



CONSULTATION ON
CHANGES INTRODUCED BY BANKRUPTCY AND DEBT ADVICE
(SCOTLAND) ACT 2014

SCOTTISH GOVERNMENT

Introduction

- 1 The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents over 22,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK. We have an in-depth knowledge and expertise of insolvency law and procedure.
- 2 ICAS's Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires ICAS to represent its members' views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.
- 3 ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all the implications and that alleged failings within the process are supported by evidence.
- 4 ICAS is pleased to have the opportunity to submit its views in response to the Scottish Government consultation on the changes introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 (the 2014 Act). We shall be pleased to discuss in further detail with the Scottish Government any of the matters raised within this response.

Our approach to the consultation

- 5 We have adopted the following approach in drafting our response, in the hope of producing a shorter and more accessible submission:
 - While we are responding to each of the questions, we also include an executive summary below to highlight our key comments.
 - In some instances, we will provide a single response to multiple questions (where we consider that the questions are raising similar issues).
 - If we do not feel able to provide a definitive answer – or if we do not consider that it would be appropriate to express a view – we will provide an explanation.
- 6 Evidence for our response has been informed by a survey of ICAS regulated insolvency practitioners.

Executive summary

- 7 We note that the consultation has been issued against a background of a commitment from the Scottish Government to carry out a more fundamental and wide-ranging review of the statutory debt solutions landscape. This is something which ICAS has called for for some time now and something which we welcome.
- 8 The responses to this consultation therefore require to be taken into account as part of that review and not used to justify further interim measures or piecemeal changes to legislation.
- 9 Our view in general is that the policy changes brought in under the 2014 Act, and subsequently incorporated in the consolidated Bankruptcy (Scotland) Act 2016, have had limited impact when assessed against their objectives. Some changes have in our view failed in their policy objective, and in some instances have made the Scottish debt solutions landscape less efficient.
- 10 Our responses to the questions posed in the consultation are set out in [Appendix 1](#). We would however like to highlight within this Executive Summary some particular areas of concern.
- 11 The Common Financial Tool has failed to achieve consistency in debtor contribution orders and has resulted in greater inefficiencies in setting debtor contribution orders. In addition, its application is difficult for debtors to understand and lacks transparency.
- 12 Importantly, our survey indicated a significant increase in time required to be incurred in agreeing the debtor contribution order following the introduction of the CFT. Nearly 90% of respondents indicated that it took on average over 2 hours to ingather evidence, complete the CFS and obtain the DCO. Over 50% of respondents indicated that it took on average more than 3 hours.

- 13 We call for a change in the CFT to a methodology which is simple to understand, transparent in its calculation and efficient to operate. We deal with this in more detail in response to question 5d.
- 14 The 2014 Act also resulted in a significant number of powers being moved from the courts to the Accountant in Bankruptcy. This area is not one which has specifically been considered as part of the review of changes introduced by the 2014 Act. We would however like to comment on this.
- 15 In our survey we sought views on whether the transfer of powers had resulted in a more efficient administration process. Nearly 80% of those responding to the survey indicated that they had not noticed any change or had experienced an increase in the administrative burden as a result of the powers being transferred from the courts to the Accountant in Bankruptcy. Over 10% indicated that the increase in administrative burden had been significant.
- 16 While there is no evidence to suggest that there are concerns over the exercising of the powers which have been transferred, the increased administrative burden suggests that concerns over the effectiveness of the Accountant in Bankruptcy to exercise the powers have somewhat been borne out.
- 17 This is perhaps more symptomatic of the manner in which the Accountant in Bankruptcy operates. One respondent to our survey commented "It is becoming increasingly difficult to act as a Trustee when the AiB monitor, supervise and challenge every aspect of our role. For example, changing a DCO by a matter of pence."
- 18 Some of the increased administrative burden will be linked to the issues highlighted above with the operation of the CFT and in particular the evidence being sought in support of the completed CFS.

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Scottish Government Consultation: Changes introduced by Bankruptcy and Debt Advice (Scotland) 2014 Act

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- ☐ Individual
☒ Organisation

Full name or organisation's name

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The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- ☒ Publish response with name
☐ Publish response only (without name)
☐ Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- ☒ Yes
☐ No

Questionnaire

Q1. Do you consider the current six-week period of protection afforded by the moratorium process to be sufficient?

☒ Yes ☐ No

There does not appear to be a fundamental case to change the six-week period currently in place. We are not aware of significant issues of the current protection period being insufficient for the majority of situations where the moratorium has been put in place.

Where issues have been experienced, these may largely be attributed to delays caused by the evidence requirements of the Common Financial Tool (CFT), which are addressed in more detail in our response to question 5.

The current period provides a balance between allowing debtors time to put in place a plan to respond to creditor action and the rights of creditors to take steps to recover debts. Unless there is a strong evidence base demonstrating that individuals are being routinely adversely impacted by the six-week period currently in place, it is unclear why there would be a requirement to change legislation.

If a change to the period is pursued following the consultation, then an increase to 60 days would seem most appropriate, to bring the moratorium in line with the 'Breathing Space' proposals in England and Wales, ensuring consistency in approach across Great Britain.

Q1a. If you answered "no" to Q1 what do you consider the appropriate time for a moratorium in Scotland?

Less than 6 weeks ☐ 60 days ☐ 10 weeks ☐ 12 weeks ☐ Other ☐

Q1b. If you selected "less than 6 weeks" or "other" in Q1a how long do you think is appropriate and please explain the reasons why?

Answer:

Q2. Do you believe that interest, default fees and charges in respect of debts at the time of the moratorium application should be frozen during the moratorium period?

☐ Yes ☐ No

Q2a. Please provide a reason for your answer to Q2?

Answer:

ICAS has no particular view in relation to this. We would however suggest that interest and charges which would otherwise have accrued would be capable of being reapplied by creditors if they so wish where the debtor does not ultimately enter an insolvency process or DAS following the expiry of the moratorium period. This would act as an appropriate safeguard to misuse and balance the rights of debtors and creditors.

Consideration should also be given to the relevant date for interest to reapply if a full dividend is paid in a sequestration. While a rare occurrence, unexpected realisations as a result of acquirenda can occur and the legislation must allow for this possibility.

Q3. Do you believe the Scottish Government should explore further provisions in the moratorium, similar to those in the UK Breathing Space scheme, which have a reserved competency?

☒ Yes ☐ No

Q3a. If you answered “yes” to Q3 which of the following areas should the Scottish Government explore?

- ☐ Stopping creditor enforcement action (excluding a commenced earnings arrestment) during the moratorium period.
- ☐ Preventing creditors from contacting debtors in relation to repayment of a debt during the moratorium period.
- ☐ Preventing deductions from benefits during the moratorium period.
- ☐ Preventing the forced installation of pre-payment meters, or the disconnecting of fuel supplies during the moratorium period.
- ☐ Preventing the eviction of debtors for unpaid debts under section 19 of the Housing (Scotland) Act 1988 during the moratorium period.
- ☐ All of the above.

We would encourage consistency in approach to problem debt policy across the UK which brings benefit to both debtors and creditors.

Q4. Do you believe that the Scottish Government should consider further separate provisions in the moratorium, similar to those in the UK Breathing Space scheme, for those receiving mental health crisis care?

☒ Yes ☐ No

We would encourage consistency in approach to problem debt policy across the UK which brings benefit to both debtors and creditors.

Q4a. If you answered “yes” to Q4, which of the following principals for those receiving mental health crisis care should be given consideration?

- ☐ The removal of the restrictions on accessing the moratorium once within a 12-month period.
- ☐ The period of moratorium protection being extended.
- ☐ Both of the above options.

Q4b. If you ticked the box for extending the period of protection how long should the period of protection last?

Duration of mental health crisis care ☐ Other ☐

Q4c. If you answered “other” to Q4b what period of protection should apply?

Answer: _____

Q5. Do you think the provision of a CFT to provide a consistent approach to the assessment of contributions remains an appropriate feature within insolvency legislation?

☒ Yes ☐ No

In relation to consistency of approach, this is taken to mean consistency of approach between providers. We do not necessarily agree that a consistent outcome across a range of debt solutions is appropriate. This has been recognised for instance in DAS from 29 October 2018 where the debtor contribution can be a proportion of the debtor's surplus income.

Q5a. If you answered "no" to Q5, what approach should be adopted to assess the contributions in statutory debt solutions?

Answer: _____

Q5b. If you have answered "yes" to Q5, should the CFT be an income and expenditure tool designed to assess individual circumstances?

☐ Yes ☒ No

Q5c. If you answered "yes" to Q5b, which tool should be adopted as the CFT?

CFS ☐ SFS ☐ Other ☐ (Please explain below)

Answer:

Q5d. If you answered "no" to Q5b, what model should be adopted to assess the contributions in statutory debt solutions?

Answer:

ICAS has strongly advocated for significant change in relation to the way contributions are calculated in Scottish insolvency procedures. While agreeing that a common methodology is required to ensure consistency in application, ICAS does not consider this will be achieved by using either the Common Financial Statement (CFS) or Standard Financial Statement (SFS).

ICAS' concerns around consistency in application and the administrative burden that the use of the CFS entails have been borne out in practice.

Our survey indicated that nearly 90% of respondents estimated that on average they spent more than 2 hours per case obtaining a DCO, with more than half indicating an average of more than 3 hours per case.

A shift to the SFS would not address these issues as its application is broadly similar. Whether or not a change is made will not address the issue that the CFT, under either model, does not deliver consistency and has a high administrative burden and cost to creditors or the public purse.

Less than half of those responding to our survey supported either the retention of the CFS or implementing the SFS.

ICAS strongly encourage the AiB and Scottish Government to carry out an assessment of the policy effectiveness behind the CFT.

ICAS considers that any change to the CFT would be best served by replacing the model designated by the CFT to one which is based on a scaled percentage of income (after deduction of essential expenditure and an allowance for a reasonable standard of living based on the household composition). This would address the issues being encountered with the current CFT model which have not resulted in consistency of application and are administratively burdensome for debtors, insolvency practitioners, third sector money advisers and the AiB.

An example of such a model is the [Irish model](#). The Insolvency Service of Ireland (“ISI”) has, pursuant to section 23 of the Personal Insolvency Act 2012, prepared and issued guidelines as to what constitutes a reasonable standard of living and reasonable living expenses.

An accompanying [calculator](#) has been produced, which is straightforward to use and completely transparent so that all stakeholders are aware of the calculation methodology. Whilst we would not necessarily advocate the use of this model (we think there is a requirement to consider additional factors such as registered disabilities and provide for some resilience for unexpected expenditure), using a similar product would vastly simplify the process and significantly reduce evidence requirements.

Similar models are used in [Canada](#) and [Australia](#) amongst others.

We would also suggest that it is appropriate for a more fundamental review of the CFT in the context of wider societal issues, namely what sequestration and debt relief should mean for individuals and their families.

The ISI arrived at the guideline figures following public consultation and debate, in the belief that an individual is entitled to a reasonable standard of living while addressing debt problems.

The ISI considers that a reasonable standard of living is one which meets “*physical, psychological and social needs. It does not mean that you should live at a luxury level but neither does it mean that you should only live at subsistence level. You should be able to participate in the life of the community, as other citizens do*”.

The consideration from a societal perspective is therefore whether the debtors contribution is considered appropriate, both in its term and methodology of calculation to ensure that individuals (and their children and wider families) are not placed in a worse position than they would be, for example, as real living wage employees.

The appropriate levels of sacrifice by distressed debtors, and the appropriate levels of protection of and compromise by their creditors, are sensitive matters of social policy which must be addressed balancing the competing interests of different stakeholders, such as debtors and creditors.

While there are questions later in the consultation on financial education, and its ability to reduce the incidence of repeat sequestration, it could be argued that the real catalyst to aiding individuals avoid insolvency in the future would be a change to the system of calculating contributions in insolvency procedures.

Q6. Do you believe 6 weeks is sufficient period of time for a trustee to submit a DCO proposal to AiB in a creditor petition bankruptcy?

☐ Yes ☒ No

Q6a. If you answered “no” to Q6 what would be a sufficient timescale?

8 weeks ☐ 10 weeks ☐ 12 weeks ☐

No time limit (with requirement to report progress at regular intervals) ☒

Other ☐

Q6b. If you answered “other”, what would be a sufficient timescale?

Answer:

Respondent to our survey were unanimous that the current 6-week timescale is insufficient. However, there was a range of responses on the appropriate timescale.

Six weeks has proven to be insufficient in a significant number of creditor petition cases due, most often, to debtor non-cooperation.

For such cases the trustee must apply to the AiB to cure the defect in procedure per section 212 of the 2016 Act. This includes a requirement to notify all interested persons of the intention to apply to the AiB in this respect.

The Accountant in Bankruptcy has only in recent days issued notification to trustees (via a Dear IP letter) that they will accept an assessed DCO proposal based on information available to the trustee and reasonable assumptions and this may go some way to assisting with having DCOs made within a reasonable period of time in the majority of sequestration cases.

The current process is however administratively burdensome, and it is appropriate to extend the time limit. However, for the change to be of benefit any additional reporting requirements should be kept to a minimum.

We would of course highlight that any change to the period for application for a DCO may be influenced by a change to the CFT. For example, it may be much easier to obtain information to allow a calculation based on income and household composition to be made.

Q7. Do you believe that the minimum debt allowed for MAP application should be increased?

☐ Yes ☐ No

ICAS does not have a particular view but supports the policy that access to debt relief should be available to those who require it.

Q7a. If you answered “yes” to Q7, what level should it be increased to?

£2,000 ☐ £2,500 ☐ £3,000 ☐ Other ☐

Q7b. If you answered “other” to Q7a please specify the amount

Answer:

Q7c. Should the debt threshold for creditor petition or full administration debtor application bankruptcy be increased (currently £3,000)?

☐ Yes ☒ No

We consider that access to debt relief should be available to those who require it. The current debt threshold is a sufficient barrier to safeguard against debt relief being accessed when it is unlikely to be appropriate.

Q7d. If you answered “yes” to Q7c, what level should it be increased to?

Answer:

Creditor Petition Debt Level: _____

Full Administration Debtor Application Debt Level: _____

Q8. Do you think that there should still be a maximum debt threshold in a MAP application?

☒ Yes ☐ No

Q8a. If you answered “yes” to Q8, at what level should the debt ceiling be set?

£17,000 ☐ £20,000 ☒ £25,000 ☐ Other ☐

If you answer “no” to Q8 please explain why?

Answer: _____

Q8b If you answered “other” to Q8a what amount do you think it should be increased to?

Answer:

An increase to £20,000 in line with the limit in England & Wales for a Debt Relief Order seems appropriate, considering inflation since the introduction of MAP. ICAS consider any further increase to be inappropriate as the scope for investigation by the trustee, which is not available in the restricted procedure alternative, may be required beyond that level.

Q9. Do you think student loan debt, that is not discharged in bankruptcy, should be excluded from the maximum debt criteria in MAP?

☒ Yes ☐ No

Q9a. If you answered “no” to Q9 please explain why?

Answer:

Student loans are expressly barred from being treated as a debt or liability in sequestrations in accordance with section 15 of the Education (Student Loans) (Scotland) Regulations 2007 and section 12 of the Education (Student Loans for Tuition Fees) (Scotland) Regulations 2006.

Funds received from student loans are also barred from being treated as income for the purpose of a DCO or from vesting in the trustee. The loans consequently sit completely out with the sequestration process and it is unclear why they are currently factored into the calculation for the maximum debt threshold level in MAP.

Q10. Do you think the total asset and individual asset limits should be increased?

☐ Yes ☒ No

Q10a. If you have answered “yes” to Q10, what limit should be applied?

Combined Assets

£3,000 ☐ £4,000 ☐ Other ☐

Individual Asset

£2,000 ☐ £3,000 ☐ Other ☐

Q10b. If you answered “other” to either part of Q10a what amount do you think the combined and individual asset limits should be increased to?

Answer: _____

Q11. Do you believe that the current content of the financial education modules is sufficient to meet the policy intention of promoting financial capability?

☐ Yes ☒ No

Q11a. If you answered “no” to Q11 what improvements would you suggest?

Answer:

According to table 5 provided with the consultation, just 5% of debtors have completed financial education since 2015-16. In turn, this figure represents only around 50% of those referred. Both the numbers of referrals and the numbers then completing the modules suggest that the system is not operating effectively.

In response to our survey, 78% of respondents indicating that they have considered less than 5% of their new cases would benefit or meet the requirements for financial education. The remainder had considered between 6% and 15% would benefit from or meet the requirements for financial education.

No evidence had been provided to back up the assertion that the financial education modules are useful in helping to reduce the incidences of repeat sequestration, although we accept that it is still perhaps too soon to properly evaluate this. While Money Advice Scotland feedback indicates positive sentiment, there is no evidence base to show that the financial education modules have made any tangible impact since their introduction.

The decision to refer an individual is left to the subjective opinion of the trustee, which inevitably leads to inconsistent application in practice. It may be helpful if the Accountant in Bankruptcy were to provide guidance or examples of factors which should be considered by trustees when considering whether it would be appropriate for the debtor to undertake financial education and they meet the other prescribed criteria.

The figures clearly show that the vast majority of referrals are in cases where the AiB is appointed as trustee (and it consequently may feel an obligation to make referrals in support of the policy intention). For private sector trustees the provision of Financial Education creates an additional administrative burden in terms of notifications, pursuing non-compliance and considering as a possible matter of non-cooperation when recommending whether the debtor should be discharged.

All this additional work is done with ultimately no benefit to the estate for creditors, in whose interest the trustee primarily acts.

In terms of the modules themselves, it is not clear that any of them get to the root cause of why people become indebted in the first place. Ultimately understanding budgeting or saving is of little relevance to people who are living hand to mouth and simply don't have the money to allow them to appropriately budget or save.

While obviously avoiding repeat sequestrations is desirable, there is no evidence that this is a large scale problem and it may be that the often chastening experience of sequestration itself, coupled with the fresh start it should offer, represents sufficient 'financial education' to allow most individuals to avoid repeating any mistakes they may have made in the past.

ICAS supports the provision of financial education as a general principle but not specifically in the context of a requirement after bankruptcy. We remain of the view that financial education is best deployed at key life stages with the aim of avoiding problem debt altogether and promoting sound financial planning.

Q12. Should the remaining balance of any outstanding child maintenance arrears be discharged following the conclusion of bankruptcy and protected trust deed procedures in Scotland?

☐ Yes ☐ No

Q12a. Please explain the reason for your response at Q12.

Answer:

ICAS considers that the issue of child maintenance arrears being included or excluded from discharged debts comes back to a wider social policy question - what is it intended that sequestration should mean for individuals.

The consultation question invites a simplistic response – discharge or not discharge child maintenance arrears irrespective of the circumstances. In reality, we consider that a distinction may be appropriate between those debtors who can pay but won't pay and those debtors who can't pay. While understanding the emotive nature of such liabilities, if individuals who, for whatever legitimate reason can't pay arrears, are not discharged from liability to repay then they may end up in a repeat cycle of debt and sequestration. Sequestration will not provide the fresh start which may be required and which may be important for emotional and mental wellbeing not only of the debtor but all parties affected by the child maintenance arrangement.

Q13. Do you consider that the currently prescribed 8% rate of interest for dividends in bankruptcy is appropriate?

☐ Yes ☒ No

Q13a. If you have answered "no" to Q13, what interest rate do you think should be applied?

BoE Rate ☐ BoE Rate + 1% ☐ BoE Rate + 2% ☐ Other ☒

Q13b. If you have answered "other" to Q13a, what alternative option would you suggest?

Answer:

In view of the current economic climate and BoE base rate, ICAS agree that the current rate of 8% is not appropriate.

It is also inequitable that a debtor in DAS – considered a debt management process and not debt relief - benefits from no interest being payable, whereas full payment to creditors in sequestration attracts interest at 8%.

The Scottish Law Commission recommended in their report on Interest on Debt and damages that interest should fluctuate at a statutory rate above Bank of England base rate. This is an approach which we consider appropriate and was supported by nearly 90% of those who responded to our survey.

The Scottish Law Commission suggested that the statutory rate should be 1.5% above Bank of England base rate. While our survey did not indicate a clear preference for any particular rate linked to the BoE rate, we consider that 1.5% above BoE base rate would be appropriate.

If statutory interest were to be linked to such a rate, we would highlight that it should be made clear whether the interest rate applicable was the interest rate at the date of sequestration or whether this would be variable dependant on any movements in Bank of England base rate during the course of the sequestration. Fixing it in relation to the Bank of England base rate at the date of sequestration would be much more straightforward and is unlikely to result in any significant negative impact on creditors where there is relative stability in Base interest rates which has been the case for most recent times. However, should base rates return to a period of instability then the method of calculation of statutory interest may have a material effect on creditors.

Q14. Do you consider that the currently prescribed 8% judicial rate of interest for remains appropriate?

☐ Yes ☒ No

Q14a. If you have answered “no” to Q14, what interest rate do you think should be applied?

BoE Rate ☐ BoE Rate + 1% ☐ BoE Rate + 2% ☐ Other ☒

Q14b. If you have answered “other” to Q14a, what alternative option would you suggest?

Answer: The comments above in relation to the rate of interest for dividends in sequestration are equally applicable here.

Other

The 2014 Act also resulted in a significant number of powers being moved from the courts to the Accountant in Bankruptcy. This area is not one which has specifically been considered as part of the review of changes introduced by the 2014 Act. We would however like to comment on this.

In our survey we sought views on whether the transfer of powers had resulted in a more efficient administration process. Nearly 80% of those responding to the survey indicated that they had not noticed any change or had experienced an increase in the administrative burden as a result of the powers being transferred from the courts to

the Accountant in Bankruptcy. Over 10% indicated that the increase in administrative burden had been significant.

While there is no evidence to suggest that there are concerns over the exercising of the powers which have been transferred, the increased administrative burden suggests that concerns over the effectiveness of the Accountant in Bankruptcy to exercise the powers have somewhat been borne out.

This is perhaps more symptomatic of the manner in which the Accountant in Bankruptcy operates. One respondent to our survey commented "It is becoming increasingly difficult to act as a Trustee when the AiB monitor, supervise and challenge every aspect of our role. For example, changing a DCO by a matter of pence."