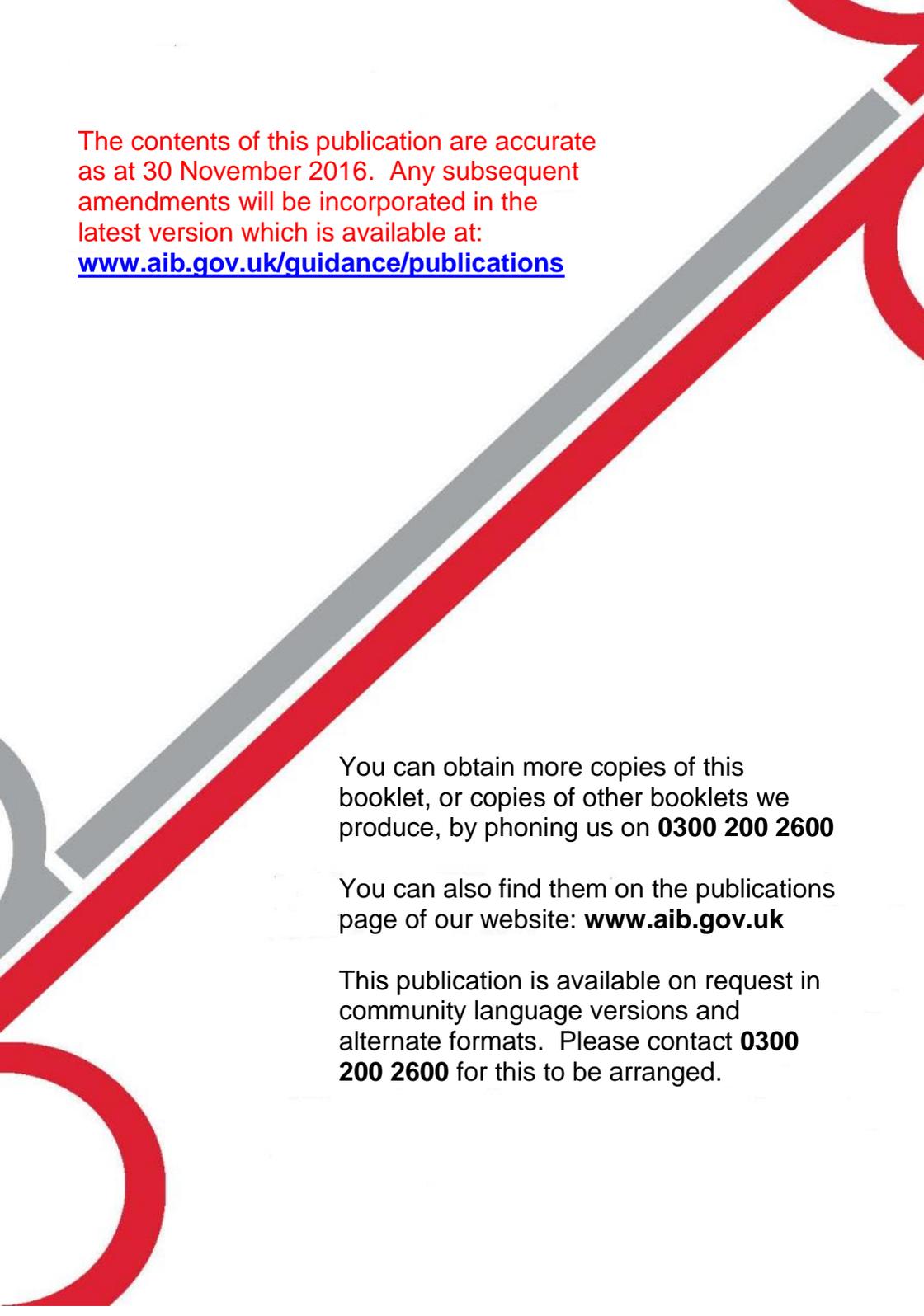




ACCOUNTANT
IN BANKRUPTCY
SCOTLAND'S INSOLVENCY SERVICE

Creditor's Guide





The contents of this publication are accurate as at 30 November 2016. Any subsequent amendments will be incorporated in the latest version which is available at:

www.aib.gov.uk/guidance/publications

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Contents

1. Introduction	1
2. What is bankruptcy?	2
2.1 Who can be made bankrupt?	3
2.2 How can I check whether someone is already bankrupt?	3
3. What do I have to consider before making someone bankrupt?	4
3.1 How do I go about making someone bankrupt?	4
3.2 Who administers a bankruptcy?	4
3.3 What are the conditions for making someone bankrupt?	5
3.4 How long does it take to make someone bankrupt?	6
3.5 Who pays the costs of making someone bankrupt and the bankruptcy itself?	7
3.6 Will I get the money I am owed?	8
3.7 How long does bankruptcy last?	8
3.7.1 Deferment of debtor's discharge	9
3.7.2 Recall	9
4. What happens after someone is made bankrupt?	10
4.1 How are creditors involved?	11
4.1.1 Creditors meeting	11
4.1.2 Commissioners	11
4.1.3 Trustee accounts	11
4.1.4 Record keeping	12
4.2 How is the debtor's estate managed?	12

4.2.1	Property	12
4.2.2	Contributions	13
4.3	What happens to the money gathered in?	14
4.3.1	What are dividends?	14
4.4	What happens to the debts I am owed?	15
5.	What are the consequences of bankruptcy for the debtor?	17
6.	What if I am unhappy with the way the bankruptcy is being handled?	19
7.	Further information	20
7.1	Contact details for Accountant in Bankruptcy	20
7.2	Sources of advice and information	20

1. Introduction

This booklet provides general information regarding bankruptcy for people who are owed money (creditors). It is not intended as a full statement of the law on bankruptcy.

The person who owes you money (the debtor) may already be bankrupt or you may be considering making them bankrupt to recover the debt they owe you.

Bankruptcy has serious consequences for debtors. You should be aware that you may not recover the amount you are owed by making someone bankrupt.

Bankruptcy is not the only way to try and recover debt. In Scotland other legal processes, known as diligences, can be used.

Diligences include:

- Arrestment of the debtor's bank account
- Arrestment of the debtor's earnings
- Attachment of the debtor's assets
- Inhibition on the debtor's property

A solicitor can give you advice about these processes. You may also get advice from Citizens Advice Scotland or Money Advice Scotland.

The information in this booklet applies to petitions or applications for bankruptcy lodged with the court or Accountant in Bankruptcy

(AiB) from 30 November 2016. Information for creditors regarding bankruptcies which started before this date can be found in the corresponding Creditors Guide publication on the AiB website www.aib.gov.uk.

The relevant legislation is the Bankruptcy (Scotland) 2016.

2. What is bankruptcy?

In Scotland bankruptcy is sometimes called sequestration.

Bankruptcy is a formal declaration that someone is unable to pay their debts. A creditor can petition a sheriff for an award of bankruptcy or a debtor can apply to The Accountant in Bankruptcy, a Scottish Government official, for their own bankruptcy.

When someone becomes bankrupt, a trustee is always appointed to administer the bankruptcy. Control of the debtor's assets is passed to the trustee and it is the trustee's duty to sell a debtor's assets or property and ingather the funds. The trustee will also consider whether the debtor can afford to pay a contribution towards their bankruptcy.

The trustee will use the money ingathered to:

- pay the costs of administering the bankruptcy
- where a creditor petitioned for bankruptcy, pay the costs incurred in presenting the petition
- pay every creditor as much as possible of what is owed to them (including interest)

The amount available to make any payments will depend on the funds ingathered. There will be cases when those funds are not sufficient to pay the costs of administering the bankruptcy or make any payment to creditors.

2.1 Who can be made bankrupt?

Scottish bankruptcy legislation applies to individuals, partnerships and other unincorporated organisations such as trusts. It does not apply to limited companies and other organisations registered at Companies House.

Subject to certain conditions, a debtor may apply to The Accountant in Bankruptcy for their own bankruptcy or you, as a creditor, can present a petition at a sheriff court to make someone bankrupt.

2.2 How can I check whether someone is already bankrupt?

The person who owes you money may already be bankrupt.

You may wish to check this before incurring any additional costs and taking action to try to recover the debt they owe you by making them bankrupt.

All bankruptcies are recorded in a public register known as the Register of Insolvencies (RoI). You can search the RoI free of charge at <https://roi.aib.gov.uk/roi>. This register holds information on bankruptcies (sequestrations) awarded and trust deeds granted in Scotland only.

3. What do I have to consider before making someone bankrupt?

Before you make someone bankrupt, you should consider what it will cost you, how long it will take, whether you are likely to get the money you are owed and who you would like to administer the bankruptcy. These topics are dealt with in the following sections.

3.1 How do I go about making someone bankrupt?

If you want to make someone bankrupt you must first have taken formal steps to pursue your debt. This usually involves going to court to demonstrate they owe you money.

Once you have taken formal legal steps to try to recover what is owed to you, you can present a petition to ask a sheriff to make the person who owes you money bankrupt.

You should consult a solicitor or Citizens Advice Scotland for advice on how to pursue debt or make someone bankrupt.

3.2 Who administers a bankruptcy?

Every bankruptcy is administered by a trustee. When you present a petition to make someone bankrupt, you can choose to nominate The Accountant in Bankruptcy or an insolvency practitioner to act as the trustee.

Insolvency practitioners are regulated by an approved Recognised Professional Body. You cannot nominate an insolvency practitioner unless they agree in writing to accept your nomination. This is done on a form which is available from AiB

or your local sheriff court. An insolvency practitioner may not agree to accept your nomination.

If you do not make a nomination or an insolvency practitioner has not agreed to be nominated, the sheriff will appoint The Accountant in Bankruptcy to act as the trustee.

When The Accountant in Bankruptcy is appointed, the bankruptcy may be administered by The Accountant's staff or may be passed to an insolvency practitioner who works on The Accountant's behalf.

When an insolvency practitioner agrees to be the trustee and is appointed, they may personally administer the bankruptcy or will ask members of their staff to work on the case.

3.3 What are the conditions for making someone bankrupt?

You can ask the sheriff to award bankruptcy against a debtor if:

- they owe you at least £3,000, including any fees, charges and interest added to the original debt **or**
- you apply for a joint petition with other creditors provided the combined debts are at least £3,000 **and**
- you have sent them a copy of the Scottish Government's Debt Advice and Information Package – you must have sent this at least three weeks and not more than 12 weeks before you make your petition **and**
- the debtor is apparently insolvent

When someone is apparently insolvent, they appear not to be able to pay their debts. The sheriff will require evidence to

support this, usually an expired Charge for Payment or Statutory Demand.

You may wish to speak to a solicitor about evidence of apparent insolvency, to draft the bankruptcy petition and to represent you in court. You will have to pay a fee to the court in addition to any fee charged by your solicitor. The costs of making someone bankrupt can be added to what is owed to you.

3.4 How long does it take to make someone bankrupt?

This depends on the circumstances of the case. The process will usually take between two and six weeks from the date the petition is presented. A sheriff will grant a warrant citing the debtor to appear at court on a specified day. You must arrange for a sheriff officer to serve the warrant on the debtor at their last known address. At the hearing, a sheriff will consider the evidence provided and will ask you or your solicitor to confirm the debt is correct and still outstanding.

At the hearing a sheriff may:

- declare the debtor bankrupt **or**
- dismiss your petition if the debt has been paid before the hearing
- postpone the hearing to allow a debt payment plan to be set up under the Debt Arrangement Scheme if they think the debtor is able to repay you over a reasonable period

3.5 Who pays the costs of making someone bankrupt and the bankruptcy itself?

The costs of representing the petition for bankruptcy include the court fee and the fees due to the solicitor who presents the petition on your behalf and represents you in court. An additional creditor petition fee is also payable to Accountant in Bankruptcy. If you are making someone bankrupt, you are responsible for these costs. You can claim these petitioning costs from the funds gathered into the bankruptcy.

The costs of administering a bankruptcy will be paid first from funds obtained from the sale of the debtor's assets and from contributions the debtor makes from their income. These costs include the fees and outlays of the trustee.

When The Accountant in Bankruptcy is the trustee, costs which cannot be met by selling assets or from contributions will be met from the public purse. **However, the public purse will not make any payment towards the debts owed to creditors.**

When an insolvency practitioner is the trustee, costs that cannot be met by selling assets or from contributions will be met by the trustee. The insolvency practitioner will consider this before agreeing to act as trustee in a bankruptcy.

Creditors will not normally be asked to cover any of the administration costs, other than those incurred in presenting a petition for bankruptcy to court. Where the sale of assets and income from the debtor's contributions produce enough funds to pay all the administration costs, a creditor who petitioned for the bankruptcy may then have any reasonable costs in making the petition reimbursed. Their debt and the debts of other creditors will then be considered equally after this.

If there are not enough funds to pay all the administration costs, you, as petitioning creditor, will remain solely responsible for any solicitor's costs and outlays that you incurred as petitioning creditor.

3.6 Will I get the money I am owed?

Bankruptcy can take time to administer and can only realise whatever is in the debtor's estate plus any contributions the debtor is able to make out of their income. Funds are distributed equally amongst all creditors after paying the costs of administration, the costs incurred by the creditor who petitioned for the debtor's bankruptcy and the debts due to any preferred creditors, such as payments for the remuneration of employees.

Debts may not be paid if:

- a debtor has few, or no, assets of value
- they have a low level of income
- the costs of administering their bankruptcy are high (for example, if there are complex legal issues involved)

3.7 How long does bankruptcy last?

A debtor who has been made bankrupt through the Minimal Asset Process will be automatically discharged six months after the award of bankruptcy. In all other cases, the debtor's discharge will not be automatic. It will be dependent upon certain factors including the debtor's co-operation with their trustee. If the debtor meets their obligations, their discharge would normally be one year after the award of bankruptcy. Even after the debtor is discharged, the trustee will continue to deal with any

outstanding matters, including the realisation of assets and the collection of contributions until they are satisfied all required administration has been completed. The administration of the bankruptcy includes making payment to creditors if this is appropriate.

3.7.1 Deferment of debtor's discharge

The trustee can apply to The Accountant in Bankruptcy to defer the debtor's discharge where a debtor cannot be located. This period can be indefinite.

3.7.2 Recall

The Accountant in Bankruptcy or a sheriff can recall an award of bankruptcy if it is considered appropriate to do so.

A debtor, creditor, trustee or any other person having an interest can apply to The Accountant in Bankruptcy or a sheriff for recall. The Accountant in Bankruptcy can only recall a bankruptcy where the debtor has or can pay all their debts, including interest, trustees outlays and remunerations in full. In all other cases, a petition should be sent to the appropriate sheriff court for a decision to be made by a sheriff. Creditors and the trustee can object to a recall. The law states that until recall is granted, the trustee must continue with the administration of the bankruptcy.

Creditors can also petition the sheriff for recall of bankruptcy if they have made someone bankrupt in error. Recall restores the debtor, as practicable as possible, to the position in which they would have been had the bankruptcy not happened. The creditor will be liable for the trustee's fees for the costs of the recall.

4. What happens after someone is made bankrupt?

The trustee will contact the debtor to arrange to interview them and obtain details of what they own and what debts they have. The trustee will then write to all known creditors within 60 days of the award of bankruptcy. If you hear nothing, you should write to tell the trustee that you are a creditor.

Debtors are obliged to co-operate with their trustee and may be committing a criminal offence if they do not. They may also be committing an offence if they withhold relevant information or try to conceal their assets.

The trustee will administer the debtor's estate to try to gather in funds.

You cannot pursue the debtor for money they owed you before they were bankrupt.

4.1 How are creditors involved?

4.1.1 Creditors meeting

Within 60 days of an award of bankruptcy, the trustee will decide whether or not to call a statutory meeting of creditors. This is only applicable in cases where The Accountant in Bankruptcy is not trustee.

If a meeting is held, the creditors present can vote to replace the trustee. If the trustee decides not to call a meeting, creditors can request one and the trustee is obliged to call the meeting if not less than a quarter in value of the creditors (based on the total debt owed) request it.

Meetings can be called by creditors at any time. A meeting must be held if called by one tenth in number or one third in value of creditors. Creditors can issue directions to a trustee at a meeting, but the trustee and other creditors have the right of appeal to the sheriff if they disagree with directions issued by a meeting of creditors.

4.1.2 Commissioners

Commissioners can be elected at any meeting of creditors. Commissioners generally advise and supervise the administration of the bankruptcy, including auditing the trustee's accounts and can be creditors or their mandated representatives. If no commissioners are elected, The Accountant in Bankruptcy performs this function.

4.1.3 Trustee accounts

Trustees are required to produce accounts at the end of the first year and periodically thereafter until the end of the bankruptcy.

Accounts have to be audited by The Accountant in Bankruptcy or elected commissioners. Creditors will be sent copies of a determination of the trustee's outgoings and remuneration. You can ask to see the accounts and can appeal against the determination.

4.1.4 Record keeping

The trustee must keep a sederunt book which includes copies of court documents, accounts and records of meetings but not general correspondence. During the bankruptcy period, you can ask to inspect the sederunt book and the trustee should arrange a suitable time for you to do so.

4.2 How is the debtor's estate managed?

The trustee is responsible for the management and realisation of the debtor's estate, which can involve selling the debtor's assets, continuing trading or closing down their business. They can initiate or continue legal proceedings if required.

4.2.1 Property

The trustee will deal with the debtor's interest in any property. Before taking action on selling a property, the trustee will consider the amount of equity and the rights of other interested parties, such as secured creditors, co-owners and family members. The trustee will take into account the costs involved in selling and the overall financial benefit to the estate. If the trustee believes that a course of action is particularly contentious, they may seek creditors' views before undertaking it.

The debtor's bankruptcy does not affect the rights of a secured creditor. If the debtor does not maintain payments, the secured

creditor can still take action to repossess and sell the debtor's property. In these circumstances, any money left over after the costs of the sale and the debt is repaid will pass to the trustee.

The debtor is not allowed to sell or otherwise dispose of their interest in any property unless the trustee has formally abandoned their interest in it.

4.2.2 Contributions

The trustee or money adviser will also assess the possible contribution a debtor is able to make from their income. A Debtor Contribution Order (DCO) will be made in all cases fixing that contribution. If there is no surplus income available the DCO will be made fixing the contribution at zero.

A DCO will normally last for four years (48 months) or the equivalent weekly period. However, a trustee may vary or quash a DCO in certain circumstances. For example, a DCO can be varied if a debtor's circumstances change or if they request a payment break, having met specific criteria. In the event that a debtor does not comply with a DCO, a trustee has the authority to request compliance with the order from an employer, or any third party, such as a bank or any other person who may hold a debtor's income. Those persons must comply with the instruction sent by a trustee.

A trustee, debtor or creditor may request a review of a DCO within 14 days of the date the DCO is made. However, only a trustee or a debtor can request an appeal from the sheriff if they are dissatisfied with AiB's review decision.

4.3 What happens to the money gathered in?

Trustees will consider whether they are able to make any payments to creditors from the funds they gather and will invite claims and proof of the debt from all known creditors. Any payments made may not cover the full amount of the debt and can only be made once other costs, such as the trustee's fees and outlays, are met. The petitioning creditor is treated equally with other creditors, although the costs of presenting the petition will be paid before other claims. Creditors must provide a completed creditor claim form along with evidence for the proof of debt. All claim forms with the proof of debt must be submitted within 120 days of the date of the trustee's initial letter to creditors or if a statutory meeting of creditors is held from that date. Only in exceptional circumstances will late creditor claim forms be accepted.

Claims must be made on a creditor's claim form which can be obtained directly from AiB or from the website at www.aib.gov.uk.

4.3.1 What are dividends?

Money paid to creditors is called a dividend and is expressed as the number of pence in the pound paid in respect of each creditor's claim. **If you have not submitted a claim form and proof of debt you will not be included in this process.**

When the trustee has collected enough money to pay a dividend, they will write to all creditors telling them how much to expect. Each creditor will be sent a form of receipt to complete and return to the trustee. When this form is received, the dividend payment will be made.

Any creditor who does not return this form will not receive any dividend due to them. The trustee will lodge these funds with AiB in a special bank account called a consignment account.

If you wish to claim any money in the consignment account, you must write to AiB. A charge is made for dealing with consigned money.

4.4 What happens to the debts I am owed?

Once a debtor is discharged they are no longer liable to repay debts owed prior to their bankruptcy, although there are exceptions to this.

They are still personally responsible for a number of their debts including:

- student loans
- fines, penalties, compensation and forfeiture orders imposed by any sheriff
- any liability incurred as a result of fraud or breach of trust
- any liability to forfeiture of bail
- any obligation to pay aliment
- any periodical payment ordered by the sheriff to an ex-spouse if they are divorced

Pre-bankruptcy creditors (except for those whose debts are listed above) will not be able to take any legal action to recover their debts. However, the debt still exists unless it is 'written off' by the creditor. The debtor is still responsible for paying any

contributions agreed with the trustee to enable the debts to be paid.

Creditors can still take action against anyone else, for example the debtor's spouse, if they have a joint liability for the debt.

Debtors are also responsible for paying any debt which they have accrued after they were made bankrupt, such as any liabilities for rent, council tax, gas, electricity or telephone bill arrears.

5. What are the consequences of bankruptcy for the debtor?

Being made bankrupt is a very serious matter. These are a some of the consequences for the debtor:

Credit rating

A debtor's credit rating will be affected for many years.

Holding Public Office

People who are bankrupt are not allowed to hold certain public offices. These include being a local councillor or Member of Parliament.

Obtaining credit

A debtor cannot obtain credit of over £2,000 without disclosing to the lender that they are bankrupt. They cannot obtain credit at all without disclosing they are bankrupt if they have already incurred £1,000 of debt after they became bankrupt.

Running a business

A debtor cannot start up or be involved in the management of a limited company while they are bankrupt.

Bankruptcy Restriction Orders (BROs)

If a debtor has behaved dishonestly or irresponsibly in some way, either before or after the award of bankruptcy, The Accountant in Bankruptcy may make a BRO lasting a minimum of two years but must not make any order lasting five years or more. The Accountant in Bankruptcy can apply to the sheriff for a BRO which will last between five and 15 years. A BRO will be recorded in the Register of Insolvencies.

Some reasons why bankruptcy restrictions might be appropriate are if the debtor:

- incurred debts that they knew they had no reasonable chance of repaying
- gave away their assets
- lost money through gambling
- failed to keep proper business records
- failed to supply goods or services that had been paid for
- did not co-operate with their trustee

Further information about Bankruptcy Restriction Orders can be found on the Accountant in Bankruptcy website.

6. What if I am unhappy with the way the bankruptcy is being handled?

If you are unhappy with the way the bankruptcy is being handled, you should speak to the person dealing with the case.

If The Accountant in Bankruptcy is the trustee and you cannot resolve your complaint with a member of their staff or the insolvency practitioner acting on their behalf, you should write to AiB detailing your complaint and you will receive a full written reply.

Insolvency practitioners are regulated by an approved Recognised Professional Body. If the trustee is a private sector insolvency practitioner and you cannot resolve your complaint with them, you can report your complaint to their Recognised Professional Body, details of which may be found on their headed notepaper. If not, you should ask the trustee to give this information.

If you do not believe the trustee is acting in accordance with what the law allows them to do, you can submit your complaint to AiB or to the commissioner if one is appointed.

Full information on Accountant in Bankruptcy's complaints procedure can be found on the website at **www.aib.gov.uk**.

7. Further information

7.1 Contact details for Accountant in Bankruptcy

Accountant in Bankruptcy
1 Pennyburn Road
Kilwinning
Ayrshire
KA13 6SA

Telephone: 0300 200 2600

Fax: 0300 200 2601

E-mail: aib@aib.gsi.gov.uk (for general help about the
bankruptcy process)

Website: www.aib.gov.uk

7.2 Sources of advice and information

Some useful contacts for free advice on debt:

Money Advice Scotland

Telephone: 0141 572 0237

Website: www.moneyadvicescotland.org.uk

E-mail: Info@moneyadvicescotland.org.uk

Citizens Advice Scotland

Telephone: 0808 800 9060

Website: www.adviceguide.org.uk/Scotland

National Debtline Scotland

Telephone: 0808 808 4000

Website: www.nationaldebtline.org/S/Pages/default.aspx

StepChange Debt Charity

Telephone: 0800 138 1111

Website: <http://www.stepchange.org>

Trading Standards Scotland

Website: www.scotss.org.uk

Local addresses and telephone numbers for these agencies will be found in your phone book.

For help finding an insolvency practitioner, contact:

Institute of Chartered Accountants of Scotland

CA House

21 Haymarket Yards

Edinburgh

EH12 5BH

Telephone: 0131 347 0100

Website: www.icas.org.uk

Insolvency Practitioners Association

Valiant House

4-10 Heneage Lane

London

EC3A 5DQ

Telephone: 020 7623 5108

Website: www.insolvency-practitioners.org.uk

For help finding a solicitor with special knowledge of bankruptcy, contact:

Law Society of Scotland

26 Drumsheugh Gardens

Edinburgh

EH3 7YR

Telephone: 0131 226 7411

Website: www.lawscot.org.uk

E-mail: lawscot@lawscot.org.uk

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This booklet is for general guidance only.
It is not a detailed or full statement of the law.



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