to 107.

The trustee should weigh up the benefit to creditors prior to instigating any of the following actions and consider:

* the amount that may be ingathered to the estate following the deduction of any legal or court costs
* can an agreement be reached between the parties which negates the need for court costs
* would a creditor consider underwriting the costs to ingather the funds

## Gratuitous alienation

An alienation may be deemed to be gratuitous if it involves a voluntary transfer by the debtor of any property, or right, to another person for no valuable consideration or for a consideration which was of significantly less value than the transferred asset.

The statutory challenge is available provided the alienation was effective on:

* a date within five years of the date of bankruptcy; or
* of the debtor’s death in the case of a deceased debtor; and
* if the alienation was to an associate of the debtor, as defined in Section 229 of the Act

If the alienation was to a person who is not an associate of the debtor, the time limit is two years prior to the date of bankruptcy etc.

The only defences to a statutory challenge of a gratuitous alienation are:

* immediately, or at any time since the date of the alienation, the debtor was absolutely solvent
* the alienation was for adequate consideration
* the alienation was a reasonable birthday, Christmas or other conventional gift
* the alienation was a reasonable charitable donation made to a person who was not an associate of the debtor

In a statutory challenge the burden of proof is on the person seeking to uphold the transaction. When the statutory challenge is not available, a challenge of common law remains possible but here the burden of proof rests on the challenger.

## Unfair preference

Similarly, in terms of Section 99 of the Act, the trustee can raise a statutory action for reduction of an unfair preference provided the relevant transaction took place:

* not more than six months before the date of bankruptcy
* 12 months before the date of death in the case of a deceased debtor

An unfair preference is created if the debtor has made a payment to a creditor which was collusive and intended to prejudice the interests of the general body of creditors.

The only defences to a statutory challenge of an unfair preference are:

* the transaction was in the ordinary course of trade or business
* the payment in cash was for a debt which, when it was paid, had become payable
* the transaction was one where parties had undertaken reciprocal obligations (whether performance of respective obligations occurred at the same or different times)
* the granting of a mandate by the debtor authorised the arrestee to pay over arrested funds or part thereof to the arrestor

## Recall of orders

Under Section 100 of the Act the trustee is given the statutory right to apply to the court for any capital award made to the debtor’s ex-spouse to be recalled, provided that:

* on the date the order was made the debtor was absolutely insolvent or was rendered so by the making of the order
* the date of bankruptcy was within five years after the date of the order

## Excessive pension contributions

The trustee should consider challenging excessive contributions to an approved scheme. They may also be able to use these provisions to challenge a debtor’s decision to contribute to a new approved personal pension scheme or to increase the contributions to an existing scheme.

Section 16 of the [Welfare Reform and Pensions Act 1999](http://www.legislation.gov.uk/ukpga/1999/30/contents)will allow the trustee to seek a court order to recover excessive contributions.

Contributions are defined as such if they were made for the purpose of putting assets beyond the reach of creditors.

# Administration of the estate

This section refers to Part 8 of the Act, sections 108 to 117.

It is the duty of the trustee to ingather the estate and to manage and realise it for the benefit of the creditors. It is implicit the trustee should be efficient and economical in the exercise of their functions in order to optimise the return to the unsecured creditors.

The trustee must take care to clarify any funds received from the debtor are not derived from Social Security benefits or tax credits as these do not vest in the trustee under section 187(1) of the Social Security Administration Act 1992 and the Tax Credits Act 2002.

If a debtor inadvertently pays money from this type of source the trustee must return the funds. This applies even if the payment is made voluntarily and in full knowledge of the rules on the inalienability of these funds.

The trustee is entitled to access any documents relating to a debtor’s assets, business or financial affairs. The trustee can request delivery to them of any title deed or other document of the debtor held by the debtor, or a third party, and to make copies of these documents.

When a person obstructs the trustee in obtaining documents consideration should be taken to making an application to the sheriff to order the obstruction to cease. This would afford the trustee the opportunity to obtain sufficient information to determine whether it is to the advantage of the bankruptcy to recognise a claim for a lien from that party in order to obtain possession of principal documents. However, in many cases this will prove not to be necessary and claims by creditors for a preference will fall to be rejected by the trustee.

## Management and realisation of the estate

The trustee may do any of the following things:

* carry on or close down any business of the debtor
* bring, defend, continue any legal proceedings relating to the estate of the debtor
* create a security over any part of the estate
* where any right, option or other power forms part of the debtor’s estate, make payments or incur liabilities with a view to obtaining for the benefit of the creditors, any property which is the subject of the right, option or power
* borrow money in so far as it is necessary for the trustee to do so to safeguard the debtor’s estate
* effect or maintain insurance policies in respect of the business or property of the debtor

The trustee has a statutory obligation to consult with the Accountant concerning the management and realisation of the estate. Occasions when the trustee must consult are contained with these notes. Failure to obtain the necessary prior consent may result in remuneration and/or reimbursement of outlays being denied.

The trustee should of course consult with the Accountant at any time they consider it appropriate or prudent to do so.

The trustee must comply with any general, or specific, directions from:

* the creditors
* the sheriff following an application by the commissioners
* the Accountant

Subject to the duty to consult with the Accountant and any advice offered the trustee may do anything if in their opinion it would be beneficial to the administration of the estate.

## Heritable property

It is the responsibility of the trustee to try and realise the maximum amount from a debtor’s estate for the interest of creditors.

The trustee must consider all available options for realising the equity to ensure the most cost effective means of realising the maximum return from the estate.

The trustee should be aware of sections 114 and 115 of the Act when a debtor’s estate includes a matrimonial home.

The Accountant expects a decision is made and action started against any heritable property within the first year of the debtor’s bankruptcy.

The Accountant recommends the trustee should not wait for heritable property to appreciate in value unless there is no co-operation from the debtor, spouse or co-owner.

If the trustee has not concluded action before the end of three years, beginning with the date of bankruptcy, the trustee may send a renewal memorandum within three months before the expiry to the Keeper of the Register of Inhibitions and Adjudications under section 26(6) of the Act.

This will renew the trustee’s interest in a property for a further three years to ensure the property is not lost as an asset of the estate. The memorandum should be renewed every three years until the property is disposed of.

The following two cases should be noted:

* Tewnion’s Trustee, Noter 2000 SLT (Sh Ct) Page 37
* Roy’s Trustee, Noter 2000 SLT (Sh Ct) Page 77

The respective sheriffs were unable to grant an order permitting the trustee to renew out with the time period prescribed under section 26(6) of the Act.

It should be noted failure to renew the inhibition may only reinvest ‘a family home’ to the debtor (see section 10.2.7). All other heritable estate will remain vested in the trustee. Therefore, to protect the estate’s interest in the family home it is essential that the entry is renewed timeously.

The trustee may also be liable for the reimbursement of funds lost to the estate when a property has been sold following failure to renew the inhibition.

The Accountant’s advice is the trustee should not normally rely on renewing the inhibition at three yearly intervals and on every occasion they do so, they should also write to the debtor and the other interested party, or parties, advising them of the action taken and the implications and indicating willingness to consider an offer for the equity according to the current valuation or to arrange an open market sale by agreement.

If the trustee fails, without reasonable cause, to renew the inhibition within the three year time limit and it is necessary for them to take notice of title to the property, they will be liable for this cost. However, anyone adopting this course should be aware of the possibility they may incur personal liability for any burdens falling on the property. The trustee would have a right of relief against the estate but it is not certain that any personal liability would be limited to the value of that estate.

Trustees who nevertheless adopt this course, should also notify the debtor (and the other interested party or parties) of the intended action and of its potential consequences should they wish to enter into any transaction involving the property at any future time.

If, having taken notice of title, the trustee should for any reason be unable to act, it would be necessary for a court to appoint a replacement trustee and assign the notice of title to the replacement trustee. This process is likely to be expensive and the estate would not be liable for this cost.

When a trustee has taken Notice of Title to a property and it has not been realised the trustee must arrange to transfer the property back to the debtor before seeking their discharge.

If a trustee takes notice of title on a property containing tenants paying rent, the trustee must be aware of their requirement to register as a landlord with the appropriate local authority (see section 10.2.4).

### Searches of the property registers

Searches of the Land Register will reveal properties presently owned by the debtor and not properties which they may have conveyed to other parties.

Only if a trustee has reason to believe the debtor may have conveyed property to another, e.g. to their spouse, should a search against the name of the person(s) to whom the property might have been conveyed and against the property itself be undertaken.

As regards the Sasines Register, full indices of past and present owners are maintained, although these are organised in 32 counties (pre-regionalisation) making a blanket search impracticable.

Requests for searches should therefore be confined to the county or counties in which the trustee has reason to believe the debtor may have property, or have had property during the relevant period.

### Special destination

Heritage held in joint names subject to special destination, i.e. held in joint names under survivorship destination, such as debtor and spouse or other party or survivor, may present a possible problem.

The debtor’s share vests in the trustee and may be sold for the benefit of the creditors to the co-proprietor or, with the co-proprietor’s consent, the whole property may be exposed for sale on the open market. Should the co-proprietor not co-operate in the disposal it may be appropriate to proceed by way of an action of division and sale.

If the debtor dies before the trustee registers a conveyance following sale in the Land Registry the debtor’s interest passes direct to the survivor.

However, the Extra Division of the Inner House of the Court of Session held that in such circumstances the debtor’s interest passes to the survivor burdened by the debtor’s debts.

Consequently the trustee is entitled to take action to ensure the survivor takes no greater right than the debtor had had for the purpose of restoring to the trust estate the value of the property which is equivalent to the value of the debts by which it is burdened.

Accordingly the trustee is entitled to look to the survivor to recover either the value of the property transferred or the amount of the debtor’s debts, whichever is the lesser.

### Council tax

The trustee is not liable for council tax in respect of a heritable asset in a bankruptcy.

If the property is occupied, it is the occupier, and not the trustee, who assumes responsibility for council tax. The occupier, not the trustee, would require to contact the local authority to ascertain whether any discounts would be appropriate in terms of Section 79 of the Local Government Finance Act 1992.

If the property is vacant, it may qualify for (unlimited) exemption in terms of [The Council Tax (Exempt Dwellings) (Scotland) Order 1997](https://www.legislation.gov.uk/uksi/1997/728/contents/made).

The exemption applies to the property and not the person. To satisfy the exemption the property must:

* not be the sole or main residence of any person (i.e. be vacant)
* be vested in a Trustee by virtue of Sections 78 or 86 of the Act
* the trustee is the only qualifying person (i.e. there is no joint/several liability)

The trustee should notify the local authority to advise them of the bankruptcy and the status of the property vesting with the trustee.

This will allow the local authority to update their records regarding any council tax liability and to commence any investigations they deem necessary.

### Registering as a landlord

When a multi-tenanted property is currently vested in a trustee, the trustee is obliged to be registered as a landlord with the appropriate local authority, in accordance with Part 8 of the Antisocial Behaviour etc. (Scotland) Act 2004.

### Points to consider

The trustee should consider:

* is there any equity in the property? A professional valuation should be done as early as possible. A chartered surveyor or other suitably qualified third party should complete the valuation. The valuation should detail the maximum market value. The valuation should be specified as the current Royal Institution of Chartered Surveyors (RICs), Red Book equivalent of open market, and not impose other restrictions such as a forced sale or the sale price expected for a transaction concluded within a truncated period
* are there arrears and, if so, has the secured creditor taken steps to repossess the property?
* if there is little or no equity, can the property be abandoned for a nominal sum?
* is the non-debtor spouse or a third party willing to buy out the trustee’s interest?
* will the property require to be sold, either on the open market or by private bargain?
* if it is a family home, will the relevant consent in terms of Section 113(1)(a) be given?
* trustees should consider if the Scottish Government sponsored Mortgage to Rent scheme should be recommended to the debtor for consideration. However, trustees must be aware of the maximum amount of funds which can be released to a trustee under the terms of this scheme and assess if it will be in the best interests of creditors to accept an offer on a property under the terms of the Mortgage to Rent scheme. See [Home Owner's Support Fund : guidance for trustees](https://beta.gov.scot/publications/home-owners-support-fund-guidance-for-trustees/#role)for further information
* if the trustee decides to sell the property has formal intimation been given to the secured creditor of their intention to do so?
* if property is to be sold on the open market has the secured creditor agreed to underwrite the costs in the event of the sale price being insufficient to cover the secured loan?
* has the market been fully tested
* if the negotiations to transfer title are likely to extend beyond the three years the inhibition been renewed?
* if the purchase offer is not enough to settle the secured debt has the consent of all secured creditors been obtained to acceptance of the offer?
* if the trustee has exhausted all attempts at disposing of the interest in the property has the debtor been formally notified of the potential consequences should it be sold at a later date?

### Family home

A trustee must take additional steps when the heritable property is considered a family home under sections 112 and 113 of the Act.

It should be noted if the trustee becomes aware of a family home from a date after three months from the date of bankruptcy, the three year period will commence from the date the trustee became aware of the debtor’s right or interest under section 112(5) of the Act.

The trustee must ensure the debtor is fully informed about any action being taken against their property and the implications for the debtor and their family if the action is successful.

If it is expected the outcome of action will be that the debtor is removed from their home, the debtor should be informed where they can seek support and information in the event they will become homeless. The trustee must give notice of the proceedings to the local authority, in whose area the home is situated. This must be done using a Form 22 of [The](http://www.legislation.gov.uk/ssi/2016/397/contents/made) [Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made).

If, at the end of a three year period beginning from the date of bankruptcy, the trustee has failed to take any of the required action(s) against the family home the rights and interests of the debtor’s family home shall be reinvested in the debtor. Therefore, a trustee must also ensure they have an administration process in place which will prevent the automatic default of the family home to the debtor.

The actions a trustee can take to prevent the family home reinvesting in the debtor after three years are:

* disposal or realisation of the debtors interest/right in the home
* conclude missives for sale of the right or interest
* send a memorandum to the Keeper of the Register of Inhibitions, as described under Section 26(6) of the Act
* take notice of title in relation to the debtor’s right or interest of the property
* commence proceedings:
	+ to sell or dispose of the debtor’s right or interest
	+ for an action for division of sale of the family home
	+ for an action to obtain vacant possession of the family home
* reach an agreement with the debtor under which:
	+ the family home will cease to form part of the debtor’s sequestrated estate
	+ the property is reinvested in the debtor, without need for any conveyancing, disposition or other transfer

The trustee may make an application to the sheriff to amend the three year period to a longer period in circumstances as the sheriff thinks appropriate.

### Need to consult with the Accountant

To comply with section 109(1) of the Act the trustee must complete the heritable assets section of BASYS for any property, prior to commencing any of the actions as described at sections 10.2.9 to 10.2.14 and provide all necessary documentation. See the guidance for more information.

This role is undertaken by AST on behalf of the Accountant.

AST will respond to the request within 20 working days of receipt.

When consent is given to the trustee’s proposal and they are unable to progress the action within one year of the agreement an update should be provided to AST.

### No available equity

In some cases the property may not be sold because there is no available equity. If the trustee does not expect this situation to change in the immediate future they should attempt to reach an agreement with the debtor whereby upon payment of a nominal sum the trustee would formally abandon their interest in the property.

The amount of the sum is a matter for the trustee. However, in order to cover costs, which will include the fee to Registers of Scotland for the recording of a Notice of Abandonment, The Accountant will not normally agree to a sum less than £550 and moreover will not agree to any arrangement which results in a further charge to public funds.

An agreement should be in writing and include:

* the value of the agreement
* if applicable, the period over which the payments will be made
* details of the person making the payment(s)
* the outcome for the property following full payment i.e. Notice of Abandonment
* the consequences for the property and the debtor if the agreement is not complied with
* it is recommended the agreement is signed by the debtor, any third party and the trustee

The trustee should provide AST with the following information:

* the action proposed
* the reasons for the action
* a copy of the property search
* a copy of the valuation, or Home Report, carried out by a chartered surveyor
* a copy of the information provided by the secured lender in relation to any outstanding security against the property
* copies of any relevant correspondence i.e. letters to debtors, negotiations with third parties to reach an agreed settlement
* a copy of the proposed agreement
* full details of any fees or costs to be paid to the trustee by a third party

When the action is agreed by AST the trustee must:

* record the agreement in writing
* formally abandon interest in the property using a Form 15 of The Regulations (see [section 1.5](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/1-role-of-the-accountant-in-bankruptcy/15-electronic-signatures)) at the relevant date, if appropriate

If no agreement is possible the trustee may either:

* record the reasons for the abandonment on the case file
* formally abandon interest in the property using a Form 15 of[The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)(see [section 1.5](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/1-role-of-the-accountant-in-bankruptcy/15-electronic-signatures)) at the relevant date, if appropriate
* consider allowing any inhibition still in place to lapse after the appropriate period

### Settlement of trustee’s interest

When the equity is too low to justify marketing the property, or the debtor does not want the property sold, the trustee may be able to come to an agreement with:

* a third party
* the debtor on completion of their DCO

The Accountant does not consider it reasonable for the trustee to take into account any potential saved costs when determining what is an acceptable amount for the property to avoid the need for a sale.

The trustee should try and obtain payment of an amount equal to the equity that has been calculated in the property and only reduce this amount if no person is prepared to pay the full amount of equity, or it would not be cost effective for the equity to be paid through instalments. When the amount agreed has been reduced a full explanation and reasons as to why the offer should be accepted must be provided to the Accountant when submitting the proposal on BASYS.

An agreement should be in writing and include:

* the value of the agreement
* the period over which the payment(s) will be made
* details of the person making the payments
* the outcome for the property following full payment i.e. Notice of Abandonment, disposition (please note when a disposition is to be signed the trustee must ensure the obligations to any secured lender(s) are also met and the debtor has given written consent)
* the consequences for the property and the debtor if the agreement is not complied with
* it is recommended that the agreement is signed by the debtor, any third party and the trustee

The trustee should provide AST with the following information with the proposal:

* the action proposed
* the reasons for the action
* a copy of the property search
* a copy of the valuation, or Home Report, carried out by a chartered surveyor
* a copy of the information provided by the secured lender in relation to any outstanding security against the property
* copies of any relevant correspondence i.e. letters to debtors, negotiations with third parties to reach an agreed settlement
* a copy of the proposed agreement
* if applicable, consent to a disposition by the debtor
* full details of any fees or costs to be paid to the trustee by a third party

When the action is agreed by AST the trustee must record the agreement in writing.

Once the agreement has been completed:

* formally abandon interest in the property using a Form 15 of The Regulations (see [section 1.5](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/1-role-of-the-accountant-in-bankruptcy/15-electronic-signatures)) at the relevant date, if appropriate
* sign a Disposition

If the agreement fails the trustee must consider realising the asset as soon as possible.

### Marketing

If the trustee decides to sell the heritable property they must ensure it is exposed to the full potential of the open market.

A home report is required under the Housing (Scotland) Act 2006 for any property put onto the market, with the following exceptions:

* new build houses
* newly converted premises
* properties to be demolished
* dual use
* mixed sales

The trustee should provide AST with the following information with the proposal:

* the action proposed
* the reasons for the action
* what alternatives to a sale have been considered and rejected
* a copy of the property search
* a copy of the valuation, or home report, carried out by a chartered surveyor
* a copy of the information provided by the secured lender in relation to any outstanding security against the property
* copies of any relevant correspondence i.e. letters to debtors, agreement with secured creditors to pay fees and outlays of trustee
* consent to sell under Section 113 of the Act if a family home
* full details of any fees or costs to be paid to the trustee by a third party.

When the action is agreed by AST the trustee should proceed to appoint an estate agent/legal agent as appropriate.

The trustee is only required to submit a further proposal when any offer is 10% below market value and the trustee is recommending acceptance.

The trustee should submit:

* a copy of the offer
* an explanation why it should be accepted

If the property fails to sell on the open market, the trustee may consider it more appropriate to pursue a sale through the auction process. An update should be provided to AST together with an estimate of any additional costs.

The trustee should consider the following:

* reasonable endeavours have been undertaken to secure a sale on the open market, for at least nine months
* a viable offer has not been received
* further marketing costs and benefit to the estate
* be satisfied market value will be obtained
* placing a reserve price on the property

### Sale by private bargain

If the trustee decides to sell the heritable property by private bargain the trustee should provide AST with the following information with the proposal:

* the action proposed
* the reasons for the action
* a copy of the property search
* a copy of the valuation carried out by a chartered surveyor
* a copy of the information provided by the secured lender in relation to any outstanding security against the property
* copies of any relevant correspondence i.e. letters to debtors, negotiations with third parties to reach an agreed settlement, agreement with secured creditors to pay fees and outlays of trustee
* an explanation why the trustee does not intend to expose the property to the open market and reasons why this should be accepted
* full details of any fees or costs to be paid to the trustee by a third party
* consent to sell under Section 113 of the Act if a family home; or
* debtor’s consent and an explanation if offer is for less than market value

### Court action

The trustee should consider if there is enough equity to justify an application to the court for authority to sell and/or evict the occupants of the property, in circumstances when:

* relevant consent to sell is not given
* a co-owner refuses to agree to a sale
* the debtor, and or other occupants, refuse to co-operate and vacate a property

The trustee should provide AST with the following information with the proposal:

* the action proposed
* the reasons for the action
* a copy of the property search
* a copy of the valuation, or home report, carried out by a chartered surveyor
* a copy of the information provided by the secured lender in relation to any outstanding security against the property
* an estimate and breakdown of anticipated costs of the court action
* copies of any relevant correspondence i.e. letters to debtors, negotiations with third parties to reach an agreed settlement, agreement with secured creditors to pay fees and outlays of trustee
* full details of any fees or costs to be paid to the trustee by a third party

When the action is agreed by AST, the trustee should proceed to inform the debtor and all interested parties of the proposed action, inviting a resolution to the situation to avoid court action.

If no resolution can be obtained the trustee should commence the court action within one year of the agreement of AST.

Upon consent of the sheriff the trustee should proceed as directed by the court. No further consultation regarding marketing, or offers, should be directed to the Accountant.

If the result is a sheriff’s refusal of consent the trustee should consider whether there has been any change in the situation which would justify the making of a renewed application to the court. Further consultation with the Accountant would only be required if there is a significant change in the circumstances.

### Sale of property on behalf of a third party

Prior to agreeing to sell a property which does not vest in the trustee, e.g. on behalf of a secured lender the trustee must obtain the consent of the Accountant.

The Accountant considers it important for trustees to be fully transparent with regard to notifying the Accountant/Commissioner(s), creditors and debtors, of the terms and conditions that have been agreed with a secured lender, including the financial terms of the agreements.

The requirement for this transparency is set out in Sections 1 to 7 of SIP9 Scotland.

The Accountant considers it important that all interested parties are aware of the background and reason why the trustee is selling a property on behalf of the secured lender, to help inform any decision they may make with regard to applying their legal right to challenge the actions of the trustee.

As a property forms part of the debtor’s estate, regardless if it is in nil or negative equity, the trustee is required, before commencing any action regarding the property, to submit their proposal for the property to AST for consideration, in the relevant section of BASYS.

To allow the Accountant to make an informed decision when making a proposal, the trustee must submit the following supporting information:

* a copy of the agreed terms between the trustee and the secured lender to sell the property
* details of fees and outlays agreed to be paid by the secured lender, including details of the basis for how the fees are to be calculated
* a copy of the agreement of any subsequent secured lender(s), where their security will not be paid in full, that confirms their agreement to the terms between the trustee and the other secured lender
* a professional valuation of the property
* confirmation of the redemption figures for all secured loans
* an explanation of why, in the trustee’s opinion, the proposed sale will comply with the conditions specified in Section 50(9) of the Act

When the action is agreed by AST the trustee should proceed to appoint an estate agent/legal agent as appropriate.

The trustee would not be required to submit a further proposal regarding the acceptance of an offer.

See section 13.12.4 relating to the submission of an account following a sale of this nature.

## Moveable assets

It is the responsibility of the trustee to try and realise the maximum amount from a debtor’s estate for the interest of creditors.

The trustee must consider all available options for realising the equity in a moveable asset to try and ensure the most cost effective means of realising the maximum return from the estate.

### Monies held in bank accounts

Under section 86(9) of the Act, when a trustee knows, or becomes aware, of any vested estate which comprises funds held by a bank, the trustee must serve a notice on the bank informing them of the bankruptcy, specifying reasonable detail in order to allow the bank to identify the debtor and the funds held.

The notice must be in writing and can be sent by first class post, by recorded delivery or in some other manner (including electronic means) which the trustee reasonably considers the bank will receive on the same or next day. The notice is deemed to have been received the day after it is sent.

The trustee is not entitled to any remedy against a bank in respect of a transaction entered into before the receipt of the notice whether or not the bank is aware of the bankruptcy.

If a debtor withdraws significant funds from their bank account post- bankruptcy the trustee must establish if the bank should have been aware of the bankruptcy prior to the withdrawal before considering any action to seek recovery of the funds from the bank.

### Life assurance policies

A trustee should always have their interest noted in a policy even if it has no current surrender value and furthermore they should obtain an acknowledgement from the insurer that their interest has been recorded.

This equally applies to policies when payment is only either made on the death of one of the parties or, is assigned to a third party. Failure to register an interest may result in a trustee being held liable if the failure results in a loss to the estate.

Any policy which has a surrender value will vest in the trustee for the duration of the bankruptcy and the trustee should attempt to realise the asset by surrendering the policy or having a third party buy out the trustee’s interest.

Any policy which does not have a surrender value should be treated as a non-vested contingent asset which will vest in the trustee for a period of four years from the date of bankruptcy.

It may be practical for the trustee to inform the insurance company when they consider the an insurance policy is no longer vested in the estate i.e. on discharge of the trustee or the end of the four year period. This will allow a debtor to access the funds in future years without the requirement to first obtain consent from the former trustee.

### Motor vehicles

Only vehicles valued at over £3000 vest in the trustee. The Accountant does not consider it appropriate for a trustee to deduct this amount from the value of a vehicle when calculating the value to the estate.

If a vehicle is valued at over £3000 and the trustee thinks it is cost-effective to sell, it should be sold as soon as possible unless the vehicle is considered essential to the debtor to get to work so they can pay a DCO.

If the debtor is allowed to keep a vehicle that could vest in the trustee, they must maintain the agreed regular payments to a DCO. If they fail to do so without reasonable excuse the trustee should take possession of the vehicle as soon as possible and sell it, if cost-effective.

When the trustee decides to allow a third party, or the debtor on completion of their DCO, to buy out the trustee’s interest in the vehicle the amount agreed should be the full value of the vehicle to the estate. Formal abandonment of the vehicle should be given following completion of the payments.

Trustees are advised they may incur personal liability for any third party claims arising from the debtor’s use of a motor vehicle vesting in, or under the control of, the trustee. Moreover, trustees may be guilty of a criminal offence in terms of [Section 143 of the Road Traffic Act 1988](http://www.legislation.gov.uk/ukpga/1988/52/section/143)(1988 Act) if they permit the debtor to use such a vehicle without proper insurance. In this context simply leaving a vehicle in the possession or control of the debtor may be sufficient to constitute permission for the purposes of the 1988 Act.

The trustee should consider obtaining a written acknowledgement that while the vehicle remains in their possession, the debtor will:

* have and maintain insurance, covering at least the third party risks
* ensure the vehicle remains taxed
* have, if applicable, a current MOT certificate.

When a trustee decides to abandon a motor vehicle to the debtor, because it is of no realisable value, the trustee should inform the debtor in writing.

The notification should specify that from the effective date of abandonment, the debtor is wholly responsible for satisfying all legal requirements in respect of the ownership and use of that vehicle, including insurance.

If the trustee does not do so, there may be an inference they are merely permitting the debtor to use the vehicle and the trustee could be subject to the risk of potential liability under the 1988 Act.

### Inheritance

This does vest in the trustee, unless the inheritance is held on trust for or by the debtor, in which case it does not vest. If held in trust for the debtor, it only vests if the debtor becomes entitled to the capital of the trust during the four years from the date of award.

## Unrealisable assets vested in trustee

While the trustee remains in office they must make arrangements as necessary to safeguard their interests in any asset.

The trustee should:

* remind the debtor the interest remains vested in the trustee
* in advance of the earliest possible payment date remind the holder of the asset of the trustee’s right to it

The Accountant will not grant a certificate of discharge to a trustee who remains vested in estate of potential substantial value.

## Abandonment of assets

Trustees may find themselves vested with assets which are of no immediate or foreseeable realisable value but which might possibly acquire such a value at some point in the future.

The Act contains no provisions for abandonment of any asset, other than the debtor’s heritable property. It is the Accountant’s opinion the trustee should take no action which might be construed as a formal abandonment of such assets, unless it is burdensome in nature.

However, the trustee must consider the long term costs and implications to the debtor and creditors of retaining a vested interest which is unlikely to acquire any value for several years. It is in the interest of all parties to try and obtain an agreed settlement with the debtor over the asset which will allow the trustee to abandon their interest.

The trustee shall inform creditors and commissioners, if elected, of their proposals for approval to deal with such assets. If approval is not received the trustee can consider applying for a direction from the Accountant (see section 4.3).

The Act also contains no provisions for residual vesting after the discharge of the trustee. Assets vest in the trustee by virtue of their appointment.

Once discharged the appointment ceases to have effect and assets do not continue to vest in a trustee. Nevertheless, given the limited effect of section 145 of the Act, such assets do not automatically re-vest in the debtor but are in limbo. In practical terms there is nothing to stop the debtor transacting with such assets unless an interested creditor revives the bankruptcy following a petition to court.

Any vested right of the debtor, e.g. the fee in a life rent estate, does not re- vest in the debtor by virtue of their discharge whether or not the trustee has been discharged. If the trustee has been discharged their rights to such estate transmit to any successor in office and should not therefore be formally abandoned.

It would however be prudent to inform creditors and the debtor, in the final circular, of all identified assets and vested rights which the trustee does not intend to realise and to advise them of their future rights and obligations in respect of such assets and rights.

The Accountant will not grant a certificate of discharge to a trustee who has not provided suitable reasons for the abandonment of an asset.

## Contractual powers of the trustee

A trustee is given power to enter into any contract which they consider would be beneficial for the administration of the debtor’s estate under section 110(11) of the Act.

The trustee has an option as to whether or not they adopt a contract entered into by the debtor prior to bankruptcy, unless its terms and nature preclude adoption, i.e. delectus personae - a contract for the personal services of the debtor, or if the contract expressly excludes assignation.

It should be noted the trustee can be vested in rights under a contract, without the need to adopt that contract, even if - as is the case with some pension scheme policies - it excludes assignees. If they decline to adopt, the other party may have a claim for damages in the bankruptcy.

If the trustee does adopt the contract they incur personal liability in relation to it, subject to a right of relief against the estate, or unless criterion is whether or not adoption would be beneficial to the administration of the debtor’s estate under section 110(1) of the Act.

The trustee shall within 28 days of receipt of a request, in writing, from any party to a contract entered into by the debtor, adopt or refuse to adopt the contract.

When the trustee does not reply in writing to a request within the relevant period the trustee is deemed to have refused to adopt the contract.

When the trustee fails to make a decision within the relevant period they may apply to the Accountant for permission to extend this period under section 212 of the Act (see section 18.3).

## Debtor’s account for state of affairs

A debtor who is not discharged or has a DCO in place (including a nil amount) is required to complete a Current State of Affairs, Form 23 of [The](http://www.legislation.gov.uk/ssi/2016/397/contents/made) [Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made), every six months from the date of bankruptcy.

Upon receipt of the document the trustee should review the information and advise the debtor, in writing, whether or not there will be any changes made to their DCO, or the administration of assets, within four weeks of receipt of all the information required.

## Financial education for the debtor

A trustee must decide whether a debtor should complete a financial education course.

The trustee must notify the debtor of their decision and clearly state which module(s) of the financial education course they are required to complete. The notification must be made before the end of the six month period from the date of the award of bankruptcy or when the debtor’s whereabouts are unknown, as soon as reasonably practicable once the debtor’s whereabouts have become known.

The available modules are:

* Budgeting and Financial Planning
* Saving
* Borrowing
* Insurance
* Understanding Tax
* Financial Life Stages (Setting up a new home)
* Financial Life Stages (Having a baby)
* Financial Life Stages (Redundancy)

Financial education may be appropriate, if within five years of this award, the debtor:

* was subject to an award of bankruptcy
* granted a trust deed
* had entered into a debt management plan
* had an approved debt payment plan under the Debt Arrangement Scheme was approved
* a debtor is subject to, or under investigation with a view to an application being made for a BRO
* the trustee considers the pattern of a debtor’s behaviour, whether before or after the award of bankruptcy, is such that the debtor would benefit from a financial education course
* a debtor agrees to complete a financial education course

Debtors who have undertaken a financial education course within five years of their bankruptcy award are exempt from participating in any further courses.

The trustee should consider any known health issues relating to the debtor (including mental or physical disabilities) which would render the debtor unable to complete the financial education course. In these circumstances the trustee should report the reasons why financial education was not appropriate in the report for the debtor’s discharge.

The trustee should complete the online form which is available from Money Advice Scotland (MAS) confirming which modules the debtor should complete.

The trustee should direct the debtor to Head of Events at MAS to undertaken the required modules. The contact email address is: info@moneyadvicescotland.org.uk. MAS will contact the debtor to confirm they have access to the online course.

It is the debtor’s responsibility to notify the trustee when they have undertaken the modules and they will receive a certificate for each module completed. However, MAS will be able to provide the trustee with confirmation of completion on request.

If the debtor does not have access to a computer or is unable to use a PC, MAS can send a paper copy of the questionnaire by post. The debtor can obtain guidance over the phone or visit their local money advice office for assistance.

The trustee should notify AiB by uploading a letter, or by way of a note, on the BASYS case file of the requirement for the debtor to undertake any required modules and further advise of the outcome.

If the debtor refuses to undertake or does not complete the financial education course as instructed this should be noted as non-cooperation within the report sent to the Accountant to consider whether or not the debtor should obtain their discharge.

If it is the trustee’s recommendation that, despite not completing the course, the debtor should be discharged the trustee must provide an explanation for this recommendation and consider if the debtor’s behaviour is reasonable grounds for a BRO (see [section 14.1](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/14-discharge/141-discharge-of-debtor) and [section 16](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/16-bankruptcy-restriction-orders)).

## Re-direction of mail

The attention of trustees is drawn to the decision of the European Court of Human Rights in the case of Foxley v The United Kingdom.

Whilst mail may be opened this can only be done so with the consent of the debtor, or the sheriff. See also Donna McKenzie Skene on Bankruptcy, at Part 12-19.

Correspondence marked as being from the debtor’s legal advisers, or is otherwise apparently privileged material, should not be opened.

## Papers, books and records

It is important immediate possession is obtained of any trading records of a debtor who has carried on a business, and of any other papers and documents relating to the debtor’s financial affairs.

As property of the debtor their books and records vest absolutely in the trustee and the debtor accordingly has no right to their return except in the following circumstances:

* the bankruptcy is recalled
* there is a reversion to the debtor after all the debts have been paid, with interest
* any right to pursue the recovery of debts owing to the debtor or any other right of action has been abandoned to the debtor and the trustee holds records or documents relating to the debts

When there is any such reversionary right, the interim trustee or trustee, as the case may be, must take every reasonable step to return to the debtor all papers, books and records which the trustee has taken possession of.

### Entitlement to records

The powers available to a trustee are not as specific as those pertaining to an interim trustee. However, section 108(5) of the Act requires the debtor or any other person to hand over any title deed, or other document.

Section 218(5) of the Act makes it an offence to destroy, damage, conceal or remove any document.

### Inventory of accounting records

It is important to make an inventory of business records and to have such records identified by the debtor. This will avoid any possible evidential difficulty in cases which go for prosecution on an alleged offence, e.g. of failure to keep proper accounting records.

A separate statement must be taken from those asked to carry out the identification of the records. The separate statement will identify the records handed over to the trustee and will additionally list all the records maintained, including any which have not been handed over.

### Records not to be annotated

Business books and records used in the business of a debtor should not be ruled off after the last entry in them, or otherwise annotated either by the interim trustee, trustee or their staff; or by the debtor or their accountants preparing statements of affairs etc.

### Records subject to a lien

Records which the interim trustee or trustee is entitled to take possession of may be subject to a lien. Section 108(5) allows the trustee to require delivery of documents despite a right of lien being claimed but without prejudice to any preference of the person claiming the lien.

When a person claiming a lien refuses to deliver up relevant documents the trustee may apply to the court at any time to require the delivery or surrender of any records relating to the debtor’s estate or affairs which are in the possession or under the control of the debtor or anyone else.

### Private and public examination

Uncooperative persons may additionally be warned of the trustee’s power, under sections 118 and 119 of the Act, for the private or public examination of any person known or suspected to have in their possession documents or information relative to the debtor’s financial affairs (see section 11).

### Disposal of records no longer required

In all other cases, subject to section below, the trustee is entitled to dispose of the debtor’s papers, books and records whenever they have no further use for them. Such records, particularly those identifying the debtor by name, should be disposed of carefully as confidential waste. Entirely at the discretion of the trustee, a debtor who requests the return of papers, books and records may be allowed to collect or have them delivered, at their own expense.

### Preservation of certain records

Certain records must not be disposed of unless the trustee is satisfied there is no third party interest.

#### Company Pension Scheme

If it is known there is a company pension scheme it is advisable for any relevant papers, including policies, trust deeds, rules or equivalent documentation and the wages records be identified and separated at an early date from the remainder of the records. Unless the trustee is certain, from consultation with other parties concerned, those records will not be needed in connection with the pension fund, they shall be preserved until they are no longer required.

#### Historical interest (general)

Consideration should be given to whether any records might be considered to be of historical interest and ought to be preserved. If so, or if anybody, such as a local museum or the Scottish Record Office, has expressed interest in any documents, the matter must be referred to AST.

#### Historical Interest (Insurance Companies)

Records of debtors who traded as insurance brokers should not be destroyed without prior reference to the Accountant, supplying a list of the records. The matter will then be referred to the History Committee of the Chartered Insurance Institute, who may wish to arrange for the preservation of some or all of the records.

### Time of disposal

Generally, records should not be disposed of, or returned, until the trustee has received their discharge.

In particular, trustees should have regard to the following in which records might be required:

#### Records Relating to Asset Realisation

If assets, especially book debts, remain unrealised care should be taken not to dispose of any records which could be useful in this connection.

#### Offences and BROs

A check should be made with the Accountant as to whether any prosecution or BRO proceedings are outstanding and whether any papers etc. may be relevant to such proceedings.

#### Private Or Public Examination

If there is a real possibility of a private or public examination being held consideration should be given to whether any records are likely to be required in that connection.

#### Application For Deferral Of Debtor’s Discharge

If an application is to be made for deferral of the debtor’s discharge it may be necessary to retain records which are likely to be referred to at a later date.

#### HMRC/DWP involvement

HMRC and DWP should be given an opportunity to inspect any records before they are destroyed. Except in cases of urgency, when notification may be given by telephone, HMRC and DWP should be given six weeks’ written notice of intention to destroy. It may be convenient in most cases for this aspect to be dealt with at the same time as contacting HMRC.

#### Records Relating To VAT

The age of a business record is determined by the date of the last entry in it. Where records are on that basis more than six years old they can be destroyed without reference to HMRC.

Where records are those of a person not registered for VAT they can be destroyed at any time without reference to HMRC.

However, when there is no VAT registration but it is apparent the person concerned should have been registered HMRC should be notified and the case treated for the purpose of these provisions as if there had been a registration.

When records are less than six years old but more than a year has elapsed since the date of bankruptcy they can be destroyed without reference to HMRC.

When it is intended to destroy records within the period of one year after the date of bankruptcy and the records are less than six years old a letter shall be sent to HMRC. A copy of the letter must also be sent for HMRC to endorse and return to the trustee as authority to destroy the records concerned.

When urgent authority is required, e.g. to avoid having to take possession of vast quantities of papers, ‘expedited treatment’ should be requested on the letter and telephone contact should be made with HMRC to put them on notice that such a request is being sent. This will enable HMRC to respond more quickly to the request. ‘Expedited treatment’ should not be requested as a matter of course.

#### Civil Proceedings

If it is known there are civil proceedings, or the possibility of them, in connection with the affairs of a debtor the persons concerned must always be asked in writing whether they wish any records.

# Examination of the debtor

This section refers to Part 9 of the Act, sections 118 to 121.

If the debtor continues to refuse to co-operate the trustee should consider the actions below. If they still fail to comply with the sheriff’s order they can be prosecuted and if found guilty can be fined or imprisoned by the court.

A trustee must consider the potential benefits to the administration of the bankruptcy before considering an examination. It is recommended they are only considered when all other methods of obtaining information have failed due to the cost and resource implications of arranging and conducting these hearings.

The trustee can request the debtor, the debtor’s spouse or civil partner, or any other person who can give information relating to the debtor’s assets, business or financial affairs attend a meeting to provide the information as required.

The debtor must be notified of their legal obligation to co-operate and advised of the consequences if they fail to:

* provide a complete and accurate statement of their assets, income or liabilities
* fails to attend an interview
* fails to provide any information or documents

Before considering taking court action against the debtor the trustee should instruct sheriff officers to personally serve a formal demand for the required information and/or documents. Personal service of the documents ensures the debtor has no defence that they were unaware of both their legal obligation to co-operate, that failure to do so is committing an offence, that they be made subject to a BRO or their discharge from bankruptcy may not be granted.

If the debtor does not co-co-operate the trustee can apply to the sheriff under section 215 of the Act requesting an order that the debtor comply. If the debtor fails to comply they will be guilty of an offence and be liable on summary conviction to a fine, imprisonment or both.

If they still do not provide the information or attend the meeting they should be informed, in writing, that the trustee believes they have failed to co- operate and if they continue in this way:

* they are committing an offence and may be made subject to a BRO and/or reported to the Procurator Fiscal
* their discharge can be delayed until the Accountant is satisfied they have co-operated and provided the trustee with all the required information and documents to allow the trustee to carry out their duties under the Act

The Accountant believes it is reasonable to consider a debtor has failed to co-operate if they have been made aware of their obligations and have failed to provide information or documents which have been requested at least three times by the trustee with at least one such request having been made to the debtor by recorded or registered delivery.

## Private examination

When the debtor or other person fails to attend, or fails to answer relevant questions, the trustee may apply to the sheriff for an order requiring the debtor or person to appear before the sheriff for private examination under section 118 (4) of the Act.

The sheriff is given a discretion whether to grant an application for private examination.

### Actions of the trustee

Intimation of a private examination should be given to the debtor and a copy uploaded to BASYS, together with a certificate of posting.

Penalties are provided for non-compliance with the sheriff’s order under Section 118(7) of the Act.

### Conduct of the examination

The conduct of the examination, although not held in open court, is taken on oath by the debtor or other person and is regulated by section 121 of the Act. The examination can be conducted by the trustee or a solicitor appointed by the trustee.

When there is to be a private examination of a third party the debtor is permitted to question that third party as to any matter relating to the debtor’s assets or their business or financial affairs under section 121(2) of the Act.

A copy of the record of the private examination must be uploaded to BASYS under section 121(7) of the Act.

## Public examination

At least eight weeks before the end of the first accounting period a trustee may apply to the sheriff for an order for the public examination of the debtor, the debtor’s spouse or any other person who can give information relating to the debtor’s assets, their business or financial affairs under section 119(1) of the Act.

A sheriff must grant a competently presented application for public examination.

Penalties are provided for non-compliance with the sheriff’s order under section 119(8) of the Act.

### Actions of the trustee

The trustee must:

* send a copy of the notice to every known creditor
* send a copy to the debtor when the order is in respect of a relevant person. The intimation from the trustee shall inform the recipient of their right to participate in the examination, under section 119(6) of the Act
* upload a Form 24 of [The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)to BASYS.

### Actions of the Accountant

AST shall enter particulars of the notice in the Register of Insolvencies on behalf of the Accountant.

### Conduct of examination

The conduct of the examination, which is held in open court, is regulated by section 121 of the Act. The examination can be conducted by the trustee or a solicitor appointed by the trustee.

A copy of the record of the public examination must be uploaded to BASYS under section 121(7) of the Act.

# Claims, dividends and distribution

This section refers to Part 10 of the Act, sections 122 to 131.

## Submission of claims

A creditor must submit a claim to the trustee for:

* entitlement to vote at a meeting of creditors, other than the statutory meeting
* entitlement to a dividend.

The claim must be made on a Form 11 of[The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)and be accompanied by documentary evidence of the debt.

The trustee has discretion on the evidence they will accept.

Evidence of a debt can be accepted in a variety of formats, such as an invoice, bank statements, court decree, or screen prints from computer records, etc. It should identify the creditor, the debtor, and the balance at the date of bankruptcy.

A trustee may allow an informal claim, in writing, if a creditor neither resides, or has a place of business in the United Kingdom.

A creditor will have committed an offence if they knew or had reason to believe the claim, or any evidence produced, was false.

A debtor will have committed an offence if they knew, or became aware, that the claim or any evidence produced was false and failed to report it to the trustee.

## Adjudication of claims

A trustee should adjudicate on claims:

* at the commencement of every meeting (other than the statutory meeting)
* when funds are available for payment of a dividend in respect of an accounting period

The trustee must record their decision on each claim detailing:

* the amount accepted
* the category of debt and the value of any security
* any reasons for rejection

### Entitlement to vote

A claim should be submitted to the trustee at, or before, the meeting. When the creditor submitted a claim at the statutory meeting they are entitled to consider the original claim to be re-submitted for the purposes of any other meeting. Alternatively, the creditor may submit an amended claim.

The trustee must accept or reject the claim of each creditor.

### Entitlement to a dividend

For the purpose of receiving a dividend a creditor must submit a claim before the expiry of 120 days from the date on which the trustee gives notice inviting a claim.

If a claim is submitted after the 120 days the trustee may adjudicate on the claim only if they deem there were exceptional circumstances which prevented the claim from being submitted within the statutory time period. If the creditor has not provided a reason for not being able to submit their claim within the 120 period the trustee should contact the creditor to obtain the reason, before they decide if the claim can be considered.

When the trustee does not consider the circumstances justify the claim being considered they should provide the creditor with the reasons, in writing. There is no right of review or appeal, against this decision,  however, the creditor may make an application to the sheriff under section 50(7) of the Act, to request a direction be made to the trustee to adjudicate on their claim.

If the trustee decides the circumstances for not submitting the claim within the required 120 days were exceptional, they must adjudicate on the claim. The trustee should not make any reference in their adjudication decision notes and letters, to the fact the claim was received out-with the 120 day period. This is not relevant to the adjudication decision which should be based only on the evidence provided in support of the claim.

## Adjudication Process

The trustee is required to keep a record of the date claims are produced and lodged by them.

The trustee must be satisfied:

* the claim was received within 120 days of the date the creditor was notified of the bankruptcy
* the debt was incurred prior to the date of bankruptcy and any interest has only been calculated to this date

A trustee can carry out an adjudication of claims at any time.  However, as a formal notification provides the debtor and creditors the right of review and appeal against the decision it should only be issued when the trustee has funds available to make a distribution (see section 12.5).

## Other claim considerations

The trustee should have regard to Schedule 2 and 3 of the Act and consider the following.

### Local authority claims

When a local authority makes a claim in a sequestration for unpaid council tax the trustee should confirm the period for which the unpaid council tax is due.

A full year’s council tax is payable from the start date of the council tax year. Therefore, a local authority may submit a claim for a full year’s council tax amount, regardless if the debtor was made bankrupt before the end of the council tax year.

Post-bankruptcy, a debtor may pay their council tax liability for a period included in the local authority’s claim. If this is the case the local authority should revise their claim accordingly prior to the trustee’s adjudication and distribution. Trustees should be aware that a reduction may be required to the claim prior to adjudication.

If a local authority has submitted a claim for a whole council tax year, this should remove the requirement for the debtor to pay council tax for that year. However, some local authorities do expect the debtor to continue to pay their council tax, regardless if a payment period is included in their claim. The trustee should establish if this is the case.

If council tax does not have to be paid by the debtor at any time during their bankruptcy the trustee should review the DCO calculation, as non-payment of council tax may increase the debtor’s surplus income from which an increased DCO contribution can be paid (see section 8).

### Claims evidenced with a court decree

If a creditor presents a court decree as evidence of a debt the trustee has a responsibility to check that all funds recorded in the decree were due prior to the date of bankruptcy.

If the decree has been granted without the sheriff making any enquiry into the merits of the claim the trustee may examine the amount recorded in the decree, to be satisfied it was a valid claim. The trustee may consider rejecting all, or part of, a claim supported by a decree, if they do not agree the amount declared can be allowed under the adjudication process.

### Student loans

Student loans provided under the Education (Scotland) Act 1980 and the Education (Student Loans) Act 1990, as amended by the [Bankruptcy and](http://www.legislation.gov.uk/asp/2007/3/section/34) [Diligence (Scotland) Act 2007](http://www.legislation.gov.uk/asp/2007/3/section/34)(2007 Act), are not considered as an asset or a debt in bankruptcy. They are also not discharged once the bankruptcy ends.

The debtor would still have to make their monthly payment towards their loan if they are earning above the threshold. If the debtor is in arrears with their payments the collection of the arrears will be deferred until the debtor is discharged, or once their DCO is completed.

There is one exception to this ruling. If the loan was for the purposes of paying the graduate endowment it will still be discharged and the Student Loans Company will submit a claim. This will include any arrears due by the debtor. The Student Loans Company must cease to collect any contributions from the date the debtor is made bankrupt.

If further contributions are collected after this date the trustee may request that these are paid back to the debtor.

## Notification of adjudication

Any formal notification must be issued no later than four weeks before the end of the relevant accounting period.

The trustee shall record their adjudications as directed in section 126(7) of the Act.

A formal notification provides the debtor and creditors the right of review and appeal against the decision, therefore, it should only be issued when the trustee has funds available to make a distribution.

The trustee must notify the debtor and creditors of their decision regarding the adjudication no later than four weeks before the end of the accounting period when it is proposed to pay the dividend and provide reasons for:

* any rejection
* when a preferred ranking is claimed and the adjudication is for ordinary ranking only, that decision also requires to be intimated since it represents a rejection in part of the claim

The parties should also be made aware of their right of review from the date the decision was made as follows:

* 14 days from the date the decision to accept or reject the claim was made in respect of an entitlement to vote
* 28 days from the date the decision to accept or reject the claim was made in respect of an entitlement to a dividend

A copy of the adjudication of claims must be uploaded to BASYS to be inserted into the electronic Sederunt Book.

## Adjudication of claims - review and appeal

A debtor or creditor may apply to the Accountant’s independent review team for a review of a decision made on:

* acceptance or rejection of a claim
* the amount or category of a claim and the value of any security

The debtor may only request a review if they satisfy AiB they have, or are likely to have, the potential for a reversion of funds if the review is upheld.

An application must be received before:

* the expiry of 14 days from the date of the decision regarding an entitlement to vote
* the expiry of 28 days from the date of the decision regarding an entitlement to a dividend

A review does not prevent the dividend being paid by the trustee. However, arrangements should be in place if the decision is overturned, i.e. an amount set aside to pay the dividend in respect of a claim.

The Accountant must take into consideration any representations made by the debtor, any creditor, the trustee or any other person having an interest before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

The debtor, or creditor, may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The debtor may only make an appeal if they satisfy the sheriff that they have, or are likely to have, the potential for a reversion of funds if the appeal is granted.

As with a review, an appeal does not prevent the dividend being paid by the trustee. However, arrangements should be in place if the decision is overturned i.e. an amount set aside to pay the dividend in respect of a claim.

The sheriff’s decision is final.

## Distribution

Any monies gathered into the debtor’s estate must be distributed in accordance with section 129 of the Act.

### Money received by the trustee

The trustee must deposit all funds received by them in an interest bearing account in the name of the bankruptcy and in an appropriate bank or institution, as defined by section 228 of the Act.

Trustees should ensure they comply with their recognised professional body’s money regulations.

A trustee is able to retain in their hands only such sums as may be prescribed under section 111 of the Act. This amount is currently £200 and may be amended by regulations made by Scottish ministers.

If such funds are placed on the trustee’s firm’s general client bankruptcy account and this account is interest bearing the problem arises of the apportionment of the interest earned.

Given that various sums will be lodged and withdrawn at different times for different cases it would be extremely difficult and time-consuming to split any interest earned.

The monies do not however belong to the firm, therefore, the only practical solution is for any interest received in such circumstances to be periodically consigned in the name of The Accountant as an unapplied balance, under section 148(1)(a) of the Act.

In accordance with the decision in Freyd’s Trustee (1864, 2M 1293), trustees must not withdraw funds from the bank for the purpose of paying a dividend or dividends until such time as that dividend or dividends can actually be paid.

Similarly, funds in a bank earmarked for specific purposes may not be withdrawn from the bank until payment under the purpose is actually to be made.

Funds withdrawn but not paid out will be regarded as cash in the hands of the trustee for the purpose of determining whether there has been contravention of the duty to not retain a sum in excess of the prescribed amount.

Unless the interest is credited net of tax, the trustee will be liable to make an annual return to the HMRC in respect of interest earned. The funds which give rise to the interest are vested in the trustee and are therefore sufficient to make a single or composite annual tax return in respect of interest earned on all funds banked in the name of the trustee to the tax district for the trustee’s office, i.e. it is not necessary to make individual tax returns to the tax district office appropriate to the debtor. Trustees are however advised to confirm this advice with their own district office.

Failure in these duties will be reported to the court by the Accountant and may result in removal from office, censure, or such other order as the court sees fit to make.

### Payment of funeral expenses

Section 129(1)(c) of the Act does not expressly distinguish between a debtor who has died prior to, or after, the date of their bankruptcy and prior to the distribution of the debtor’s estate by the trustee.

It is considered that funeral expenses and administration costs take precedence over claims of other creditors in the order of distribution prescribed in Section 129 of the Act.

A claim form under Section 122 of the Act for these costs is not required and therefore no adjudication is necessary under section 126(1).

The trustee should record in the distribution section of the account what they have considered are reasonably incurred funeral expenses and administration costs and provide the relevant vouching.

### Personal liability and rights of relief

The order of distribution for trustee outlays and fees is set out at section 129(1) of the Act and cannot be amended.

#### 129 Priority of distribution

* the funds of the debtor’s estate must be distributed by the trustee in the sequestration to meet the following debt in the order in which they are mentioned
	+ the outlays and remuneration of an interim trustee in the administration of the debtor’s estate
	+ the outlays and remuneration of the trustee in the sequestration in the administration of the debtor’s estate

Any expenses incurred by either trustee which are payable to a third party should be paid irrespective of whether funds are available in the estate.

This also applies to statutory fees and charges due to the Accountant as prescribed in the Fees Order.

Where funds are ingathered an interim trustee has a right of relief against the trustee; the trustee has a right of relief against the estate. Both rights of relief are limited to the funds available.

Therefore, if an interim trustee is appointed their outlays and fees, as determined by the Accountant, are payable before those of the trustee. These funds would only become payable, if or when, monies are ingathered into the estate.

Similarly, when a replacement trustee is elected, or appointed. the original trustee would be entitled to payment of any determined fees and outlays prior to payment to the replacement trustee.

## Dividends

It is a key function of a trustee to pay out dividends that are due. Where monies are available a trustee should consider making an interim dividend to decrease the amount of statutory interest that may become payable.

The trustee must make reasonable efforts to pay a dividend to a creditor if they are satisfied that the creditor does still exist.

The trustee should invite all creditors to notify their preferred method for payment, to confirm or provide bank details and to encourage payment by secure BACS transfer. Trustees should consider requesting these details at the same time as requesting claims from creditors.

The trustee should circularise each creditor giving notice of any dividend payment to be made to them and specifying the amount due. If details of a creditor’s bank account are already known payment should be made to these details.

The trustee must pay the creditors the dividends allotted to them in the Scheme of Division either on the expiry of the period for appeal under section 134(1) if no objection is made to the trustee’s remuneration. If an appeal is made the sheriff’s decision is final and payment should be made on the final determination of the last such appeal.

The trustee should not consign funds if they have not made reasonable effort to contact and pay a creditor. A trustee should not consign funds solely on the grounds that a creditor has not returned details of their bank account to enable a BACS payment.

### Statutory interest

Interest is only payable when a claim is paid at the rate of 100 pence in the pound.

Preferred and ordinary creditors are entitled to claim interest on their claims from the date of bankruptcy to the date of settlement at the contractual rate, if so provided, or at the rate of 8% per annum in accordance with section 26 of [The Regulations](http://www.legislation.gov.uk/ssi/2016/397/regulation/26/made). Statutory interest may apply even when there is a contractual right to interest on the debt.

### Consignment of dividends

This role is undertaken by the finance team on behalf of the Accountant.

Any unclaimed dividend will fall to be consigned with the Accountant under section 135(2) of the Act. To do so, trustees may apply to the head office of either the Bank of Scotland or the Clydesdale Bank in Edinburgh for a consignation receipt which they should lodge with the Accountant.

Alternatively, the trustee can remit the sum to be consigned directly to the Accountant to be lodged in a Royal Bank of Scotland special deposit account. The consignation receipt is available on request.

In either case a fee will be payable to the Accountant for each consignation lodged. This fee will be deducted from the consigned dividend unless otherwise notified.

# Accounts

This section refers to Part 10 of the Act, sections 132 to 136.

This role is undertaken by the Bankruptcy Accounts Team on behalf of the Accountant.

## Accounting periods

The trustee is required to make up accounts in respect of each accounting period with the first period in every case being for 12 months commencing with the date of award of bankruptcy.

When the trustee was initially appointed as interim trustee and appointed trustee on award of bankruptcy, the first accounting period will commence from the date of their appointment as interim trustee and end one year after the date of award of bankruptcy.

Subsequent accounting periods must also be for periods of 12 months, beginning with the day after the end date of the previous accounting period.

## Application to accelerate/extend an accounting period

A trustee can ask the commissioner(s), or the Accountant, to bring the end date of an account forward, or extend to a later date.

The first account cannot be extended. However, it can be brought forward to less than 12 months, but not less than six months, if the trustee considers the ingathered funds are sufficient to pay a dividend after making allowance for future contingencies.

A subsequent account can be brought forward if the trustee is in a position to pay a dividend and is submitting a scheme of division or a final account.

A subsequent account can be extended if there have been no significant transactions during the period or for some other reason as agreed between the trustee and the Commissioner(s) or AiB.

Applications to extend or accelerate an accounting period must be made to the commissioners or the accounts team, as appropriate, before the end of the accounting period to be extended. Any agreement will not have effect unless it was made before the day on which the accounting period would otherwise end.

Applications to commissioners should be made and confirmed in writing. A copy of the confirmation must be uploaded to BASYS to be included in the electronic Sederunt Book.

Application to the accounts team should be made using the BASYS system. An explanation should be provided for consideration. A formal determination of the application will be issued on BASYS and will be included in the Sederunt Book.

The accounts team will reject any applications to extend the accounting period if they are not satisfied that the application was submitted within the relevant timescale.

## Accounting periods after the appointment of a replacement trustee under Section 60 of the Act

The current accounting period will be amended between the former and replacement trustee from the date of the meeting of creditors when the replacement trustee was elected.

The former trustee should submit their accounts for audit within three months of the appointment of the replacement trustee.

The replacement trustee will submit their accounts from the date of the meeting to the current end date.

## Appointment of a replacement trustee under Section 69 or 66 of the Act

The former trustee should only submit their account for audit if requested to do so by the replacement trustee and the accounting period will be amended to end on the date the replacement trustee is appointed.

If the replacement trustee does not require the above the accounting period will not be amended and they will be responsible for the submission of the account for any outstanding period of the former trustee.

## Fees and outlays payable on appointment of a replacement trustee

Section 133(3)(a) requires the Accountant to take account of the work reasonably undertaken by the trustee in fixing the remuneration payable, having regard to the value of the debtor’s estate which has been realised by the trustee.

Accordingly, it is the Accountant’s position, when the replacement trustee has been appointed for a bankruptcy, as a condition of a commercial arrangement between Insolvency Practitioners (or their firms), any fees and outlays incurred as a cost of the replacement trustee process will not automatically be approved by the Accountant to be paid from the bankruptcy estate.

These fees and outlays must not be recorded in the bankruptcy accounts unless their payment has been approved in advance by the Accountant, or by a sheriff.

If the original, or replacement’ trustee wishes approval of these fees and costs, representation must be made, prior to preparing the accounts explaining why the trustee believes payment from the debtor’s estate is appropriate.

It is the Accountant’s opinion it is not appropriate for the fee rates of a replacement trustee to be applied until their appointment has been confirmed by the Accountant or a sheriff, as appropriate.

Responsibility for the administration of the bankruptcy remains with the original trustee until such time as a replacement trustee is appointed.

When a replacement trustee has been appointed the accounts prepared must record remuneration using the fee rates charged by the original trustee up until the date of the appointment of the replacement trustee.

The replacement trustee’s fee rates must be charged from the date of their appointment. If accounts are presented to the Accountant for audit, and the fee rates have not been calculated as above the accounts will be returned to the trustee for amendment, unless the trustee can demonstrate either creditors have approved the fee rates charged for the periods recorded in the accounts, or the fee rates and the date of their introduction, have been approved by the Accountant or a sheriff.

## Submission of accounts

A trustee must submit accounts to the commissioners, or the accounts team, within two weeks of the end of the accounting period under section 132(1) of the Act.

The information provided must include:

* a copy of the receipts and payments
* a claim for remuneration (if on a time and line basis this should be in a table format as set out in Appendix A of SIP 9 showing a breakdown of the categories of work carried out by grade of staff). This is still required when a request for deferral of remuneration is made (see section 8)
* copy invoices/supporting evidence
* bank statements or prints from electronic banking covering the accounting period (these will not be required if no income has yet been ingathered to the estate)
* account card

The trustee must ensure any previously raised audit observations have been actioned and all changes have been incorporated into the current account.

If the trustee is unable to provide a bank statement or other bank evidence verifying the closing balance this can be submitted with their next account, or if it is a final account, prior to discharge being granted.

Please note that although these are minimum requirements of the Accountant, trustees should take account of requirements placed on them by SIP 9.

If insufficient information is provided the account may be returned or it may delay the issue of the determination or result in outlays not being determined for that accounting period.

Accounts will be considered to be submitted late if they are not submitted within two weeks from the end of the accounting period with all the required information.

If the trustee does not submit their accounts before the end of the two week submission period, they will not be accepted until the trustee has an order from the Accountant under section 212 of the Act waiving their failure to submit the accounts within the prescribed time limit (see section 18.3).

## Audit and determination of accounts by the commissioner(s)

Copies of any documentation submitted to the commissioner for audit and determination should be uploaded to the relevant account on BASYS.

When there is more than one commissioner the determination requires to be approved by all commissioners.

The fixing of remuneration and approval of outlays is a matter for the commissioners, however, it is expected that the commissioner(s) will follow any guidance issued by AiB in respect of the audit and determination of accounts.

The commissioner must issue a determination fixing the fees and outlays of the trustee within six weeks of the end of the accounting period.

When it is not possible for a commissioner to determine the accounts within the statutory period, for reasons which are the commissioner’s responsibility, they may cure a defect in procedure by making an application under section 212 to the Accountant. See section 18.3 of these Notes.

Upon receipt a copy of the determination should be uploaded to the relevant account on BASYS.

A determination by the commissioner(s) is subject to appeal rights in the first instance to the Accountant and in the second instance to the sheriff.

## Audit and determination of accounts by the Accountant

Accounts should be submitted using the BASYS system. Please refer to the trustee user guide for further guidance.

The accounts team must issue a determination fixing the fees and outlays of the trustee within six weeks of the end of the accounting period.

When it is not possible for the team to determine the accounts within the six week period, for reasons which are the team’s responsibility, they may cure a defect in procedure without an application under Section 212(1) of the Act.

Once the team has issued a determination fixing the trustee’s fees and approving the outlays the trustee becomes immediately liable for all statutory fees relevant to that determination.

## Deferral of remuneration by the Accountant

If the trustee wants to have their accounts determined, but their remuneration and liability for the audit fee in respect of this period not fixed until a later accounting period, they should make this request on BASYS when submitting the account.

A SIP9 must be submitted with the account to show the amount of remuneration that has been incurred by the trustee during the period. Only the remuneration stated at the time of the account submission will be considered under section 133(4) of the Act.

The determination issued will show the trustee’s remuneration has been fixed at nil with a statement advising:

‘The Accountant may at a later accounting period adjust the amount of remuneration fixed in respect of this accounting period, in accordance with Section 133(4) of the Act.’

When the trustee wants their remuneration for a previous period to be fixed they should make the request on BASYS when submitting the relevant account.

The determination issued will show the trustee’s remuneration as the total of the amount fixed for the current period, together with the amount fixed for the previous period(s).

The appeal rights for the fixing of the remuneration, for all periods included in the determination, will now be within the timescales relevant to the current accounting period.

When the sum found due to the trustee includes such an adjustment, it will be the responsibility of the trustee to fully disclose this information to the debtor and creditors in the circular intimating the amount of remuneration fixed.

Please note that the Accountant also reserves the right to adjust the remuneration for a current period, if after investigation, they believe an amount of remuneration fixed for a previous period has been proved to be inappropriate.

## Scheme of Division account

Prior to paying a dividend to creditors trustees are required to have the Scheme of Division approved by the commissioners, or the Accountant. This must always be submitted with an account which has an end date that is the same as the date of the Scheme of Division.

In arriving at the fund for division, the trustee should provide for contingencies, to allow for the Accountant’s fees for:

* supervising proceedings in the bankruptcy
* audit of the account under review
* audit of the final account in which the estate is distributed

An estimated breakdown of the fee to close for the final period and closure should accompany the Scheme of Division.

## Final account

A final account, clearly noted as such, should be submitted only when all transactions have been finalised.

When the final account follows on from a Scheme of Division account it should include:

* the relevant dividend payments to creditors
* copies of the signed receipts in respect of the dividend payments should be submitted with the account. If these are not available, copies of the cheques and the relevant copy bank statements showing the payments will suffice.

Any increase in the estimated final fee will not be determined at the final account stage unless the trustee can demonstrate exceptional circumstances caused an increase in the fee.

When funds are received by a trustee after they have made the final distribution and submitted their final account and the amount of the funds is insufficient to justify making a further distribution, the trustee may consign such unapplied balances under section 135(2) of the Act. A fee will be payable to the Accountant for each amount lodged.

Residual balances of less than £52 should not be consigned but may be retained by the trustees to defray the expenses of closing the bankruptcy.

## Other account considerations

The following areas should be considered by the trustee.

### Pre-award fees and costs

A fee cannot be charged for the granting of a Certificate for Sequestration.

If a fee or outlay becomes due prior to the date of the debtor’s bankruptcy, it is not a fee or outlay of the estate and cannot be claimed through the bankruptcy accounts.

The Accountant in Bankruptcy will disallow any fee or outlay which was incurred prior to bankruptcy and the appointment of the insolvency practitioner as trustee if it is declared in a bankruptcy account.

### Outlays

The Accountant will consider the following in respect of outlays:

* ensure that they were not incurred prior to the date of sequestration
* that they were reasonably incurred for the administration of the estate
* the cost is reasonable
* whether legal outlays should not be taxed under section 132(5) (see section 13.12.13)

For any outlay, a valid invoice must be produced. It is expected that the following information would be included on the invoice:

* the word invoice
* a unique identification number
* the supplier name, address and contact information
* VAT registration number (if applicable)
* the name and address of the customer being invoiced
* a clear description of what is being charged for
* the date the goods or service were provided (supply date)
* the date of the invoice
* the amount(s) being charged
* VAT amount if applicable
* the total amount owed

If an invoice cannot be produced, alternative means of providing evidence of the outlay will be acceptable. For example, where the expense is an application to court, a copy of the application and evidence of the outcome (i.e. copy of the court interlocutor) should be provided.

To evidence the payment of a trustee’s bond, a copy of the invoice from the insurance company or a copy of the trustee’s monthly RPB return will suffice. The Accountant is aware that VAT can be charged on this outlay and will take into consideration when determining the amount requested e.g. bond invoice states £10, amount claimed £12, the Accountant will determine the latter amount.

To evidence outlays for postage, photocopying etc. the trustee should provide a breakdown of any costs. This can be attached to the table providing a breakdown of time costs by activity and staff grade or on a separate document. However, to be determined, the cost must also be shown through the receipts and payments.

To evidence outlays for travel expenses a copy of an expense return or petty cash voucher will be required together with information relating to the date and reason for the travel.

When a property has been sold on the open market or an asset sold at auction a copy of the state for settlement or auctioneer’s invoice must be provided. This will allow the Accountant’s staff to correctly identify those outlays that will not attract an audit fee.

For all account types except final, only outlays claimed through an account which are vouched will be determined. The outlay may be determined in any subsequent account through which the trustee claims the outlay and provides the voucher.

AiB staff would make provision for any such outlay not vouched where the trustee has provided an estimated scheme of division.

If the account is a final account, the Accountant’s staff will endeavour to phone or e-mail the trustee’s office to request the required supporting evidence. If the information is not received within three working days, or by a mutually agreed timescale which adheres to statutory constraints, the account may be returned or otherwise not treated as final. This could result in a section 212 application by the trustee or a further account requiring to be submitted.

### Taxation of Legal invoices

Section 132(3) of the Act requires all accounts, in respect of legal services incurred by the trustee, to be submitted to the auditor of the court for taxation.

Section 132(5) of the Act makes provision for the trustee to make a request, under certain circumstances, that such accounts do not require to be taxed.

All requests under this section should be made on the trustee's statement for legal expenses not to be taxed confirming:

* the trustee is not an associate of the person who has provided the legal services, an
* the trustee finds the legal expenses to be reasonable and the amount of the invoice has been agreed by the trustee and the legal agent entitled to payment

This must be uploaded when the relevant bankruptcy account is being submitted for audit and determination.

The trustee should include the legal account with the account and provide a detailed breakdown of the work carried out. The Accountant will either determine it as an outlay of the bankruptcy or advise it should be submitted for taxation.

If the outlay has to be submitted for taxation, it will be removed from the current accounting period and the trustee will be permitted to re-submit a request for this legal outlay, upon taxation, to be determined within a later accounting period.

Please note, this does not preclude the trustee from making payments on accounts against an undertaking from the payee to repay any amount which proves, on taxation, to have been overpaid. The commissioners, or the Accountant, will advise if it is deemed appropriate that the accounts are taxed.

### Funds from a third party

The Accountant is aware some insolvency practitioners, or their firms, request a third party pays, deposits, or guarantees an amount towards payment of the trustee’s fees and outlays, particularly in the event of a shortfall of asset realisations or debtor contributions being insufficient to cover the expenses of the insolvency, including the trustee’s remuneration.

The Accountant considers it is important all interested parties are made aware of any agreement the trustee has made with a third party which has influenced the decision of the trustee to act.

The Accountant will not determine any fee and outlay of the trustee that is to be met from funds contributed by a third party and these should be highlighted by way of a note in the description box for the outlay.

The Accountant requires trustees to declare in their accounts’ circulars, any monies that have been paid to, or deposited with, the trustee or their firm, being payment of the trustee’s remuneration and outlays.

The requirement to disclose such payments is specified in Section 8(f) of SIP 7 and is consistent with paragraphs 2 and 5 of SIP 9(Scotland).

If the trustee has received, or is to receive, funds from a third party in respect of a specific instruction, but also seeks approval of remuneration and outlays from the debtor’s estate they must submit to the Accountant with their bankruptcy accounts their SIP 9 detailed time sheets and vouchers to support their claims to be paid from the estate. Copies of the terms, conditions and payment details, the trustee has agreed with the third party should also be provided.

### Sale of heritable assets on behalf of secured lenders

When a heritable asset is sold by the trustee on behalf of the secured lender, and there are other assets to be realised for the benefit of the estate generally, the trustee should account for the income and expenditure relating to the secured asset sales in a separate receipts and payments account, to be uploaded as a separate document to BASYS, in the same way as a trading account.

If a separate account is not uploaded and any outlays and/or expenses relating to the sale on behalf of the secured lender are shown through the main receipts and payments account, your account may be returned and not determined.

The Accountant will not determine any fee and/or outlay of the trustee that relates to work completed for the sale of a property on behalf of the secured lender that will be paid by the secured lender.

The following guidance should be noted:

* the gross proceeds of the sale must be shown through the account
* any expenses incurred in selling the property, or outlays agreed to be paid by the secured lender, are to be shown through the account, as they become due
* the amount paid to the secured lender is to be shown through the account and an up-to-date redemption statement provided if the sale is completed more than six months after the proposal action was approved by the AiB
* the trustee’s fee, agreed by the secured lender for selling the property is to be shown through the account
* if the agreement specifies all fees and outlays are to be paid by the trustee and reimbursed from the secured lender, but not from their security, the money paid to the trustee is to be shown through the receipts, in order to balance the account
* any net amount arising from the sale, which is due to the bankruptcy should be shown through the main receipts and payments account. If this situation arises, the fee agreed by the secured lender may not be taken from the estate funds. If the trustee wishes to take remuneration in respect of the sale from these funds they must first have the amount determined by the accounts team

If the trustee is also seeking payment of other remuneration and outlays they must submit their detailed SIP9 timesheets and vouchers to support their claim.

It is expected that the sale of any heritable asset under these circumstances will previously have been approved by The Accountant (see section 10.2.13).

When a heritable asset is sold by the trustee on behalf of the secured lender following a formal repossession of the property, the net amount, if any, received should be shown in the account as receipts and the related costs should be given by way of a note in the description box for the outlay.

Details of the agreed amount of fees and outlays paid by the secured lender to the trustee, in the specific accounting period, along with details of the properties sold in the period should be declared in the relevant account circular.

### Category 2 disbursements

Category 2 disbursements cannot be determined until they are shown through an account.

However, the Accountant is aware that under SIP 9 a trustee cannot draw these disbursements until they are agreed. If a trustee wishes to have these disbursements agreed they should show the entries through the account, providing the relevant documents or supporting evidence.

These entries should be shown as due to trustee at the end of the account. These outlays will be included in the determination as an agreement they may be drawn.

### Payments for services to associated companies

When the trustee is engaging the services of an associated company the Accountant is of the opinion this should be treated in line with a category 2 disbursement.

The following process should be applied:

* the outlay should be shown through the account for determination
* advise of the association by way of a note in the description box for the outlay
* include a paragraph in their account circular detailing the outlay payable and advising it is payable to an associated company
* should not be drawn from the bankruptcy estate until such time as the appeal period has passed

### Agreements with legal agents/third parties to fund litigation

Before entering into agreements with legal agents and third parties, who are charging an uplift in their fees or taking a percentage of the realisations when assets are finally realised, trustee’s must be able to demonstrate that creditors have been notified of their intentions to do so and that they have first been given the opportunity to fund any action.

### Recovery of VAT

If the debtor was registered for VAT, but de-registered prior to the date of bankruptcy, any VAT due on the supply of services made after the date of de-registration cannot be claimed by virtue of Regulation 111(3) of the VAT General Regulations because the requirements of section 24(6) are not met.

If the trustee de-registers after bankruptcy, however, the VAT charged on the trustee’s own fees and outlays are fully recoverable.

## Entitlement to remuneration

The trustee is not entitled to take any remuneration from the bankruptcy estate until a determination is issued by the Accountant or commissioner(s).

In addition, except when they were the interim trustee, the trustee is not entitled to take any remuneration or reimbursement of outlays until the expenses of the interim trustee have been paid full, as determined by the Accountant or commissioner(s).

The basis for fixing the amount of the remuneration payable to the trustee may be a commission calculated against the value of the debtor’s estate which has been realised, but shall take into account the work which, having regard to that value, was reasonably undertaken by them and the extent of their responsibilities in administering the debtor’s estate.

A trustee is required to comply with SIP 9 in submitting a claim for remuneration. This requires a trustee to provide sufficient supporting information and an explanation of what has been achieved in the period and how it was achieved to enable the Accountant, or commissioner, to make an informed decision as to whether the remuneration requested is reasonable. This can be added to BASYS as a separate document or a note to the account.

If there have been any changes to charge out rates during the period being determined these should be disclosed by grades of staff, split by the periods applicable.

A trustee should also provide details and the cost of any work that has been sub-contracted out and that could otherwise be carried out by the trustee or their staff.

### Information required by the Accountant

#### For claims less than £10,000.00

The Accountant will require a breakdown of the claim for remuneration by activity and grade of staff. The Accountant will also carry out a random check of claims under this amount or consider whether more detailed information is required taking into account the trustee’s cumulative remuneration.

On these occasions, the request for detailed time records will be made by telephone and e-mail receipt of the account to request this documentation be submitted within three working days or by a mutually agreed timescale which adheres to statutory constraints. If, after this agreed timescale the documentation is not received, the remuneration will be determined, however, this information must be submitted with the next account and the Accountant reserves the right to amend any future claims for remuneration in accordance with section 133(4). The Accountant will not be able to audit any future scheme of division or final accounts until this check has taken place, which may delay the distribution to creditors or discharge of the trustee.

#### For claims between £10,000.00 and £14,999.99

The Accountant requires a breakdown of the claim for remuneration and detailed time records. These should be submitted with the account. If they are not received, the Accountant’s staff will either phone or e-mail the trustee’s office to request this documentation be submitted within 3 working days or a mutually agreed timescale which adheres to statutory constraints. If, after this agreed timescale the documentation is still not received, the remuneration will be determined at which the Accountant considers appropriate. Future claims for remuneration may take into account any adjustment which is considered appropriate in accordance with section 133(4).

#### For claim of £15,000.00 and over

The Accountant requires a breakdown of the claim for remuneration, detailed time records and the trustee’s case files. These should be submitted with the account. If they are not received, The Accountant’s staff will either phone or e-mail the trustee’s office to request this documentation be submitted within three working days or a mutually agreed timescale which adheres to statutory constraints. If, after this agreed timescale the documentation is still not received, the remuneration will be determined at a level which the Accountant considers appropriate. Future claims for remuneration may take into account any adjustment which is considered appropriate in accordance with section 133(4). When case files are submitted, the trustee should still attach copies of the relevant invoices etc. to the receipts and payments.

The Accountant will endeavour to return the case files to the trustee within 14 days of receipt.

### Detailed time records

If the Accountant requests detailed time records the information required is as follows:

* date a task was carried out
* length of time taken to carry out said task
* member of staff who completed the task including grade
* a description of the actual work carried out for each entry (this should be proportionate to the time charged)

The Accountant will assess that the work was necessary to the administration of the sequestration, that it was carried out by the correct grade of staff, that the time taken to complete the task was reasonable.

Where the category of work does not sufficiently explain the task undertaken or where the time recorded does not appear to be consistent with the task, the Accountant will restrict or disallow time entries that do not contain a sufficient narrative describing the work carried out.

The Accountant will also disallow or restrict any entries where the work is not considered relevant to the administration. The Accountant may reduce the rate charged for work if it is considered that the task was not undertaken by the appropriate grade of staff.

The Accountant may reduce the time claimed for a task if it is considered to be excessive.

If the trustee disagrees with the determination, in addition to the option available under section 134(1) to (3) for the trustee to appeal the determination, the trustee may submit a request following the issue of the determination, or with the next account, for the Accountant to reconsider the amount determined and to make an adjustment in a future determination in accordance with section 133(4). The trustee must provide any missing information, an explanation as to why an entry should be allowed or any further document or supporting evidence which will assist the Accountant to reach a decision.

If the Accountant allows any further remuneration to be claimed, a revised determination will be issued or an amendment will be made to a future claim for remuneration in accordance with Section 133(4).

If the Accountant does not allow any further remuneration to be claimed the trustee may make an appeal to the sheriff within the appeal period of the relevant determination.

## Fees due to the Accountant

The Accountant is obliged to charge a fee for issuing a determination of the trustee’s entitlement to remuneration and the reimbursement of outlays under [The Fees Order](https://www.legislation.gov.uk/ssi/2018/127/contents).

The sum determined is defined in section 133(1) (a) (ii) of the Act as the amount of the outlays and the remuneration payable to the trustee.

Outlays for this purpose are intended to include all sums actually paid out by the trustee from their own or bankruptcy funds.

The following outlays and expenses would not be included in the audit fee calculation:

* bank charges
* trading expenses
* tax on interest
* income tax
* inheritance tax
* capital gains tax
* remuneration and outlays settled by third party e.g. property sold on behalf of a secured creditor
* the Accountant’s statutory fees
* petitioning creditor expenses
* funeral expenses and the expenses in
* expenses of realisation which have been deducted at source

An expense of realisation is defined as any outlay incurred by the trustee in realising the debtor’s estate, which in the course of normal business practice is deducted from the price payable to him.

For example, outlays directly referable to the sale of heritage, that is, advertising, conveyance, etc. would be off-set against the proceeds of sale.

The cost of legal advice or action to secure authority to sell the heritage would not however be treated as an expense of sale, but as a direct outlay.

This will also include other assets that are realised and the auctioneers/agents fees are deducted directly from the price payable to the trustee.

Trading expenses are defined as any outlays incurred by the trustee in the carrying on of any business by the debtor. Thus, if a trustee (with authority) continues to trade the debtor’s business, only the net profit or loss needs to be recorded in the trustee’s account and claim for remuneration and outlays.

When submitting statutory accounts, trustees must make it clear in the notes to the account when outlays are being set-off against receipts, enclosing the appropriate paperwork to verify this when necessary e.g. states for settlement, auctioneers’ invoices.

See section 12.7.3 for advice on personal liability and rights of relief of interim trustees and trustees in respect of statutory fees due to the Accountant.

## Intimation of the determination to the debtor and creditors

The trustee must ensure any changes made by AiB, or the Commissioner(s), have been incorporated into the account before issuing the notification.

receipt, the trustee must notify the debtor and creditors of each determination issued by AiB, or the commissioners. The notification must include the following information:

* the precise accounting period as detailed in the determination
* if the determination includes an adjustment of a previous account period determination, the precise account period the adjustment has been made to
* details of the remuneration and outlays fixed, together with the amount of VAT eligible
* the Accountant’s fees (if appropriate) which can be found on the relevant account on BASYS
* information regarding rights of appeal, i.e. to the Accountant or the sheriff as appropriate, and the time limits for lodging such an appeal
* advise the audited accounts and scheme of division, if appropriate, together with the determination are available for inspection by arrangement

A copy of the notification should be uploaded to the relevant account in BASYS, together with a certificate of posting to be included in the electronic Sederunt Book.

The trustee may wish to not take their remuneration until the expiry of the appeal period to avoid the necessity of repaying the estate should there be a successful appeal.

## Determination of trustee fees and outlays - appeal

A debtor, or creditor, may appeal the determination:

* of the commissioner(s) to the Accountant
* of the Accountant to the sheriff

The appeal should be lodged at the court which has jurisdiction of the residency of the debtor.

A debtor may only appeal against the trustee’s remuneration if they satisfy the Accountant, or a sheriff, they are likely to have a financial interest in the outcome of the appeal, under section 134(4) of the Act.

If a successful appeal by a debtor is not expected to release sufficient funds to enable a reversion of funds to the debtor, the debtor is not expected to be permitted to lodge an appeal.

The sheriff’s decision is final.

# Discharge

This section refers to Part 11 of the Act, sections 137 to 154.

This role is carried out by the Adjudication and Supervision Team (AST) on behalf of the Accountant.

## Discharge of debtor

The debtor may be discharged from their bankruptcy at the end of one year from the date of the award of bankruptcy, as detailed in section 137(2) of the Act.

The Accountant does not expect a trustee to recommend the discharge of a debtor if they have not been co-operating. If it is the recommendation of the trustee that a debtor who has not co-operated should be discharged, the trustee must provide both an explanation why they consider it is appropriate and details of the action they have taken to try and get the debtor to co- operate.

### Actions of the trustee

The trustee must provide a report on BASYS, without delay, 10 months after the date of the award of bankruptcy.

AST expects trustees to have submitted their report within three weeks of the end of the 10 month period. If the report is submitted after this period the trustee should include in their report an explanation why the report could not be submitted within this period.

When a trustee consistently fails to submit reports timeously, without good cause, consideration will be given to making a report to their professional body.

### Application to the Accountant

The application and report should be created on BASYS.

The report should include:

* information on the debtor’s assets, liabilities, financial affairs and business affairs (i.e. the current status of the realisation of the assets or investigations)
* the debtor’s conduct in relation to these assets (i.e. did the debtor disclose all the assets etc and have they co-operated)
* information on the debtor’s conduct in the course of the bankruptcy (i.e. has the debtor provided all information requested and co- operated with the trustee)
* any other information about the bankruptcy the trustee deems appropriate
* a statement by the trustee advising whether the debtor has at the date of the report
* complied with any DCO (provide details of any missed payments or variations made)
* co-operated with the trustee in terms of section 215 (i.e. has the debtor provided all relevant information and documentation on request)
* complied with the statement of undertakings:
	+ made a full and fair surrender of their estate
	+ notified the trustee of any further assets acquired after the date of bankruptcy
	+ informed the trustee of any change to address or financial circumstances
	+ co-operated and provided requested documentation
	+ completed any required financial education modules;
* a statement by the trustee as to the extent, as of the date of the report, they have completed their functions under section 50 of the Act

After submitting the application on BASYS the trustee must send a copy of the report to the debtor and all known creditors providing details of their right to make representations to AST within 28 days of the notification. The report can be downloaded from BASYS.

It is important to provide AST, the debtor and creditors with as much information as possible to make a decision, or allow them to assess if representations should be submitted.

The trustee should also ensure all relevant documentation and information relating to the case has been uploaded to BASYS.

### Actions of AST

AST will:

* consider the information provided by the trustee and where appropriate request further information and/or evidence
* consider any representations received with the specified timescale

### Actions of the Accountant

The Accountant will consider discharging the debtor if:

* all their obligations have been met
* the trustee has been able to administer the case in a satisfactory manner
* a DCO has been made and payments have been maintained;
* representations have not been received to the suggest discharge should not be granted

The Accountant will not consider discharging the debtor if:

* all their obligations have not been met
* the trustee has not been able to administer the case in a satisfactory manner
* a DCO has not been made, unless the trustee can confirm they have sufficient funds in hand to pay all creditors in full including statutory interest, at the time of making the report
* a DCO has been made and payments have not been maintained
* representations have been received to the suggest discharge should not be granted

AST will notify the decision to the trustee and the debtor.

The trustee must within seven days of receipt of the decision notify all known creditors and provide details of the review and appeal procedure.

The decision of the Accountant to grant or not grant discharge will not take effect before the end of the period of 21 days beginning with the day AST notifies their decision.

The Accountant will (if appropriate) make the entry on the Register of Insolvencies and place a copy of the certificate of discharge in the electronic Sederunt Book at a date which is later of:

* 12 months from the date of the award
* the day following the expiry of the review period
* the day following the outcome of a review
* the day following the decision of an appeal of a review

### Subsequent debtor discharge reports

When a debtor was not discharged after 12 months from the date of award the trustee will require to submit a subsequent report when they consider it appropriate for the debtor to be discharged using the process as 14.1.2.

Evidence should be provided to confirm the reasons for which the debtor was not discharged have been resolved:

* evidence of co-operation of debtor i.e. documents provided
* evidence that trustee is able to administer the case satisfactorily
* when a DCO has been made at a later stage at least 10 months have passed since the first payment date and the debtor is maintaining payments

### Effect of discharge on the debtor’s estate

The discharge of the debtor has no bearing upon any estate which may vest in the trustee as at the date of bankruptcy, or estate which subsequently vests before the expiry of four years from the date of bankruptcy.

The effect of discharge is found in section 145 of the Act and it has no effect on the trustee’s powers and duties under the Act. Those powers and duties remain until the estate has been realised, distributed and the trustee discharged.

Subject to section 112(2) and (3) of the Act a debtor is usually re-invested in such estate only upon recall or reduction of the award of bankruptcy.

### Discharge of debtor - review and appeal

An application can be made by the debtor or trustee to the Accountant’s independent review team for a review of a decision made by the Accountant to refuse to discharge the debtor.

An application can be made by any creditor to the Accountant’s independent review team for a review of a decision made by the Accountant to grant discharge the debtor. In this circumstance the decision to discharge the debtor will be put on hold until the outcome of the review is decided.

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

The team must take into consideration submissions made by any interested person before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

## Deferral of discharge of debtor

When a debtor cannot be traced the trustee can apply to AST to request the deferment of a debtor’s discharge under section 141 of the Act.

An application must be made to AST between eight and 10 months after the award of bankruptcy.

### Actions of the trustee

The Accountant expects the trustee to have carried out a number of actions in order to try to find and contact the debtor prior to making an application to defer the debtor’s discharge indefinitely.

There may be occasion when the trustee has had some initial contact with the debtor but the debtor has since ‘disappeared’ and can no longer be traced. In these circumstances deferral cannot be considered and the trustee should take action not to discharge the debtor under section 137 (see section 14.1).

If the trustee has not been able to contact the debtor since they were appointed trustee they must be able to demonstrate they have:

* written to the debtor on a minimum of three occasions, to all addresses where the trustee believes the debtor may be living, asking them to contact their trustee and detailing the potential consequences if they do not comply with this request
* emailed the debtor at all email address(es) recorded, asking them to contact their trustee and detailing the potential consequences if they do not comply with this request
* appointed Sheriff Officers to attempt personal service on the debtor of a letter asking them to contact their trustee and detailing the potential consequences if they do not comply with this request
* made an attempt to serve the letter by Sheriff Officers should be done at each address where the trustee believes the debtor may be living and the Sheriff Officers must provide a written report(s) supporting the belief that the debtor does not live at the address(es) and their whereabouts are not known
* telephoned, on at least five occasions and at various times, all phone numbers the trustee has obtained for the debtor and recorded the outcomes of these phone calls
* checked the electoral register for each known possible address of the debtor and noted if the debtor, is, or isn’t, recorded at each address checked
* contacted the local authority(s) and established who is registered for paying the council tax for each property the debtor is believed to possibly reside at and establish if council tax is being paid and by whom
* made enquiries regarding the debtor’s whereabouts with any relative, friend or employer of the debtor that is known to the trustee and recorded the outcome of these enquiries
* completed an Experian check for the debtor
* employed a tracing agent to try and locate the debtor and recorded the outcome of this investigation

The trustee should also provide supporting evidence to show they have been unable to carry out their functions under the Act:

* a written record of the actions they have carried out to try and locate the debtor and the outcomes
* a written explanation of any actions they have not been able to undertake
* copies of reports received from sheriff officers, tracing agents and any other persons appointed to try and locate the debtor
* detail of the trustee’s functions that they are not able to complete due to the debtor’s whereabouts not being known
* any other information they believe supports their claim that the debtor cannot be traced.

### Application to the Accountant

The application should be created on BASYS or using a Form 29 of [The](http://www.legislation.gov.uk/ssi/2016/397/contents/made) [Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made).

At the same time as submitting the application, the trustee must send a Form 28 of [The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made), to the debtor’s last known address(es) andevery known creditor

advising of their right to make written representation to AST within 14 days of the date of the application.

### Actions of AST

AST will:

* consider the information provided by the trustee and if appropriate request further information and/or evidence
* consider any representations received with the specified timescale

### Actions of the Accountant

When the Accountant is satisfied the trustee is unable to ascertain the whereabouts of the debtor and it would not be reasonably practicable for the trustee to continue to search for the debtor, AST will:

* issue a certificate deferring the discharge of the debtor indefinitely using a Form 30 of[The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made)
* place a copy of the certificate in the electronic Sederunt Book
* make the appropriate entry on the Register of Insolvencies

### Debtor not traced - new trustee

When a certificate deferring discharge has been issued the trustee may apply to resign from office if:

* the debtor has not been traced or made contact with the trustee;
* the application is made within six months of the certificate deferring discharge being granted

The trustee must send to AST:

* a Form 31 of[The Regulations](http://www.legislation.gov.uk/ssi/2016/397/contents/made);
* details of every known creditor known to the trustee

The Accountant will grant the resignation of the trustee and the Accountant in Bankruptcy will be deemed to be the trustee.

The former trustee is not entitled to recover outlays and remuneration payable in accordance with section 132 of the Act other than by a claim in the final distribution of the debtor’s estate.

Sections 69(9) and (10) of the Act applies to the Accountant in Bankruptcy as a new trustee.

### Debtor not traced - subsequent debtor contact

When the trustee has not applied for their discharge and they ascertain the whereabouts of the debtor, or the debtor makes contact with the trustee, they can subsequently prepare a report to discharge the debtor in accordance with Section 143(3) and (4) of the Act.

This report cannot be made earlier than 12 months from the date the whereabouts of the debtor were ascertained, or from when the debtor made contact with the trustee.

The trustee should follow the procedure shown at section 14.1.

### Subsequent debtor contact - review and appeal

An application can be made by the debtor or trustee to the Accountant’s independent review team for a review of a decision made by the Accountant to refuse to discharge the debtor.

An application can be made by any creditor to the Accountant’s independent review team for a review of a decision made by the Accountant to grant discharge the debtor. In this circumstance the decision to discharge the debtor will be put on hold until the outcome of the review is decided.

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

When an application for review is received the decision to discharge the debtor is put on hold until the review decision is made.

The team must take into consideration any submissions made by any interested party before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

## Discharge of trustee

When a trustee has completed their administration of the debtor’s estate, and the Debtor Contribution Order has been completed or quashed (see section 8.7), the trustee may apply to The Accountant for a certificate of discharge under section 148(1)(b) of the Act.

### Actions of the trustee

The trustee must check the documents held in the electronic Sederunt Book on BASYS. Any missing documents should be uploaded. A list of the documents contained in the Sederunt Book can be found at [Appendix P](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/20-appendices/appendix-p-list-of-sederunt-book-documents).

The trustee must notify the debtor and all known creditors of the application for discharge and inform them:

* the Sederunt Book is available for inspection on request to AiB
* of the effect of the grant of the discharge of the trustee
* any written representations relating to the application may be made to AST within 14 days after such notification

### Application to the Accountant

An application for discharge should be made using the template trustee discharge report and provide information on the following:

* confirmation all assets have been realised or abandoned or transferred back to the debtor. When assets have been abandoned reasons should be provided if not already done
* the date the debtor was discharged
* the date the Debtor Contribution Order has been completed or brought to an end
* all invoices payable to AiB have been settled
* the appeal period for the final account has been passed and no appeal(s) has been lodged
* all account audit observations for any account have been answered
* the date the circular advising the debtor and creditors of the intention of the trustee to seek discharge was issued
* all Sederunt book documents have been uploaded to BASYS or provided to AiB

The trustee must deposit any unclaimed dividends and unapplied balances in accordance with section 148(2) of the Act.

### Actions of AST

Upon the expiry of the 14 day period AST will:

* consider the information provided by the trustee and if appropriate request further information and/or evidence to be provided within 21 days of the request
* consider any representations received with the specified timescale

AST will withdraw the application for discharge if:

* the trustee has not completed all the required obligations
* any requested information was not received within the specified timescale

### Actions of the Accountant

The Accountant will discharge the trustee if:

* the trustee has completed all the required obligations
* representations have not been received to the suggest discharge should not be granted

The Accountant will not discharge the trustee if:

* the trustee has not completed all the required obligations
* representations have been received to the suggest discharge should not be granted

AST will notify the decision to:

* the trustee
* the debtor
* any creditor who has made representation

The decision to grant, or not grant discharge, will not take effect before the end of the period of 14 days beginning with the day AST notifies the decision.

After the expiry of the 14 day period, or following the outcome of a review and/or appeal, the Accountant will, if appropriate:

make the entry on the Register of Insolvencies

place a copy of the certificate of discharge in the electronic Sederunt Book

### Discharge of trustee - review and appeal

An application can be made by the trustee, the debtor or any creditor who made representation to AST to the Accountant’s independent review team for a review of a decision made by the Accountant to grant or refuse discharge of the trustee.

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

The team must take into consideration any submissions made by any interested party before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision, determination or requirement must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, determination or requirement was made.

The sheriff’s decision is final.

### Effect of discharge of the trustee

The discharge will have the following effect:

* discharge the trustee from all liability (other than any liability arising from fraud) to the debtor and the creditors
* in respect of any act or omission in exercising their function under the Act

The granting of a certificate of discharge to a trustee will cover and include:

* when the trustee was also interim trustee, their acting as such, in accordance with section 148(7) of the Act
* where a trustee has died, to the trustee’s executor or where a trustee has resigned office or been removed from office, in accordance with section 149(9) of the Act

# Assets discovered after discharge of the trustee

This section refers to Part 12 of the Act, sections 152 to 154.

This role is undertaken by AST on behalf of the Accountant.

## Vesting of the estate - post discharge of the trustee

This section applies to estate that would have vested in the trustee at the date of bankruptcy which is not discovered until after the trustee has been discharged.

This would include an entitlement to funds, or property, which existed prior to or during the period of the bankruptcy which do not have a value lower than £1000.

There is nothing in the Act which states the role of the trustee, in principle, ceases on their discharge. Section 152(3) states The Accountant has the authority to reappoint a trustee on application of the trustee who was discharged or appoint a new trustee.

The discharged trustee, or an insolvency practitioner, should only consider seeking to be appointed, if this action is expected to bring a benefit to the debtor’s creditors. The request must be made before the expiry of five years from the date of bankruptcy.

If the action will not result in a dividend to creditors the funds/assets should revert back to the debtor.

## Actions of the insolvency practitioner

An insolvency practitioner may consider making an application to be appointed as trustee in a case if:

* the trustee has been discharged
* they become aware of an asset with a value of more than £1000
* the asset was not known to the trustee before their discharge date
* the asset would have vested in the trustee had they been aware of it
* the asset was brought to their attention within five years of the date of bankruptcy
* a dividend will be payable to creditors after taking into consideration the expected cost of making the application and the administration costs for ingathering the funds, or sale of asset, distribution and closure of the case

## Application process

The request should be made in writing to AST providing:

* details of the newly identified asset
* the estimated value of the asset
* the reason why it should have formed part of the estate
* the reason why the asset was not realised prior to the trustee’s discharge
* the estimated outlays and remuneration that will be incurred by the trustee to carry out all their necessary duties if they are appointed
* the estimated dividend that will be paid to creditors if they are appointed

## Actions of AST

When the criteria has not been met AST will reject the application in writing providing the reason(s).

When the criteria has been met AST will:

* notify the debtor, the former trustee (who is not the applicant) and all known creditors of the application
* inform the above they may make representations within 14 days of the notification

## Actions of the Accountant

Following the expiry of the 14 day period the Accountant will:

* consider the information provided by the person seeking appointment, reappointment
* take into account any representations received
* make a decision on appointment

AST will notify all parties of the decision. If the decision is made to appoint, or reappoint, the notification to the debtor will include information in relation to their obligation to co- operate with the trustee.

## Appeal

Any interested person may make an appeal to the sheriff on the decision of the Accountant to make, or refuse to make, an appointment or reappointment.

The appeal must be made within 14 days of the decision.

The sheriff’s decision is final.

# Bankruptcy Restriction Orders

This section refers to Part 13 of the Act, sections 155 to 161.

A Bankruptcy Restrictions Order (BRO) can be made following a debtor’s unacceptable behaviour either before or during the period of their bankruptcy. A BRO is a means to impose conditions on a debtor’s activities. A BRO can be made for period between 2 and 15 years. It shall come into force when it is made and shall cease to have effect on the date specified in the Order.

This role is carried out by the Bankruptcy Restrictions Team (BRT) on behalf of the Accountant.

Section 50 of the Act requires a trustee to report a debtor to the Accountant if they believe there are reasonable grounds to believe the debtor’s behaviour is of a kind defined under Section 156 of the Act, that would result in the Accountant, or a sheriff, making a BRO.

An application can only be made before a debtor is discharged from their bankruptcy, unless a sheriff grants permission for a late BRO application. The Accountant will only consider this type of application to a sheriff if there is very good reason to do so.

To provide BRT with sufficient time to make a decision on an application and/or prepare a case and application to a sheriff for a BRO/interim BRO the completed application should be submitted no later than eight months after the date of award. Later submissions will only be considered if there are strong grounds i.e. new information becomes available and it is in the public interest to pursue a BRO.

A report made under these circumstances shall be absolutely privileged under the Act and details should not be disclosed. It is expected there may be cases when a BRO application is made when a Suspected Offence Report should also be submitted to the Crown Office as that behaviour will relate to a criminal office and a BRO is a civil matter. See section 18.6 for further information.

If a trustee is unsure if a debtor’s behaviour could merit a BRO they should contact BRT to discuss the case.

## Interim BROs

The Act provides for interim BROs to be made when there is an urgent need to protect the public. This may happen if there are delays in obtaining information for the investigation.

BRT will decide if there is a need to make an interim BRO, or submit an application to a sheriff.An interim BRO will cease to be effective:

* on determination of the BRO by the Accountant
* on determination of the BRO by the sheriff
* on discharge by the sheriff on application by the Accountant or the debtor

## Expectations of the Accountant

The trustee must consider early into the debtor’s bankruptcy if there are grounds to consider making a BRO investigation application. If there are, the trustee must proceed to gather evidence of the suspected misbehaviour and submit a request for an investigation within eight months of the date of the award.

If an application is being considered the trustee must ensure that the debtor has been made aware of and understands their responsibilities.

It is recommended that AiB’s Bankruptcy Restrictions Guide is made available to the debtor when a BRO application is being considered by BRT.

## Grounds for a BRO

The following behaviours could be considered grounds for an application for an investigation:

* failure to keep records which account for a loss of property
* failure to produce records to the Accountant, the trustee or interim trustee
* failing to supply accurate information to an authorised person for the purpose of the granting under section 9 a certificate for sequestration of the debtor’s estate
* making a gratuitous, or other, alienation
* creating an unfair, or any other, preference
* making an excessive pension contribution
* failure to supply goods or services which has given rise to a creditor’s claim
* trading when they knew they could not pay their debts
* incurring a debt before bankruptcy which they knew they could not pay back
* failure to satisfactorily account for losses in property to the:
	+ sheriff
	+ Accountant
	+ interim trustee
	+ trustee
* excessive gambling or other extravagance which may have materially affected their debts
* neglect of business affairs that contributed or increased their debts
* fraud or breach of trust
* failure to co-operate with the Accountant, interim trustee, trustee

## Public interest test

A trustee should be satisfied it is in the public interest to impose a BRO on a debtor.

The public interest will vary from case to case and the trustee must consider the particular circumstances of each case when applying the test. If one of the following public interest criteria applies an application should be submitted to BRT.

Act as a deterrent:

* would the planned action deter a potential wrong-doer from doing the same thing if the outcome was publicised?
* afford protection to business and consumers from potential future losses or damage?
* reduce the possibility of future losses/damage?

Consideration should also be given to determining:

* at the time of the event, without the benefit of hindsight, why was the behaviour (un)reasonable?
* would BRO action observe the human rights of the debtor and the justice and equity of proceedings?
* are proceedings possible in a timely manner within the framework of the Act?
* do the circumstances of the individual and the seriousness of the facts make action just and equitable?
* would the planned action look reasonable to the average person on the street and/or to business?
* is there likely to be any negative impact of the planned action?
* is there more than 50% likelihood of success?
* effectively apply the public purse?
* does the case overall merit public expenditure?
* does the likelihood of success and the ultimate result justify continued investment?

## Making an investigation application

As the restrictions imposed by a BRO are stringent the application will need to satisfy the Accountant the allegations are both accurate and supported by evidence.

The application should be submitted using BASYS together with all supporting documentary evidence including:

* transcript of an interview with the debtor
* written statements from creditors or other potential witnesses
* supporting documents and statements from relevant persons or organisations
* list of creditors, if not already attached to the case
* a copy of the supplementary questionnaire, if not already attached to the case

## Receipt of an investigation application

On receipt of application BRT will:

* review the information and evidence provided
* request further information as required
* consider if the investigation can be completed within the timescale available
* apply the Public Interest Test
* make a decision to accept or reject the application
* when an application is rejected reasons will be provided

### Investigation process

BRT will in-gather sufficient information and evidence to effectively support or reject, the requirement to impose a BRO on an individual.

BRT will undertake this by:

* requesting assistance from the trustee if appropriate
* writing to appropriate individuals or organisations
* interviewing the debtor to allow them to present any relevant information and/or evidence
* considering the information in-gathered against the Public Interest Test
* if appropriate, considering the period the restrictions should be imposed for
* making a decision to:
	+ take no further action
	+ request the Accountant impose a BRO (for a period of between two and four years eleven months)
	+ make an application to the court to impose a BRO (for a period of five years or over)

### Period of restrictions

BRT will assess the misbehaviour of the debtor and consider the severity of the behaviour to determine the period they believe is appropriate and can be justified to the Accountant or the sheriff.

Each individual case must be treated on its own merits. This Guidance has divided the 15 year period into three groups:

#### Period of 2-5 years

* cases which are not relatively serious
* debtors who have over-reached – going beyond the point when they should have realised they were likely to become bankrupt
* debtors who are careless rather than overtly reckless
* consumer credit cases, unless there is reason for them to move into the middle bracket
* cases involving small amounts of debt (less than £5,000), even though there has been recklessness by the debtor

#### Period of 6-10 years

* cases when there is a cynical exploitation of creditors (may be overt or implied by timing of events and may include actual or potential criminal acts)
* cases when there is overt recklessness or a blatant disregard for creditors resulting in substantial/material detriment
* the debtor does something to put substantial/material assets out of reach of creditors

#### Period of 11-15 years

* particularly serious cases
* cases of very substantial fraud or dishonesty, involving material sums (more than £50,000)
* cases when there has been a breach of a previous BRO

## BRO restrictions

BRT will request, on all occasions, when a BRO or interim BRO is granted, that the following will apply to the debtor for the duration of the order:

* the debtor must disclose their status to a credit provider if they, either alone or jointly with another person, wish to get credit of more than £2,000
* the debtor must disclose their status to a credit provider if they wish to get credit of any amount and already have debts of £1,000 or more

There are further restrictions relating to the debtor being unable to hold certain public office positions and jobs. It is the responsibility of the debtor to ensure they are aware of the full range of restrictions that apply when a BRO is imposed on them.

## Application for a BRO to the Accountant

The Accountant can impose a BRO for a period between two and four years eleven months.

### Actions of BRT

BRT will notify the debtor of the intention to impose a BRO providing the following:

* the grounds that were investigated
* details of the behaviour
* the period the BRO will be imposed for
* the right to make written representations within 14 days of the notification

### Actions of the Accountant

Upon the expiry of the representation period the Accountant must within seven days:

* consider the evidence
* consider any representation
* make a decision to take no further action or impose a BRO for a period of under five years

BRT will notify the debtor and the trustee of the decision and if appropriate:

* issue a copy of the Order to the debtor detailing the start and end date of the restrictions
* make the relevant entry on the Register of Insolvencies
* issue an invoice to the trustee. The fee to be applied can be found in [The Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made)

## Application for a BRO to the sheriff

A sheriff can impose a BRO for a period between five and 15 years.

BRT will:

* make an application to the appropriate Sheriff Court
* notify parties as instructed by the court
* if required attend a court hearing
* notify the debtor and the trustee of the outcome

If appropriate BRT will:

* issue a copy of the Order to the debtor
* make the relevant entry on the Register of Insolvencies
* issue an invoice to the trustee. The fee to be applied can be found in [The Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made)

## Variation or revocation of a BRO

A BRO can be revoked upon recall of a bankruptcy (see section 2.7).

A debtor may also apply for their BRO to be varied or revoked.

Applications must be made to:

* the Accountant (when they made the order)
* on a Form 1 of the[Applications and Decisions Regulations](https://www.aib.gov.uk/guidance/bankruptcy#Legilsation)
* the sheriff (when the sheriff made the order)
* on a Form 7.1A of the[Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016](http://www.legislation.gov.uk/ssi/2016/313/schedules/made)

### Application to the Accountant

This role is carried out by AST on behalf of the Accountant.

AST will:

* notify the trustee and all known creditors of the application
* inform the above they may make representations in writing within 21 days of the notification

AST may make any necessary enquiries of the applicant, or any person making representation. Any request will be made in writing and specify the time period under which the information, evidence or documentation must be provided.

AST may, if satisfied there is a good reason, require any person making an application, or making representations:

* to provide any document or information as may be reasonably required
* to attend a hearing at such time and place as may be specified for the purposes of giving evidence

### Actions of the Accountant

Following the expiry of the 21 day period and before the expiry of 28 days the Accountant will:

* consider the reasons and evidence that supported the original BRO decision
* any reasons presented by the debtor in their application
* take into account any representations received
* make a decision to:
	+ confirm the period of the BRO
	+ vary the period of the BRO
	+ revoke the BRO.

AST will notify all parties of the decision and if appropriate, make the relevant entry on the Register of Insolvencies.

## Variation or revocation of a BRO – appeal

The debtor may appeal the decision to the sheriff before the expiry of 14 days from the date the decision was made.

The sheriff’s decision is final and they make an further order when determining the appeal, or at the request of AiB, which provides the debtor may not make another application of for variation or revocation for a specified period.

# Functions of the Accountant in Bankruptcy

The Accountant has a statutory duty to:

* supervise the statutory functions of interim trustees, trustees and commissioner(s)
* investigate complaints made against the above
* determine debtor applications
* maintain the Register of Insolvencies (ROI)
* prepare an annual report

## Supervisory functions

The Accountant will charge a fee for this role and an invoice will be issued to the trustee each year on the anniversary of the award of the bankruptcy and for any part year on the discharge of the trustee. The fee to be applied can be found in [The Fees Order](http://www.legislation.gov.uk/ssi/2018/127/contents/made).

This function is undertaken by the Accounts Team and AST on behalf of the Accountant.

They will carry out this role by:

#### Monitoring the documentation provided by the trustee to ensure

* compliance with any timescale within the Act
* all relevant information is being provided to the required party
* the trustee is carrying out their duties in accordance with the Act, regulations and any other guidance issued by AiB

#### Recording information using BASYS and monitoring

* realisation of assets
* variation, quashing and compliance with Debtor Contribution Order
* remuneration and outlays of the trustee
* compliance with any timescale within the Act
* the trustee is carrying out their duties in accordance with the Act, regulations and any other guidance issued by the agency

When it is considered necessary AST will issue a direction to a trustee under section 109(2) of the Act. If the trustee fails, without reasonable cause, to follow the direction AST will consider an application to the sheriff under section 50(7) of the Act.

The sheriff may confirm, revoke, modify the decision in question, confirm or annul the decision in question, give the trustee directions or make such order as the sheriff thinks fit.

## Complaints

This function is undertaken by AST on behalf of the Accountant.

AST will investigate complaints made against interim trustees and trustees.

AST will carry out this role by:

* responding to general enquiries directly
* requesting information from the trustee regarding specific details
* requesting the case files of the trustee

The Accountant will report on complaints received in the annual report.

Further information regarding the AiB complaints procedure can be found in the complaints handling procedure.

## Register of Insolvencies

The Register of Insolvencies (ROI) is a formal record of all bankruptcies awarded in Scotland. The Accountant is responsible for updating and maintaining it.

This function can be undertaken on behalf of the Accountant by Insolvency Registration Team, the Adjudication and Supervision Team and the Bankruptcy Restrictions Team.

Information is held for the majority of bankruptcies for the longer period of:

* one year following the date of discharge of the trustee
* one year following the recall of a bankruptcy
* one year after the end date for the period imposed by a Bankruptcy Restriction Undertaking or Bankruptcy Restriction Order

The ROI has a free search facility which can be accessed by anyone who has an interest. The details recorded for bankruptcy cases can be found at Appendix A of these notes.

A commercial daily data download service is available and is subscribed to by the main credit reference agencies.

The Accountant will, on request, provide a certified copy of an entry from the ROI.

### Changes to the ROI

On application the sheriff may, at any time after the bankruptcy has been awarded, transfer the bankruptcy to any other sheriff. The details of any transfer will be shown on the ROI.

The transfer may take place when a debtor is no longer living within the jurisdiction of the court where the award was made to allow for any subsequent applications to be made to a more suitable location.

The debtor may, with the permission of the sheriff, appeal to the Sheriff Appeal Court against the transfer.

### Information not shown on the ROI

If the Accountant is of the opinion the inclusion of information on the ROI - would be likely to put any person at risk of violence or jeopardise the safety, or welfare, of any person the Accountant can withhold publication.

A request to withhold information can be made at the same time as making a debtor application.

## Reporting requirements to the sheriff

This role is undertaken by AST and the Operational Policy and Compliance Team (OPC) on behalf of the Accountant.

The Accountant is required to report to the sheriff an interim trustee, a trustee in a bankruptcy or a commissioner when it appears they have failed without reasonable excuse to perform a duty imposed on them.

The sheriff will hold a hearing and may:

* remove the person from office
* censure the person
* make any such other order as the circumstances of the case may require

## Reporting requirements to the Lord Advocate

This role is undertaken by AST, BRT and OPC on behalf of the Accountant.

When there are reasonable grounds to suspect an offence has been committed by:

* an interim trustee
* a trustee in a bankruptcy
* a commissioner
* a debtor in respect of their assets, dealings with the assets or conduct of their business or financial affairs
* a person, other than the debtor, in that person’s dealings with the debtor, interim trustee or trustee in respect of the debtor’s assets, business or financial affairs

The Accountant is required to report the matter to the Lord Advocate.

Any report made by the Accountant is privileged and cannot be divulged until the matter is within the public domain.

## Fees payable to the Accountant

The fees payable to the Accountant in relation to the exercise of any of their functions under the Act are prescribed by Scottish ministers within the [The](http://www.legislation.gov.uk/ssi/2014/227/contents/made) [Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made).

The Accountant cannot waive any fee payable under Part 2 of [The Fees](http://www.legislation.gov.uk/ssi/2018/127/contents/made) [Order.](http://www.legislation.gov.uk/ssi/2018/127/contents/made)

Fees can be recovered from the bankruptcy estate by the trustee. However, in certain occurrences the trustee will require to satisfy AiB, or a sheriff, that the fee was incurred in circumstances out with their control and produce an order confirming they can be recovered from the estate.

It should be noted fees payable to AiB require to be paid whether or not monies are ingathered to the estate.

Fees are payable are in respect of the following functions:

* supervision of a bankruptcy
* considering and issuing a determination in an appeal against a determination of commissioners of the outlays and remuneration of a trustee
* issuing a determination fixing the outlays and remuneration of an interim trustee or trustee
* attending a meeting of creditors
* calling a meeting of creditors
* attending an examination of a debtor
* lodging an unclaimed dividend
* uplifting an unclaimed dividend
* receiving a report of proceedings at the statutory meeting
* appointing a replacement trustee following resignation and no new trustee is elected
* considering and making an order in relation to an application for removal of a trustee
* considering and making a declaration and order that the office of trustee is vacant
* making a determination or appointment for the replacement of a trustee acting in more than one sequestration
* appointing a trustee after discharge when newly identified estate is discovered
* giving a direction following an application by a trustee
* issuing an order curing defects following an application
* determination of an application for recall
* considering and making an order for the conversion of a trust deed to bankruptcy
* an application to court or the Accountant in Bankruptcy for a bankruptcy restrictions order
* registering a court order appointing a replacement trustee

# Miscellaneous

This section refers to Part 17 of the Act, sections 206 to 219.

## Extortionate credit transaction

If a transaction has not entered into more than three years before the date of bankruptcy the trustee can apply to the court for an order varying or setting aside the obligations under the agreement if those obligations are extortionate.

Section 209(3) of the Act specifies the circumstances in which transactions may be regarded as extortionate credit transactions.

## Sederunt book and other documents

The trustee shall maintain a Sederunt Book for the purpose of providing an accurate record of the bankruptcy process, under section 50(1)(e) of the Act.

The trustee has discretion not to insert confidential documents into the Sederunt Book, for example, Counsel’s Opinion on a matter relating to a claim by a creditor, under Section 210(6) of the Act.

During the period of the bankruptcy the trustee must make the Sederunt Book available for inspection at all reasonable hours by any interested person, under section 210(1) of the Act.

### Maintaining the Sederunt Book

During the administration of a bankruptcy the Accountant requires the trustee to upload all Sederunt Book documents to BASYS.

These documents will form the electronic Sederunt Book. Functionality is available for downloading all documentation when required.

Upon conclusion of the bankruptcy the trustee must check the electronic Sederunt Book and upload any missing documents. A list of the required documents and records can be found in Schedule 5 of the Act and at Appendix P.

The Accountant will make the Sederunt Book available for viewing for a period of six months following the discharge of the trustee.

The trustee will also have access to the documents on BASYS for this period.

### Other documentation

The trustee’s correspondence files and the maintenance of records are regulated by [Part 4 of the Insolvency Practitioners Regulations 2005](http://www.legislation.gov.uk/uksi/2005/524/part/4/made)(SI 2005/524).

In terms of Section 50(1)(g) of the Act, an interim trustee or trustee, whether or not they are still acting, is required to provide the Accountant with such information as required.

That obligation includes providing the Accountant with any document, or copy of a document, case files or the Sederunt Book when required.

## Power to cure defects

A sheriff may make an order under section to 211 of the Act to waive a failure to comply with a requirement of the Act or Regulations only when the failure relates to:

* a document to be lodged with the sheriff
* a document issued by the sheriff
* a time limit specified in relation to proceedings before the sheriff or a document related to those proceedings

The Accountant may make an order under section 212 of the Act to waive a failure to:

* correct a clerical or incidental error in a document required by or under the Act
* waive a failure to comply with a time limit
* which is specified by or under the Act
* for which no provision is made by or under the Act

### Application to court

An application to court must be made on a [Form 7.1A](https://www.scotcourts.gov.uk/rules-and-practice/forms/sheriff-court-forms/bankruptcy-forms---2016-rules)of the [Act of Sederunt](http://www.legislation.gov.uk/ssi/2016/313/article/6.7/made) [(Sheriff Court Bankruptcy Rules) 2016](http://www.legislation.gov.uk/ssi/2016/313/article/6.7/made).

Any further information regarding the process should be requested from the relevant sheriff court.

A copy of the application and any interlocutor issued by the court should be uploaded to BASYS to be included in the electronic Sederunt Book.

### Application to the Accountant

This role is undertaken by AST on behalf of the Accountant.

An application can be made by any person having an interest in the bankruptcy.

Applications to cure a defect in procedure can be made to correct a:

* failure to submit a request for an extension to an accounting period under section 130(3) of the Act prior to the end of the accounting period
* failure to submit accounts under section 63(3) of the Act, within three months by the original trustee upon election of a replacement trustee
* failure to submit a proposal under section 90(2) of the Acts, within 12 weeks from date of award for AiB to fix a Debtor Contribution Order
* failure to submit accounts under section 132(1) of the Acts within two weeks of the end of the accounting period
* failure to submit a deferral of discharge under section 141(3) of the Acts later than 10 months after the date of award
* failure to submit the required Statement of a Debtor’s Affairs following a recall application to the Accountant within the prescribed 21 days, under Section 32(3)(b) of the Act
* failure to apply to AiB to be appointed trustee within 14 days of a creditors meeting, under section 69(6)(a);
* a typographical error in a statutory document submitted to the Accountant or the debtor

This list is not exhaustive.

### Application process to the Accountant

An application can be created on BASYS or made by using a Form 1 of the [Applications and Decisions Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made).

When a trustee wishes to claim the application costs as an expense of the bankruptcy they must request this in the application and provide:

* an explanation why they believe it is appropriate for the costs to be paid as an expense
* if the application is required due to non-cooperation by the debtor information about the actions taken to try and obtain the debtor’s cooperation

When the application is submitted it should be intimated to the debtor and all known creditors advising of their right to make representations to AST within 14 days of the notification on a Form 1 of the [Applications and Decisions Regulations](http://www.legislation.gov.uk/ssi/2016/295/contents/made).

### Actions of AST

AST will consider:

* the application
* were the interested parties notified at the required time
* when further information was required was it received within the set timescales and sufficient to proceed
* has the applicant requested the cost of the application be an expense of the estate
* when the above request has been made is it appropriate to allow the costs
* has the applicant provided a reasonable explanation for not meeting the requirement of the Act
* any representations received within the correct timescale

### Actions of the Accountant

The Accountant will make a decision to:

* grant the order
* grant the order with any necessary amendments
* refuse the order
* grant expenses (if requested and appropriate)
* refuse expenses (if requested and not appropriate)

AST will issue the notice to:

* the applicant
* the trustee (if not the applicant)
* the debtor (if not the applicant)
* all known creditors (if not the applicant)
* if appropriate, The Keeper of the Register of Inhibitions and Adjudications

AST will:

* issue an invoice to the applicant. The fee to be applied can be found in [The Fees Order](http://www.legislation.gov.uk/ssi/2014/227/contents/made)
* place a copy in the electronic Sederunt Book

When expenses are not requested, the notice will state they cannot be claimed as an expense of the estate. The decision to refuse expenses cannot be reviewed or appealed.

### Power to cure defect under section 212 – review and appeal

A review application can be made by any interested person to the Accountant’s independent review team following a decision made by the Accountant to grant, or refuse to grant, a recall of bankruptcy.

An application must be received before the expiry of 14 days from the date the decision was made by the Accountant.

A copy of the review application will be sent to any person having an interest. They will be advised they may make submissions before the expiry of 21 days from the date the review application was received.

The team must take into consideration any submissions made by the applicant, or interested parties, before the expiry of 21 days from the date the application.

The outcome of the review to confirm, revoke or amend the decision must be made before the expiry of 28 days from the date the application for review was made.

Any person entitled to request a review may appeal the review decision to the sheriff before the expiry of 14 days from the date the review decision, was made. The sheriff’s decision is final.

## Arbitration and compromise

A trustee can refer any claim or question arising in the course of the bankruptcy to arbitration and reach a compromise with regard to any claim made in relation to the sequestrated estate.

These powers are exercisable only with the consent of:

* the commissioners
* the creditors by obtaining the votes of a majority in value of such creditors at a meeting of creditors called for the purpose
* the sheriff

If arbitration commences AiB may vary any time limit for carrying out a procedure under the Act.

Any outcome is binding on the creditors and debtor.

## Meetings of creditors and commissioners

A meeting of creditors, or commissioners, may be called at any time by the trustee.

The trustee must call a meeting of creditors within 28 days under Schedule 6, Part 1 of the Act if they receive:

* an order of a sheriff
* a request of one tenth in number or one third in value of the creditors
* a request by a commissioner
* a request from the Accountant

The trustee must call a meeting of commissioners within 14 days under Schedule 6, Part 3 of the Act if they receive:

* an order of a sheriff
* a request by a commissioner
* a request from the Accountant

### Meeting of creditors

The trustee must arrange for the meeting to be held at a location, or by electronic means, whichever is most convenient for the majority of creditors.

No less than seven days before the date of the meeting every known creditor should be notified of:

* the date
* time
* place
* purpose of the meeting

A copy of the letter should be uploaded to BASYS.

If the trustee fails to call a meeting of creditors when properly required to do so the Accountant may call the meeting.

### Procedure at a meeting of creditors

The general requirements regarding the conduct of these meetings are:

* a quorum at any meeting is one creditor
* the trustee must arrange for a record of the proceedings to be kept
* the trustee takes the chair at the start of the meeting
* the trustee will invite the election by the creditors of one of their number as chairperson. If no chairperson is elected by the creditors the trustee remains in the chair throughout the meeting
* if a vote is necessary the chairperson should invite creditors to proceed to a vote. The matter is to be decided by a simple majority in value of the creditors, or mandatories, present

### Procedure following a meeting of creditors

Within 14 days of any meeting the trustee must upload to BASYS a copy of the minutes of the meeting of creditors (signed by the person who chaired the meeting) to be placed in the electronic Sederunt Book and a copy of the list of attendees.

### Resolution at a meeting of creditors - appeal

A resolution made by the creditors at a meeting can be appealed by the trustee a creditor or any other person having an interest to the sheriff within 14 days of the date of the meeting.

Any documentation relating to an appeal should be uploaded to BASYS to be included in the electronic Sederunt Book.

### Meetings with the commissioner

The commissioner(s) must be given at least seven days’ notice of the meeting unless the commissioner(s) decides it is not required.

If the trustee fails to call a meeting with the commissioner(s) when properly required to do so a commissioner may call the meeting.

### Procedure at the meeting with the commissioner

The general requirements regarding the conduct of these meetings are:

* a quorum at any meeting is one commissioner
* the trustee must make a record of the proceedings
* if the commissioner(s) are considering the conduct or performance of the trustee they will withdraw from the meeting as requested
* if the trustee withdraws the commissioner(s) are responsible for making a record of the proceedings and providing a copy to the trustee
* any matter will be decided by a simple majority in value of the commissioner(s)
* any matter may be agreed without a meeting if the commissioner(s) come to a unanimous agreement and a minute to that effect is signed

### Procedure following the meeting with the commissioners

A copy of the following should be provided to AiB for insertion in the electronic Sederunt Book:

* a record of the meeting taken by the trustee or commissioner(s)
* a copy of the signed minute to any matter agreed when a meeting did not take place

## Suspected offences by the debtor

This role is carried out by BRT on behalf of the Accountant.

In terms of Section 50(3) of the Act trustees are required to make a report to the Accountant if they have reasonable grounds to suspect an offence has been committed by a debtor, or by anyone else in their dealings with the debtor.

A list of typical offences is shown at Appendix R.

### Considerations

Any suspicion of serious offences must be submitted without delay to the Accountant for consideration.

Before making a report the Accountant requests that documents requesting co-operation and providing the implications of not co-operating are personally served on the debtor. Handing documents to a person other than the debtor, or leaving at an address where they are believed to reside, is not personal service. This may require more than one visit by Sheriff Officers. Failure to effect personal service means a debtor can later deny receipt of documents or correspondence, even when these were handed to another member of their household or posted through their letterbox.

Information that a suspected offence report has been submitted should not be disclosed to a debtor.

However, a trustee must ensure that the debtor has been made fully aware of, and understands, their responsibilities, in particular:

* a Statement of Assets and Liabilities should be signed and witnessed
* records must be kept of all actions taken and enquiries made
* the debtor must have been given a reasonable period of time to comply with their responsibilities
* any important documentation has been personally served on the debtor by a sheriff officer

The Crown Office and police have asked, before submitting a report to them, the Accountant considers the following criteria:

* sufficient evidence has been enclosed with the report to merit investigation by the police
* all courses of civil action have been exhausted
* prosecution of the debtor (or any other person) will have a significant impact on the administration of the bankruptcy

The police have provided suggested minimum standards of enquiry to assist trustees and the Accountant when considering whether they have reasonable grounds to suspect an offence. These are shown at Appendix S.

### Making an application

The report should be made using the Suspected Offence Referral Application.

Trustees should note the following:

* it is not deemed acceptable to assume there are reasonable grounds
* when there is a potential criminal offence by the debtor it is essential all matters are pursued and reported promptly
* a report not be submitted if the whereabouts of the debtor have not been confirmed
* a report should not be submitted as a means to secure the debtor’s co-operation. There are alternative civil routes to obtain co-operation or information
* the trustee must provide evidence to show the debtor is aware of their legal obligations and they are aware of the implication of failing to comply with their obligations

### Actions of BRT

BRT will consider all reports against guidelines provided by the Crown Office and the police.

When they are satisfied there are both reasonable grounds to suspect an offence has been committed and the information provided conforms to the guidance, the report will be forwarded to the Crown Office for investigation and possible prosecution action.

The trustee will be notified of the decision and provided any reasons for rejection.

### Actions of the Crown Office

When considering a report the Crown Office must have regard to the implications of the European Convention of Human Rights (ECHR). In terms of Article 6 the question of within a reasonable time is paramount.

The date from which unreasonable delay is considered is the date on which it became known to the potential accused they may well be the subject of a criminal prosecution. What is described in ECHR case law as a period of inactivity is likely to result in the Crown Office not pursuing a case.

An example of a period of inactivity is when a trustee took no action to pursue a debtor for a period of eight months after they had failed to comply with the trustee’s instruction.

### Further actions of the trustee

If there is any change to a debtor’s circumstances that may impact on a submitted report this must be brought to the attention of BRT with a recommendation as to what action should be taken.

The trustee should note following submission of a report the Accountant, or the police, may request:

* a statement from the trustee and/or their staff regarding the circumstances leading up to the submission of the report
* original, or copies, of documents that support or evidence the suspected offence

The Procurator Fiscal may wish additional information regarding the case which may be used to influence the sentence imposed.

Information that would be useful may include:

* whether the offence is a technical one
* whether there is any criminal element involved
* whether the debtor is now co-operating with the trustee
* whether there has been any quantifiable loss to creditors for which a compensation order might be the most appropriate disposal for the case. Quantifiable loss to the estate should be recorded in Part III of the report

### Outcome

The Accountant will liaise with the Crown Office and monitor the outcome of suspected offence reports and may issue press releases to give publicity to successful prosecutions.

Information regarding successful prosecutions may also be placed on the AiB website.

It is hoped these reports may act as deterrents to future potential offenders. Reference in general terms to successful prosecutions can be used in letters to debtors when notifying them they may be committing an offence.

## Bond of caution

Insolvency practitioners are required in terms of regulation 12(1)(b) of the [Insolvency Practitioners Regulations 1990](http://www.legislation.gov.uk/uksi/1990/439/contents/made), (as amended), to ensure there is in force in relation to their bond of caution a specific penalty in respect of their acting in particular bankruptcy proceedings.

Practitioners should note when they have obtained a specific penalty as interim trustee and they are subsequently appointed as trustee in that bankruptcy it is unnecessary for them to obtain a further specific penalty in respect of that subsequent appointment under regulation 13 of the Insolvency Practitioners Regulations 1990 (as amended).

However, a specific penalty obtained by a trustee acting under a trust deed is not acceptable in a subsequently awarded bankruptcy. They will have to ensure a separate specific penalty in relation to their actions in the bankruptcy is in force.

The foregoing is without prejudice to the duty of a practitioner to obtain a further specific penalty in a higher sum, in terms of Regulation 12(1)(c) of[the Insolvency Practitioners Regulations 1990](http://www.legislation.gov.uk/uksi/1990/439/contents/made), (as amended), should the value of the assets under administration justify an increase in the specific sum.

# Duties and functions of commissioners

This section provides further information and guidance for a commissioner.

Information regarding the election and removal of a commissioner can be found at section 6 of these notes.

## The office of commissioner

A commissioner performs their functions at no cost to the estate and not even out of pocket expenses incurred can be recovered.

Attention is specially drawn to the fact when a commissioner also acts as solicitor for the trustee they are not entitled to charge a fee for such legal services. They are entitled to recover their legal outlays only. It was decided in the case of Geddes’ Trustee [6 April 1985 (n.r.)] that all of the professional charges of the solicitor during the period when they also acted as commissioner were disallowed.

The Accountant acts upon this court decision and will hold the trustee personally liable to make good to the estate a sum equal to the amount of fees paid to any such commissioner.

This rule is also applied when the commissioner’s firm or any partner thereof acts as solicitor to the trustee.

## General function of commissioners

The commissioners are a representative body of the creditors. They are elected by the general body of the creditors to advise and supervise the trustee in the management of the estate. They have no power to deal directly with, or transact, with the estate and they are expressly barred from purchasing any part of the debtor’s estate.

Under section 109(2)(b) of the Act the trustee must comply with any general or specific directions given by the commissioners after they have made an application to the sheriff regarding the recovery, management and realisation of the estate.

## Specific duties of commissioners

Many of the duties of commissioners are discretionary, however, there are certain specific duties imposed upon them which are detailed below.

Should the commissioners become aware the trustee is not complying with their duties they should make a report to AST.

### Replacement of a deceased trustee

See section 5.3 for further information.

### Accelerate/extend accounting periods

See section 13.2 for further information.

### Determine the trustee’s fees and outlays

See section 13 for further information.

## Discretionary powers of commissioners

Commissioners are given specific discretionary powers in the exercise of their functions.

The attention of the commissioners is directed to the terms of the Act for other discretionary powers and AST can advise commissioners on any matter included in, or omitted, from these notes.

The following list is not exhaustive, however, the undernoted are most likely to be undertaken by commissioners in matters arising in the administration of a normal bankruptcy.

### Offer advice to the trustee

See section 7, 8, 9 and 10 for further information.

### Require an application to the sheriff for a public examination

See section 11 for further information

### Dispense with taxation of a legal account

See section 13.12.2 for further information.

### Consent to the trustee referring to arbitration

See section 18.4 for further information.

### Consent to the trustee compromising any claim

See section 18.4 for further information.

### Require the trustee to call a meeting of creditors

See section 18.5 of these notes for further information.

### Require the trustee to call a meeting of commissioners

See section 18.5 for further information.

### Call a meeting of commissioners if the trustee fails to do

See section 18.5 for further information.

### Authorise payment the preferred debts

Section 131(3)(b) of the Act applies.

### Consent to postponement of payment of a dividend

Section 131(4) of the Act applies.

### Apply to the sheriff for direction

Section 109(2)(b) of the Act applies.

## Supervision of commissioners

This function is undertaken by AST on behalf of the Accountant.

AST will carry out this role by monitoring the documentation provided by, or to, the commissioner to:

* ensure compliance with any timescale within the Act
* all relevant information is being provided to the relevant party
* the commissioner is carrying out their duties in accordance with the Act, regulations and any other guidance issued by AiB

# Appendices

## Appendix A – Information held on the Register of Insolvencies

#### Case summary

* case number
* bankruptcy type (full administration/MAP)
* creditor petition type (none/creditor petition/trust deed petition)
* debtor’s first name
* debtor’s surname
* other names (if applicable)
* alias
* home address
* trading
* business address
* former address
* trading name
* date of birth
* date of death (for deceased debtors)
* debtor’s occupation
* debtor discharge date
* issue of certificate deferring debtor’s discharge indefinitely (when applicable)
* reason for debtor discharge
* award details (name and address held on petition or application)
* where sequestration awarded (sheriff court or AiB)
* sequestration awarded by (sheriff or AiB)
* low income low asset criteria (not applicable)
* date of any order converting protected trust deed to sequestration (if applicable)
* whether sequestration awarded under MAP
* has MAP ceased to apply (period of map credit restriction has expired)
* particulars of any application for removal of trustee(s) and any order removing trustee or declaring office vacant
* trustee discharge date
* making Bankruptcy Restriction Order date

#### Court information

* petition presentation date
* where sequestration awarded (court location/AiB)
* where sequestration remitted (if applicable)
* first order date
* award of sequestration date
* recall of sequestration date
* particulars of sequestration recall

#### Petitioners

* name and address of petitioner (if applicable)

#### Financial information

* level of debt (as per the Statement Of Affairs at the date of bankruptcy)
* level of assets (as per the Statement Of Affairs at the date of bankruptcy)

#### Current trustee

* date appointed
* name
* organisation name
* address
* trustee phone number
* trustee email address
* trustee discharge date

#### Previous Trustee

* date appointed, name, organisation and address
* BRO/BRU information
* date of making interim bankruptcy restriction order
* date interim bankruptcy restrictions order ceased to have effect
* date of making of bankruptcy restriction order
* date of order varying bankruptcy restriction order
* date of annulment of bankruptcy restriction order
* date bankruptcy restriction order ceased to have effect

#### Previous home address

* details of any previous addresses held on petition or application

#### Trustee agent

* details of any agent appointed by the Accountant

## Appendix H - List of documents to be sent to AiB by the trustee

* copy of the debtor’s statement of assets and liabilities
* copy of the inventory and valuation of the debtor’s estate (Section 108(1)(c)) of the Act
* copy of the notification to creditors about the statutory meeting
* copy of the signed minutes of the statutory meeting of creditors and any other meeting of creditors
* copy of his intimation to the creditors of his intention to apply for a certificate of discharge inter alia including therein intimation of the right to make representations (if appropriate)
* discharge of a trustee is appropriate only in cases when there is an elected trustee and it is not a statutory requirement. An interim trustee in such circumstances does not have to apply for discharge and in cases when the interim trustee himself becomes the elected trustee it is not anticipated that he will do so since his ultimate discharge as trustee will cover the period of interim trusteeship—see section 148(7)
* copy of the revised statement of the debtor’s affairs (if appropriate)
* copy of an amended Debtor Contribution Order (DCO)
* copy of accounts and claim for remuneration
* if a replacement trustee is elected by the creditors, a copy of minutes of the meeting of creditors and the Court Order appointing the replacement trustee
* if a replacement trustee is elected by the creditors, a copy of the circular (or notification) to the debtor and the creditors intimating the amount of outlays and remuneration payable to the original trustee, together with a signed certificate of posting relative thereto
* copy of the record of the private or public examination of the debtor or other relevant person (section 123(4) and (5) of the Act) (if appropriate)
* copy of the intimation sent to the debtor advising him of the private examination of a third party and of the day, date, time and place of such private examination, together with a signed certificate of posting thereof (section 121(2)(b) of the Act) (if appropriate)
* copy of the intimation sent to every known creditor (and debtor if appropriate) advising of the public examination together with a signed certificate of posting thereof (section 119(6) of the Act) (if appropriate)
* in cases when there are no commissioners and the trustee’s Accounts are to be audited by, and his scheme of division approved by, The Accountant, the creditors’ claims and ground of debt together with the trustee’s adjudications thereon
* when commissioners are acting a copy of the trustee’s accounts; claim for remuneration; and scheme of division of the funds; all as submitted to the commissioners (section 132(1) and (2) of the Act)
* when there are no commissioners, the trustee’s accounts for audit; his claim for remuneration for determination; and his scheme for division for approval, all by The Accountant in terms of section 132 of the Act
* copy of the circular (or notification) to the debtor and the creditors indicating the remuneration fixed to the trustee, together with a signed certificate of posting relative thereto
* on conclusion of the trustee’s administration, the Sederunt Book; a copy of the audited final account; and consignation receipt(s) for unclaimed dividends (section 148(1)(b) of the Act)
* copy of the circular (or notification) sent by the trustee to the debtor and the creditors intimating their application for a certificate of discharge, together with a signed certificate of posting relative thereto
* when there are no commissioners, all legal business accounts against the sequestrated estate, for perusal and onward transmission to the Auditor of Court for taxation, all prior to settlement of said legal business accounts.

This list is not exhaustive.

## Appendix P – List of sederunt book documents

* copy of a debtor application made under section 2(1)(a)
* copy of a petition presented under section 2(1)(b)
* copy of an award of sequestration grated under section 22(1) or (3)
* copy of a warrant to cite the debtor granted under section 22(3) and (4)
* copy of any:
	+ the audited accounts sent to the trustee by the Accountant in Bankruptcy in accordance with section 56(5)(d)
	+ the determination fixing the amount of the outlays and remuneration payable to the interim trustee sent to the trustee by the Accountant in Bankruptcy in accordance with section 56(5)(d)
* copy of any:
	+ order recalling or refusing to recall an award of sequestration by the sheriff under section 30 and sent to the trustee under section 30(9)(b)(ii)
	+ grant or refusal to grant a recall of an award of sequestration under section 34(1), 35(6) or
* copy of any order under section 114(3)(b) or 115(3)(b) sent to the trustee under section 30(9)(b)
* where the trustee is a replacement trustee appointed under section 60 and the Accountant in Bankruptcy was not the original trustee:
	+ copy of any determination fixing the amount of the outlays and remuneration payable to the original trustee and of the original trustee's audited accounts which is sent to the trustee under section 63(5)(c)(ii)
	+ upon appointment, such information as is appropriate to provide a record of the sequestration process before the trustee's appointment as replacement trustee (except that no entry is to be made in relation to any written comments made by the original trustee under section 42(2))
	+ an entry recording any certificate of discharge issued to the original trustee under section
* copy of a statement of assets and liabilities sent to the trustee under section 41(1) or (2)
* copy of a notice given under section 44(3)
* copy of a report made under section 45(1)
* where the trustee is a replacement trustee appointed under section 60 and the Accountant in Bankruptcy was the original trustee, upon appointment, such information as is appropriate to provide a record of the sequestration process before the trustee's appointment as replacement trustee
* copy of any initial proposal for the debtor's contribution provided by the trustee under section 90(1)(b)
* copy of a debtor contribution order applying to the debtor
* copy of any decree issued under section 98 affecting the sequestrated estate
* copy of any decree of recall issued following an application under section 100(2)
* copy of any decree issued under section 99 affecting the sequestrated estate
* the inventory and valuation of the estate made up and maintained in accordance with section 108(1)(b)
* copy of an account given by the debtor under section 116(2)
* the debtor's deposition at an examination subscribed under section 121(6)
* copy of the record of an examination sent to the Accountant in Bankruptcy under section 121(7)
* an appropriate entry in relation to the production of any document to the trustee in accordance with section 124(1),(3),(4) stating the date when it was produced to the trustee
* where the trustee accepts or rejects a claim under section 126, the decision on the claim, specifying:
	+ the amount of the claim accepted by the trustee
	+ the category of debt, and the value of any security, as decided by the trustee
	+ if the claim is rejected, the reasons
* copy of a decision of the Accountant in Bankruptcy under section 127(4)(b) and of the sheriff under section 127(5).
* an agreement or determination in respect of the accounting period under section 130(3)(b)(i) or (ii).
* the audited accounts, the scheme of division and the final determination in relation to the trustee's outlays and remuneration, as mentioned in section 132
* copy the certificate of discharge given to the debtor under section 137(2) or 138(2) or 143
* copy the certificate deferring discharge where the debtor cannot be traced issued under section 141(4)(b) or (6)(b)
* decision of the court under section 211 and of the Accountant in Bankruptcy under section 212
* copy of a decree arbitral or, as the case may be, an appropriate entry recording the compromise referred to in section 216
* the minutes of the meeting mentioned in paragraph 8 of Schedule 6
* copy of the minutes of any meeting sent to the Accountant in Bankruptcy in accordance with paragraph 25 of Schedule 6
* where a meeting of commissioners is called in accordance with paragraph 26 of Schedule 6:
	+ a record of the deliberations of the commissioners at the meeting
	+ where the trustee is not clerk in accordance with paragraph 30 of Schedule 6, a record of the deliberations of the commissioners transmitted by the commissioner acting as clerk, such commissioner to authenticate the insertion when made
	+ in relation to any matter agreed without a meeting, the minute recording that agreement signed in accordance with paragraph 32 of Schedule 6
* copy of any decision (including any determination, direction, award, acceptance, rejection, adjudication, requirement, declaration, order or valuation) relating to the sequestration which is:
	+ issued by the Accountant in Bankruptcy
	+ not otherwise mentioned in this schedule
* copy of any decree, interlocutory decree, direction or order relating to the sequestration which is:
	+ granted by the court
	+ not otherwise mentioned in this schedule

Other documents to be inserted as appropriate:

* request to court to appoint new interim trustee (if applicable)
* copy court order recalling or refusing to recall the award of bankruptcy
* copy court order protecting the occupancy rights of a non-entitled spouse
* entry relative to the grant of a certificate of discharge to the interim trustee (if applicable)
* copy decree of reduction of a gratuitous alienation
* copy decree of recall of an order for payment of a capital sum on divorce
* copy decree of reduction of an unfair preference
* record of debtor’s evidence at an examination, duly subscribed
* copy record of whole examination
* adjudication on claims
* entry relative to the sheriff’s decision on any appeal against the trustee’s adjudication
* copy order by sheriff deferring the debtor’s automatic discharge
* receipt from debtor of any reversions
* entry relative to court’s decision to any application to cure defects in procedure
* copy of decree arbitral
* entry relative to compromise with regard to any claim of whatever nature made against or on behalf of the sequestrated estate
* copy of decree of reduction of order discharging the debtor
* minutes of meetings of creditors (non-statutory)
* minutes of meetings of commissioners
* minutes of matters agreed by commissioners without a meeting
* copy of Debtor Contribution Order (DCO)
* such other entries and insertions as may be necessary to provide a full record of the bankruptcy process before the date of the trustee’s act and warrant

## Appendix R - List of offences

Section 218 of Act lists general offences which may be committed by the debtor. These are in summary:

* making a false statement on assets or business or financial affairs (sections 218(1)&(2))
* destruction, damage, concealment or removal of estate from Scotland or any document (sections 218(3)&(4))
* failure to return to Scotland following a court order (section 218(5))
* falsification of a document and failure to report a falsification (sections 218(6,7,8))
* gratuitous alienation or unfair preference by a person who is absolutely insolvent (sections 218(9)&(10))
* pledge or disposal of property obtained on credit otherwise than in course of trade or business (sections 218(11)&(12))
* obtaining credit to the extent of £2000 or more without giving relevant information (section 218(13)(a))
* obtaining credit of any amount, where, at the time of obtaining credit the debtor had debts amounting to £1000 or more, without giving relevant information (section 218(13)(b))

Throughout the act there are listed various statutory offences which may be committed by the debtor:

* failure to inform the court of concurrent proceedings for bankruptcy or an analogous remedy (section 17(6))
* failure to deliver a statement of assets and liabilities to the interim trustee or to omit or misstate a material fact (section 41(3))
* failure to follow a direction or requirement of, or obstruction of, an interim trustee (section 40(1))
* failure to notify the trustee of any assets acquired on a relevant date or of any substantial change in financial circumstances (section 87(1))
* failure to attend for examination (sections 118(7)&(8) and 119(8))
* failure to inform of possible acquirenda (sections 28(2)&(3))
* failure to comply with an order of the sheriff on co-operation a trustee (section 215(4))

The following are offences not covered by the Act but are nevertheless reportable:

* common law fraud
* common law theft
* acting as a director or to promote a firm manage a company without the leave of the court whilst an undischarged bankruptcy (The Company Director Disqualification Act 1986, section 11(1))

## Appendix S - Minimum standards for suspected offence report

The following standards have been produced and provided by Police Scotland and must be considered prior to submission of a suspected offence report to the Accountant.

* police involvement should be seen as the very last option as practitioners should be encouraging the debtor to comply
* only if serious offences are discovered (disposal of assets, absconded, fraud etc.) should a formal enquiry be sent to the police giving details of all enquiries carried out to date (a diary as such)
* use any civil course of action that could assist
* ensure that the debtors are aware of their obligations to contact the trustee and they acknowledge their understanding and the consequences of failure to comply
* record full contact details including that of Next of Kin or a relative to ensure proper communication channels are maintained
* personal service of documents on the debtor as mandatory
* if no contact available - enquiry with neighbours/relatives/employment etc. to be recorded as part of a log (to show what attempts and enquiry has been made). All action should be considered with regard to compliance with the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA)
* consider standard database checks to be carried out to trace/identify the debtor (Experian, Equifax, voters roll, local authority etc)

## Appendix U - AiB team contact details

All AiB contact details can be found in the contact section on the AiB website.