ACCOUNTANT IN BANKRUPTCY
SCOTLAND'S INSOLVENCY SERVICE

Consultation on Bankruptcy Law Reform

The Scottish Government

Consultation on Bankruptcy Law Reform

The Scottish Government, Edinburgh 2012

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Consultation on Bankruptcy Law Reform

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I. Ministerial Foreword

Ensuring that the people of Scotland have access to the appropriate debt management and relief mechanisms is a key priority of the Scottish Government. The recent economic crisis has impacted on many people and this has underlined the need for strong Government intervention.

This Government has a broad and ambitious agenda for Reform which focuses on outcomes and improvements to the whole system. The current 5 year term of office provides the opportunity to develop and deliver this reform. This consultation on bankruptcy is the start of that journey; it describes a Vision for a debt advice, debt management and debt relief service in Scotland, fit for the 21st Century.

Bankruptcy law in Scotland dates back to 1621, although it was the Bankruptcy (Scotland) Act 1856 that laid down the scheme that is largely retained in today's legislation. The Bankruptcy (Scotland) Act 1985 has been heavily amended in recent years, most notably by the Bankruptcy and Diligence etc. (Scotland) Act 2007. These amendments have focused on dealing with specific issues such as the introduction of the Low Income Low Asset route into bankruptcy. This is the first time in a generation that the principles and concept of bankruptcy and other debt management solutions have been considered. However, this consultation does not consider matters pertaining to treatment of the family home or an individual's sole or main dwelling house. This complex topic will be the subject of a future consultation.

The Home Owner and Debtor Protection (Scotland) Act 2010 attempted to address some of the problems associated with the financial crisis and recession. However, it was acknowledged that it was only a partial solution and more comprehensive change would be needed.

I invite all interested parties to assist in the further development of the statutory debt relief options available in Scotland by giving your views.

Fergus Ewing, MSP
Minister for Energy, Enterprise and Tourism

II. Consultation Arrangements

Consultation on Bankruptcy Law Reform

The Scottish Government seeks your views on proposed changes to bankruptcy law in Scotland. Your comments should be made by **Friday 18 May 2012.**

Please send your response with the completed Respondent Information Form (see "Handling your Response" below) to:

BankruptcyReform@aib.gsi.gov.uk

Or

Bankruptcy Law Reform
Accountant in Bankruptcy
1 Pennyburn Road
KILWINNING
KA13 6SA

Any queries can be directed to Diane Dunn by telephone on 0300 200 2701 or by email at diane.dunn@aib.gsi.gov.uk .

A full list of the consultation questions is contained in Annex B of this document.

We would be grateful if you would use the consultation questionnaire provided or clearly indicate in your response which questions or parts of the consultation paper you are responding to, as this will aid collation of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at http://www.scotland.gov.uk/consultations.

The Scottish Government now has an email alert system for consultations http://register.scotland.gov.uk. This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). This system complements, but in no way replaces Scottish Government distribution lists. It is designed to allow stakeholders to keep up to date with all Scottish Government consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** (Annex B) which forms part of the consultation questionnaire as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002. We would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Where respondents have given permission for their response to be made public (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library and on the Scottish Government consultation web pages by **Friday 29 June 2012**. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered, along with any other available evidence from individuals, creditors, insolvency practitioners and other interested parties. We aim to issue a report on this consultation by **Friday 27 July 2012**. The report will be posted on the websites of both the Scottish Government and the Accountant in Bankruptcy (www.aib.gov.uk). Once this is done, we will seek to develop and implement any necessary legislation.

Comments

If you have any comments about how this consultation exercise has been conducted, please send them to Diane Dunn. We welcome your views on any or all of the issues covered by this paper.

III. Table of abbreviations

AiB	Accountant in Bankruptcy
BBA	British Bankers' Association
CCCS	Consumer Credit Counselling Service
CFS	Common Financial Statement
CMEC	Child Maintenance and Enforcement Commission
DAS	Debt Arrangement Scheme
DPP	Debt Payment Programme
EU	European Union
HMRC	Her Majesty's Revenue and Customs
ICAS	Institute of Chartered Accountants of Scotland
INSOL	International Federation of Insolvency Professionals
IP	Insolvency Practitioner
IVA	Individual Voluntary Arrangements
LILA	Low Income Low Assets
OR	Official Receiver
PTD	Protected Trust Deed
ROI	Register of Insolvencies
RPB	Recognised Professional Body
RPO	Redundancy Payments Office
SCCR	Scottish Civil Courts Review
SLC	Scottish Law Commission
SQ	Supplementary Questionnaire
UKIS	United Kingdom Insolvency Service

IV Executive Summary

Bankruptcy law in Scotland dates back to 1621, although it was the Bankruptcy (Scotland) Act 1856 that laid down the scheme that is largely retained in today's legislation. The Bankruptcy (Scotland) Act 1913 followed and this operated for over 70 years until the Bankruptcy (Scotland) Act 1985 (the Act) came into force. The 1985 Act has been amended on a number of occasions, including by the Bankruptcy (Scotland) Act 1993, the Bankruptcy and Diligence etc. (Scotland) Act 2007 and the Home Owner and Debtor Protection (Scotland) Act 2010.

This is the first time in a generation that the principles and concept of bankruptcy and other debt management solutions have been considered. The world we live in today, with easy access to credit cards and payday lending, for example, is quite different to that of 1985. Consumer debt has increased. The financial situation in recent years, including the credit crunch and recession has an increasing impact, not just in Scotland, but worldwide. Although the Home Owner and Debtor Protection (Scotland) Act 2010 took steps to address some of the problems associated with the ongoing financial climate, we recognise that our legislation requires to be modernised to ensure that we can effectively address the challenges our society faces today.

This Government has a broad and ambitious agenda for Reform which focuses on outcomes and improvements to the whole system. The current five year term of office provides the opportunity to develop and deliver this reform. This consultation is the start of that journey. Following this exercise, it is anticipated that a Bill will be brought forward to make the changes identified through consultation, though not all of the measures considered here will require primary legislation. This Bill will provide for a new model of debt advice, debt management and debt relief. It will be followed by a consolidation exercise relying on the work of the Scottish Law Commission (SLC) to ensure that we have a single piece of legislation, aiding the accessibility and understanding of bankruptcy law.

Whilst this consultation paper considers the modernisation and reform of bankruptcy, it does not consider matters pertaining to family homes or an individual's sole or main dwelling house in bankruptcy.

We believe that those who are struggling with debt should not be made homeless unnecessarily. We also recognise that those who lend money under reasonable terms expect to be repaid and that those providing services expect to be paid. The Scottish Government supports the right of creditors to be paid, and broadly supports the reform of debt enforcement procedures along the lines originally proposed by the SLC, which included land attachment to replace the very old diligence of adjudication for debt. We are however not convinced that this particular diligence strikes the correct balance between the rights of creditors and debtors and may even result in more creditors considering bankruptcy as a debt recovery solution.

Any change to how the home is dealt with in bankruptcy, or indeed diligence, will have wide-ranging impact. We believe these matters must be subject to the outcome of a thorough review and detailed consultation, to ensure that the sale of a debtor's home is a last resort. Considerable research is still required in this area.

We, therefore, do not propose to include any reforms that affect an individual's home in this consultation, or any Bill subsequent to this consultation.

We are seeking to develop a service for debt advice, debt management and debt relief fit for the 21st Century. It aims to place Scotland as a world leader in terms of both practice and provision of debt solutions. The service will harness together the efforts of the Accountant in Bankruptcy (AiB), insolvency practitioners (IPs), the money advice sector more generally and creditors.

The key principles of the service are:

- Ensuring that the people of Scotland have access to fair and just processes of debt advice, debt relief and debt management.
- Those debtors who can pay should pay their debts, whilst acknowledging the wide range of circumstances and events that contribute towards financial difficulty and insolvency for both individuals and businesses.
- Securing the best return for creditors by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses.

We propose that the provision of appropriate debt advice, management and relief should be seen as a 'Financial Health Service', providing rehabilitation to individuals and organisations in relation to their financial pressures, while acknowledging their financial responsibilities.

At the AiB stakeholder events in October and November 2011, the concept of developing a 'Financial Health Service' was discussed with the attendees. There was general agreement to the concept and positive responses from those attending. We have incorporated some of the feedback from these events into the detail of the proposals contained in this paper.

In order to develop a service for debt advice, debt management and debt relief that is fit for today's society, we propose to:

- Ensure that a financial debt education role is a central part of the 'Financial Health Service' seeking to impact on the culture and behaviours of individuals to prevent repeated financial difficulties. We propose that discharge from debt is linked to evidence of completion of a personal debt management module;

- Introduce a single financial assessment tool to be used across the sector to aid in the calculation of an appropriate contribution from individuals and to ensure transparency where contributions are sought;

- Introduce a new web based application process: applications could be made by an authorised money adviser, through a web-based gateway which would allow entry into all statutory debt relief and debt management products in Scotland. We acknowledge that this may not be suitable for all. We would, therefore, ensure that all individuals regardless of personal circumstances would be able to gain access to statutory debt relief and debt management products in Scotland;

- Give AiB a new role of agreeing the statutory debt relief option identified by the authorised money adviser or the individual. This role would include the power to transfer the individual to a more appropriate solution after taking into account the individual's circumstances as well as the return to creditors and cost of delivery;

- Introduce new, Scottish statutory debt relief for individuals and refine the range of current options, whilst ensuring that the key principles of the service - that individuals who can pay their debts should pay and the best return for creditors should be secured - are adhered to;

- Develop a new Debt Arrangement Scheme (DAS) type product for viable businesses. This product would be for sole traders and unincorporated partnerships and would incorporate debt relief or composition;

- Remove the court from non-contentious creditor bankruptcy petitions;

- Link the co-operation of an individual to their discharge;

- Modernise those parts of the current bankruptcy legislation in Scotland which are outdated, to ensure bankruptcy law in Scotland supports a modern service; and

- Strengthen the powers of AiB in relation to supervision of trustees in all personal debt relief products.

We will also seek views on:

- How child maintenance and other debts are treated in statutory debt relief solutions;

- Treatment of debt;

- Regulation of IPs in Scotland; and

- Creating the role of the Official Receiver in Scotland.

V. Background

Part 1. Introduction

1. This consultation paper sets out proposals for significant reform to Scottish Bankruptcy legislation. It describes a Vision for a debt advice, debt management and debt relief service in Scotland, fit for the 21st Century.

1.1 Bankruptcy law in Scotland dates back to 1621, although it was the Bankruptcy (Scotland) Act 1856 that laid down the scheme that is largely retained in today's legislation. The Bankruptcy (Scotland) Act 1913 followed and this operated for over 70 years until the Bankruptcy (Scotland) Act 1985 came into force. The 1985 Act has been amended by various legislation including the Bankruptcy (Scotland) Act 1993, the Bankruptcy and Diligence etc. (Scotland) Act 2007 and the Home Owner and Debtor Protection (Scotland) Act 2010.

1.2 Although the legislation has been amended in recent times, such amendments were based on solving specific issues of the time, such as the introduction of the Low Income Low Asset route into bankruptcy in 2008. This is the first time in a generation that the principles and concept of bankruptcy and other debt management solutions have been considered in a holistic manner. The world we live in today, with easy access to credit cards and payday lending, for example, is quite different to that of 1985. The 2010 Act attempted to address some of the problems associated with the financial crisis and recession. However it was acknowledged that it was only a partial solution and more comprehensive change would be needed. The financial problems and associated impact on individuals and businesses does not just affect Scotland. It is widely accepted that this is a worldwide problem with increasing impact. Our legislation, therefore, requires to be modernised to ensure that we can effectively address the challenges our society faces today.

1.3 This Government has a broad and ambitious agenda for Reform which focuses on outcomes and improvements to the whole system. The current five year term of office provides the opportunity to develop and deliver this reform. This consultation is the start of that journey. Following this exercise, it is anticipated that a Bill will be brought forward shortly in this Session of Parliament. This Bill will amend bankruptcy law so as to provide for a new model of debt advice, debt management and debt relief. The intention is that this will be followed by a consolidation exercise relying on work done by the Scottish Law Commission (SLC) to ensure that we have, so far as possible, a single piece of legislation, aiding the accessibility and understanding of bankruptcy law.

Part 2. Policy Context

2. The activities of the Scottish Government and the Accountant in Bankruptcy (AiB), and the policies they develop, are directed by the Government Economic Strategy. Any consideration of debt advice, debt management or debt relief policy must therefore be made in this context.

2.1 AiB is an Executive Agency of the Scottish Government. The Accountant in Bankruptcy is an independent statutory officer and officer of the court as set out in section 1 of the Bankruptcy (Scotland) Act 1985, as amended.

2.2 AiB is empowered by Scottish Ministers and legislation to develop policy on their behalf, and to deliver personal insolvency services for the people of Scotland. AiB also has responsibility to develop some aspects of corporate insolvency. AiB's key functions are:

- Supporting Ministers to develop and refine policy,
- Supervising the personal insolvency process,
- Delivering, with stakeholders, a range of options for individuals seeking debt relief and debt management,
- Delivering best value services to our customers.

Part 3. Government Economic Strategy and National Outcomes

3. The Government Economic Strategy[1] sets out the Purpose of the Scottish Government as being to make Scotland a more successful country, with opportunities for all to flourish, through increasing sustainable economic growth.

3.1 By building a more dynamic and faster growing economy we will increase prosperity, be better placed to tackle Scotland's health and social challenges, and establish a fairer and more equal society.

3.2 The strategy focuses on six strategic priorities, three of which are particularly relevant to debt management and relief services:

- Supportive business environment;
- Effective Government; and
- Equity.

3.3 The Scottish Government also has 16 National Outcomes[2] which describe what the Government wants to achieve over the next ten years. These outcomes help to sharpen the focus of government by enabling our priorities to be clearly understood.

3.4 By achieving these outcomes, we will make Scotland a better place to live and a more prosperous and successful country. The National Outcomes particularly relevant to debt management and relief, and to the proposals outlined in this consultation are:

- We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others.
- Our public services are high quality, continually improving, efficient and responsive to local people's needs.

[1] http://www.scotland.gov.uk/Publications/2011/09/13091128/0
[2] http://www.scotland.gov.uk/About/scotPerforms/outcome

3.5 The proposals set out in this consultation paper contribute towards these priorities and Outcomes.

Part 4. Wider Policy Environment

4. In developing new policy options, we wish to learn from the experiences of other parts of the world facing similar challenges. The AiB is a member of the International Association of Insolvency Regulators[3]. This is an international body that brings together the collective experiences and expertise of government insolvency regulators from jurisdictions around the world. Members have a unique perspective allowing them to examine insolvency regimes from across the globe.

4.1 We have considered insolvency practice in Europe and further afield, taking into account best practices from many countries. In particular, we believe there is much to be learned from the United States of America. However, while comparing parallel law is extremely useful, we know that there are dangers as the principles of their law may not be transferrable as they do not fit within the Scottish ideals or principles. It is also acknowledged that some aspects of the United States of America experience has not always been positively viewed. This consultation develops options which take account of the lessons learned by the American bankruptcy and debt relief experience.

4.2 We have also taken account of the principles and recommendations developed by the International Federation of Insolvency Professionals (INSOL)[4] in setting out our vision. These represent internationally agreed principles/recommendations which have been developed and are endorsed by INSOL members from across the world. We are thus seeking to align Scotland with accepted international standards in this area. In particular, we have taken account of the need identified in those principles/recommendations for:

- Provision of some form of discharge of indebtedness, rehabilitation or fresh start,
- Extra-judicial rather than judicial procedures where there are equally effective options available,
- Prevention to reduce the need for intervention.

4.3 INSOL encourages legislators to:

- Enact laws to provide fair, equitable, efficient, cost effective, accessible and transparent settlement and discharge of consumer and small business debts
- Provide for appropriate alternative proceedings depending on the circumstances of the consumer debtor
- Offer the consumer debtor a discharge from indebtedness
- Develop out-of-court proceedings to resolve the problems of consumer debt
- Ensure the availability of accessible pre and post bankruptcy debt counselling

[3] http://www.insolvencyreg.org/
[4] **INSOL INTERNATIONAL CONSUMER DEBT REPORT REPORT OF...**

- Set up voluntary educational programmes to improve information and advice on the risks attached to consumer credit.

4.4 There are also major reforms proposed to the Scottish courts and justice system, through the Making Justice Work[5] programme. The Making Justice Work programme will integrate reforms of the structure and the processes of the courts, access to justice, alternatives to court and the administration of tribunals with short term efficiency projects. The proposals in this consultation are intended to be consistent with the benefits being achieved through that programme.

Part 5. Vision for the ' Financial Health Service'

5. We are proposing to develop a service for debt advice, debt management and debt relief that is fit for the 21st Century. The vision aims to place Scotland as a world leader in terms of both practice and provision of debt solutions. The service goes beyond the operational responsibilities of AiB. It will encompass the responsibilities of AiB, IPs, the money advice sector more generally and creditors.

5.1 The key principles of the service are:

- Ensuring that the people of Scotland have access to fair and just processes of debt advice, debt relief and debt management.
- Those individuals who can pay should pay their debts, whilst acknowledging the wide range of circumstances and events that contribute towards financial difficulty and insolvency for both individuals and businesses.
- Securing the best return for creditors by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses.

5.2 We propose that the provision of appropriate debt advice, management and relief should be seen as a 'Financial Health Service', providing rehabilitation to individuals and organisations in relation to their financial pressures.

5.3 Within the 'Financial Health Service' there will be a focus on individual responsibilities with renewed emphasis on individual debtors' responsibilities to co-operate and creditors' responsibilities to be responsible lenders. Aligned with creditors' responsibilities is the appropriate credit scoring of individuals by credit reference agencies. For example, those individuals who find themselves in financial difficulties will have an adverse credit score applied to them. At the moment, it is not clear how, if at all, the 'flag' system operated by credit reference agencies differentiates between those repaying all their debt and those paying back only a proportion. We believe there is merit in making this distinction and also in 'repairing the credit file' of individuals who can demonstrate their co-operation within debt solutions. We will seek to work with both creditors and credit reference agencies to achieve this aim.

[5] http://www.scotland.gov.uk/Topics/Justice/legal/mjw

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Part 6. Advice

6. In the current Scottish model, advice is available from money advisers in the third sector, through advisers in local authorities and through IPs and debt management companies. Advice is compulsory prior to entering the Scottish Government's debt management solution, the Debt Arrangement Scheme[6]. Similarly, advice is a requirement before an individual can grant a trust deed which may become protected. On the other hand, entry to bankruptcy does not require advice to be taken and an individual can apply directly to AiB without having received any form of advice. Given the significant consequences associated with bankruptcy, we believe that the provision of sound money advice should be an essential part of the process.

6.1 Access to advice would ensure that individuals are aware of the range of options available to them, taking account of their individual circumstances. Making advice a key part of the process would also help address the growing advertising by some debt management firms. We believe that some individuals are being targeted by some firms and specific products offered without the benefit of advice on the range of options available. This can result in individuals entering inappropriate debt solutions. While the Scottish Government does not have the power to address the advertising behaviours of these firms, we can ensure that our system supports only those organisations offering appropriate holistic advice. We will consider introduction of an 'authorised money adviser' requirement, as we currently have for DAS, in respect of other debt solutions.

6.2 We are aware that individuals can often wait for long periods before being able to access money advice through the third sector. Having taken the difficult step of seeking advice, it can be frustrating and problematic if advice and a solution cannot be accessed quickly. IPs and some debt management companies currently provide advice and debt solutions to individuals. At present, AiB cannot offer advice to individuals or businesses. Often, however, those seeking to apply for bankruptcy look to AiB for such advice when they contact or arrive at our office with a bankruptcy application. We believe that, as part of a 'Financial Health Service' AiB should have an advice-giving function. We do, however, recognise that there is the potential for conflicts of interest to arise in such an approach. Any advice-giving service would require to be ring-fenced to ensure separation of duties and transparency of advice.

6.3 This advice would complement, rather than replace, the advice given by other advice providers. It is not intended to provide full financial advice. It could mean that clients have access to money advice quicker and can then have the benefit of being referred to a partner organisation for a more detailed assessment of their total needs. We would see this advice as having a 'triage' role. In this stage, we would gather information about the circumstances of the individual and use this to determine the debt management or debt relief options available to them. This may be through a technology-enabled system, by face-to-face advice, by telephone, or a combination

[6] http://www.legislation.gov.uk/ssi/2011/141/regulation/20/made

of these approaches. Options will be available to ensure accessibility for all. In carrying out this public service, there would be a need to ensure that AiB is, so far as appropriate, protected from financial liability.

Question 6.1 - Do you think that money advice should be compulsory for those considering any form of statutory debt relief?

Question 6.1a - If yes, who should give this money advice?

Question 6.2 - Should AiB have a role in the provision of money advice?

Question 6.2a – If yes, what format should that take?

Question 6.3 – Would you support a 'triage' system to signpost individuals to possible debt relief or debt management options available to them?

Question 6.3a – If yes, what format should this 'triage' system take?

Part 7. Education

7. Education does not currently form a formal part of the service offered by money advisers or IPs, although there can often be advice given on budgeting and income maximisation. However, the concept of lifelong (financial) learning/health fits in with the INSOL recommendations on both pre- and post-bankruptcy debt counselling. This consultation acknowledges the wider educational context of financial education through schools but does not seek to change this – only to add another layer to the picture. We recognise that financial education through schools is important and we will seek to work with colleagues across the Scottish Government to influence this. This consultation is only looking for views regarding the development of a financial education system for individuals who have accessed statutory debt relief or debt management.

7.1 There is no requirement on an individual to seek help to ensure that when they come out of their debt management or debt relief solution, they have the skills to avoid ending up in financial difficulty again. We recognise that lack of skills will not be the sole issue in every case. Individuals may become bankrupt due to a catastrophic change of their circumstances, such as loss of employment. It could be argued that individuals who may be on the cusp of becoming bankrupt or entering another debt solution may be too focused on their immediate problems to consider their financial future. It is worth considering, however, whether there is a need to assist individuals in the transition from a crisis-point intervention, like bankruptcy, through to empowering them to take control of their finances on a day to day level and beyond.

7.2 Whilst budgeting skills alone cannot solve every problem, they may assist individuals to make better financial decisions under these circumstances. The wider INSOL principles acknowledge the benefits of post-bankruptcy counselling or

education. Similarly, a recent study carried out in Canada[7] has demonstrated that particular aspects of financial education have a positive impact on individuals in the insolvency system. There are other regimes where debtor education is a mandatory part of the process and the debt in the bankruptcy is not discharged until an approved course of personal financial management has been completed.

7.3 We believe that a financial education role should be a central part of the 'Financial Health Service' seeking to impact on the culture and behaviours of individuals to prevent repeated financial difficulties. The Making Justice Work[8] programme mentioned in section 4.4 encompasses the development of individuals' legal capability through work being taken forward by a Legal Capability Working Group. The objective of this group is the enhancement of the knowledge, skills, confidence and attitudes of individuals who need to deal with legal matters. Financial education, we believe, should similarly enhance individuals knowledge, skills, confidence and attitudes in their dealing with their financial affairs.

7.4 Trustees in a bankruptcy currently have a duty to ascertain the reason the individual became bankrupt. Depending on the reason a person went bankrupt, for example if someone lost their job unexpectedly, the education package could be seen as patronising and may be unnecessary. An assessment would have to be made by AiB or the trustee prior to discharge, depending on circumstances and how bankruptcy itself was dealt with.

7.5 We propose that discharge, subject to the AiB's or the trustee's assessment, is linked to evidence of completion of a personal financial management module.

Question 7.1 - Should financial education be an integral part of any Scottish statutory debt relief option?

Question 7.1a - If yes, who should deliver financial education?

Question 7.2 - Should this financial education be mandatory for all those who access a statutory debt relief option?

Question 7.2a – If yes, what format should the financial education take?

Question 7.3 - Should financial education be optional based on specific criteria, such as where the individual has previously been bankrupt?

Question 7.3a – If yes, what should that criteria be?

Question 7.4 - Should participation in financial education be linked to discharge from debt?

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[7] Financial Literacy and the Canadian Credit Counselling Services Industry

[8] http://www.scotland.gov.uk/Topics/Justice/legal/mjw

Question 7.5 - How could the effectiveness of financial education be evaluated?

Part 8. Common Financial Tool

8. There has been much debate in recent years about the need for a single tool to be used across the sector to aid in the calculation of an appropriate contribution from individuals. The current arrangement means that the Consumer Credit Counselling Service (CCCS)[9] guidelines are used by some, including AiB for bankruptcy cases, while others use the British Banking Association (BBA) approved Common Financial Statement (CFS)[10]. Each model takes a different approach to calculating the amount of money on which an individual needs to live. An appropriate contribution is calculated from the surplus income. It is generally accepted that the CFS is relatively generous in its allowances, meaning that contributions can be very modest. In using the CFS, money advisers also have a significant amount of discretion meaning that household expenditure can include what could reasonably be regarded as luxury items such as the most expensive entertainment package from satellite television providers. In agreeing any new tool, we intend to take a more stringent view of appropriate household expenditure.

8.1 It is vital that where an individual can pay a contribution that they do so as these funds together with asset realisation cover the cost of the administration of the debt relief and debt management processes and provide a returns to creditor. The public purse provides some funding to cover costs and outlays, where bankruptcies are administered by the AiB and no or insufficient contributions or assets are ingathered. One of the aims of AiB is to become self-funding through recovering costs, where possible. This is particularly pertinent in the current economic climate where the tightening of public budgets has, inevitably, meant that funding is more constrained.

8.2 Ensuring transparency and clarity for individuals is the over-arching principle in moving to any new financial assessment model. An individual must be informed how much they are being asked to pay at the start of the process and for the duration of their debt management or debt relief solution, subject to unforeseen changes of circumstances. Therefore, we propose to introduce the mandatory use of the common financial tool in determining whether an individual should make a contribution in the Debt Arrangement Scheme, protected trust deeds and bankruptcy. We will ensure that any common financial tool developed will take into account the individual's ability to sustain their contribution.

8.3 CCCS and CFS are recognised budgeting tools whose key purpose is to determine a fair and reasonable expenditure budget for a debtor and use this to calculate the surplus income, so that a contribution towards the debtors bankruptcy can be set. Either, the CCCS or the CFS figures could be used, however, as both these tools have strengths and weaknesses we believe that there is a case for

[9] http://www.cccs.co.uk/
[10] http://www.bba.org.uk/policy/article/the-common-financial-statement-cfs/self-regulation/

developing a new model. We intend, therefore, to develop another procedure with our stakeholders, a Scottish-specific common financial tool.

8.4 In considering whether a single tool is an appropriate mechanism, we have also given consideration to an alternative approach. This approach would see a percentage of income above a fixed level being made available as a contribution to pay what is owed.

8.5 Two different models were considered for this approach, a fixed percentage of net income and sliding scale percentage of net income. The fixed percentage of net income contribution model simply assumes that all debtors pay a fixed percentage of their earned income towards their bankruptcy. It makes no other differentiation between debtor's circumstances and it does not attempt to ascertain whether the debtor has sufficient surplus to pay it. This would be similar to the model used for assessing deductions under an earnings arrestment.

8.6 In order to ingather approximately as much as the CCCS model currently used by AiB, the fixed percentage would need to be set at around 9%.

8.7 The sliding scale percentage of net income contribution model accounts for the fact that some debtors are much more able to pay than others, and yet still maintains the desire to see everyone pay something regardless of level of income and/or surplus available. To do so the percentage of net income taken as a contribution is set in relation to the total net income per year.

8.8 In both these models, there is a need to consider how individual circumstances of low income families or families with particular needs can be considered.

8.9 This could potentially be achieved by combining the allowable expenditure figures provided by either the CCCS or CFS guidelines to achieve a reasonable household expenditure figure for all single and family household types. Using this model all individuals would be treated equally and could choose how their allowable income was spent, for example whether to run a car, smoke, have a mobile phone, satellite entertainment packages or to save for an unexpected event or expenditure.

8.10 No account would be taken of whether an individual had a mortgage or was either a council or private tenant. Again this would treat all individuals equally and creditors would benefit as the amount of contributions received would equate to family circumstances rather than to personal choice and possible future enrichment. For example, we have individuals who have no available income due to high mortgage payments, yet the property is in negative equity. The trustee will abandon the property, however, the individual may benefit in the future if property prices rise. In contrast an individual in a council rented property may contribute more due to their subsidised rent and gain nothing.

8.11 Appendix 1 has case studies demonstrating the outcome from using the various models described above.

Question 8.1 - Should a single common financial tool be used to calculate an

appropriate contribution from individuals?

Question 8.1a – If yes, should the same common financial tool be used in the determination of contributions in DAS, protected trust deeds and bankruptcy?

Question 8.1b – If no, how should contributions be calculated?

Question 8.2 - Should AiB, in conjunction with key stakeholders, develop a specific Scottish common financial tool to calculate the appropriate contribution from an individual?

Question 8.2a – If no, what figures should be used to calculate the appropriate amount of contribution from an individual?
A) CCCS guidelines
B) BBA CFS figures
C) Other figures, please specify_____
D) A percentage of the individual's income

Question 8.2b - If a contribution is based on a percentage of an individual's income, what should that percentage be?
A) fixed percentage – 9%
B) fixed percentage – 12%
C) sliding scale percentage based on the individual's income
D) other percentage, please specify_____

Question 8.3 - Should legislation be amended to allow an assessed contribution to be deducted directly from an individual's wages?

Part 9. Application Process

9. At present all debtor applications to the AiB for bankruptcy are completed in paper form and sent by post. This can cause some delays in awards of bankruptcy being made, especially in the few cases where a form goes missing or is delayed. We propose, therefore, to introduce a new web-based electronic application process.

9.1 This electronic application process would tie in with the Scottish Government strategy for Scotland's Digital Future. This strategy sets out in more detail how we intend to achieve our digital ambition in four key areas; public service delivery; the digital economy; digital participation and broadband connectivity. The strategy on public service delivery sets out the case for technological advancements that will provide services which are easier, quicker and more convenient for people to use, and at a lower cost than other methods.

9.2 Applications would be made by an authorised money adviser, through a web-based single gateway as is the case with the Debt Arrangement Scheme (DAS) at present and would allow application for entry to bankruptcy or to DAS. This application process would ensure that an individual would gain advice from the authorised money adviser regarding options for dealing with their debt.

9.3 We acknowledge that certain individuals may not be able to get face to face advice. Currently advice is provided in various ways to individuals depending on the individual preference, such as by telephone and electronic means as well as face to face. For those individuals who prefer accessing advice over the phone or by electronic means, a system could be developed to prove that they had received appropriate advice. This would ensure that all individuals regardless of personal circumstances could demonstrate that they had accessed money advice to enable them access to statutory debt relief products in Scotland.

9.4 The Home Owner and Debtor Protection (Scotland) Act 2010[11] introduced a new route into bankruptcy, the certificate for sequestration[12]. This can be used where an approved money adviser declares, based on evidence provided by the individual, that the individual is unable to pay their debts as they become due. Since its introduction in November 2010, it has proved very successful. Money advisers and IPs have supported the continued use of the certificated process.

9.5 One of the benefits of this universal requirement for advice is that the individual would no longer have to submit proof of apparent insolvency (see glossary) or a certificate for sequestration. However, proof that the individual was unable to pay their debts as they become due would still be required by the adviser and would be a mandatory part of the application process. The authorised money adviser would take into consideration any charge for payment or statutory demand produced by the individual when considering whether they can pay their debts as they become due. They would also take into account the individual's full circumstances advising them of the most appropriate debt relief or management solution.

9.6 The definition of an authorised money adviser would be prescribed under regulations but would be similar to those currently prescribed as an approved money adviser for the DAS[13].

Question 9.1 – If money advice should be sought prior to entering any statutory debt relief or debt management product, should applications only be made to AiB through an electronic web portal?

Question 9.1a If yes, should an electronic application web portal be accessed only by authorised money advisers?

Question 9.2 - Should applicants be able to submit paper application forms?

Question 9.2a – If yes, should the applicant demonstrate that they had money advice prior to submitting their application?

Question 9.3 -. Where money advice is provided by authorised money advisers, should evidence of apparent insolvency still be required?

[11] http://www.legislation.gov.uk/asp/2010/6/contents
[12] http://www.legislation.gov.uk/ssi/2010/397/contents/made
[13] http://www.legislation.gov.uk/ssi/2011/141/regulation/9/made

Question 9.4 -. Where money advice is provided should the authorised money adviser still certify that the individual cannot pay their debts as they become due?

9.7 We anticipate that the requirement for the individual to have received appropriate advice may result in an increase in demand on authorised money advisors and may result in increased waiting times. Similar concerns were identified when the DAS was introduced. As a result the approved money adviser has to intimate that an individual intends to apply for a debt payment programme to the DAS Administrator (see Glossary). This results in a moratorium period of 6 weeks [14]where creditors are unable to take any enforcement action. We propose to introduce a similar system of intimation and moratorium for bankruptcy.

9.8 The moratorium period would protect an individual from any enforcement action being taken by creditors and could reduce the individual's stress. Similar to DAS, only one intimation period could be applied for within a 12 month period. This ensures that the restriction on creditors taking further action is not extended and repeated without limit.

9.9 Due to the importance of the moratorium and the requirement for it to be observed, it is anticipated that this will be registered on a public register that can be accessed by interested parties.

Question 9.5 – Should a moratorium period be introduced for bankruptcy?

Question 9.5a – If yes, what should the proposed moratorium period be?
A) 4 weeks
B) 6 weeks
C) 8 weeks
C) other period, please specify_____.

Question 9.6 – Should the individual only be able to access one moratorium period in a 12 month period?

Question 9.6a – If no, how many moratorium periods should the individual be allowed?
A) 2
B) 3
C) 4
D) other, please specify_____.

Question 9.7 – Where an individual intends to apply for bankruptcy, should information about the individual be displayed in a public register during the moratorium period?

Question 9.7a – If yes, should access to the information on the register be restricted to those parties that have an interest?

[14] http://www.legislation.gov.uk/ssi/2011/141/regulation/30/made

Part 10. Solutions for individuals

10. Individuals in Scotland currently benefit from the choice between DAS, trust deeds (which may become protected) or bankruptcy or voluntary agreements with creditors which are outwith these statutory processes. Further information is available in Appendix 2 about how these debt relief and debt management solutions work. Although advice may have been provided to the individual about which solution is best for their individual circumstances, this is not currently a requirement in all situations. This means that an individual may end up choosing a solution which is not the most appropriate option for their particular circumstances.

10.1 AiB sees examples of individuals selecting a protected trust deed (PTD) to pay back a proportion of their debts when it would have been possible for them to pay back all of what they owe through DAS. In the new model, we would seek to ensure that individuals are filtered into the most appropriate solution by applying different criteria to each solution, ensuring that individuals who can pay something towards their debts, do so. This approach would help ensure that, where possible, a fair return is made to creditors.

10.2 A consultation on PTDs, "Protected Trust Deeds – Improving the Process" ran from October 2011 until the end of January 2012[15]. Once the responses from the PTD consultation are analysed and potential changes in legislation identified, these will be considered alongside the changes identified in this consultation.

10.3 In line with our key principles, individuals who can pay should pay their debts and the best return for creditors should be secured.

10.4 The Debt Arrangement Scheme

10.4.1 DAS is currently the only statutory debt payment process that allows individuals in Scotland to pay their creditors over an extended period without the threat of debt enforcement, bankruptcy, or potential homelessness. DAS enables individuals to resolve serious debt problems in a dignified way. All interest and charges are frozen when the programme is approved and are written off provided the programme is completed. Creditors recover at least 90% of the debt owed to them at the commencement of the programme, if the programme is completed, without having to resort to legal remedies.

10.4.2 There is no maximum period for which a debt payment programme can last under DAS and we do not propose to change this. The average period for an individual to repay their debts in full through a DAS debt payment programme is 8 years 4 months. Therefore, we propose that if debts can be re-paid within 8 years (using an agreed common financial assessment tool that takes into account the sustainability of the contributions over the long term) that DAS would be the statutory option. Thus, access to all Scottish statutory debt relief products will be restricted to individuals who do not have sufficient surplus income, assessed by a common financial tool, to repay their debts in full within 8 years. Those who are assessed as

[15] http://www.scotland.gov.uk/Publications/2011/10/14103349/0

having sufficient surplus income to repay their debts within 8 years can enter a voluntary debt management plan or a debt payment plan in DAS.

10.4.3 DAS can still be accessed for longer periods, for example where an individual has a property, but it is recognised that other debt relief solutions may be more appropriate.

> Question 10.1 – Where it is assessed that an individual could repay their debts within a fixed period (such as 8 years), should DAS be the default option for the individual?
>
> Question 10.1a – If yes, should the period that is used be 8 years?
>
> Question 10.1b – If no, what should the period be?
> A) 4 years
> B) 6 years
> C) 10 years
> D) another period, please specify_____.

10.4.4 Currently, under a DAS debt payment programme an individual normally pays a monthly contribution to a payment distributor, who distributes payment to their creditors. The AiB takes 2% from each contribution to cover the costs of the application process. The AiB does not charge any other fees for the administration of the debt payment programme.

10.4.5 We propose to amend this current process and instead charge an up-front application fee which would be payable by the individual to AiB as with the insolvency options. This would provide a measure of consistency between the debt relief products.

> Question 10.2 - Should the mechanism for charging for a DAS application be aligned to other statutory debt relief options and an up-front fee charged?
>
> Question 10.2a – If yes, what should the fee cover?
>
> Question 10.3 – Should AiB be able to charge any other fees for the administration of the debt payment programme?

10.4.6 Currently, where the DAS Administrator makes a decision to reject, accept, vary or revoke a programme under the fair and reasonable test, an individual or a creditor can only appeal to the sheriff on a point of law. We therefore propose that another intermediate administrative review or appeals process should be created, in addition to the sheriff, to allow an individual or creditor to appeal a decision made by the DAS Administrator. This would be an internal review which would have the power to overturn the initial decision. Where this process did not overturn an original decision, we anticipate that these would be referred for consideration by an independent panel, such as the existing Policy and Cases Committee[16]. This would

[16] http://www.aib.gov.uk/publications/policy-and-cases-committee-terms-reference

ensure that appropriate impartial consideration is given to the review, without creating complex and expensive review procedures.

Question 10.4 - Should another appeal or review process in DAS be created to allow an individual or creditor to appeal a decision made by the DAS Administrator?

Question 10.4a – If yes, should these appeals be made to an independent panel?

Question 10.4b – If these appeals are not made to an independent panel, where should these appeals go?

10.4.7 The DAS Regulations previously contained an option for composition, where the money adviser proposed this at the outset of the programme being considered. This was excluded from the 2011 Regulations due to low uptake. It would be possible to re-introduce composition into DAS where the debt payment programme has been running successfully for a fixed period (such as 12 years) and the individual has paid at least a fixed percentage (such as 70%) of their debt. This would allow for long term DAS debt payment programmes to be cut down. The costs of administering a debt payment programme over excessively long periods may outweigh the benefits to creditors, especially where very small sums of monies are involved. Therefore, creditors may welcome this proposal as a suggested 70 pence in the pound is a favourable return compared to other debt relief options.

10.4.8 It is proposed that following an annual review after the fixed period, the DAS Administrator or the DAS continuing money adviser could identify suitable candidates. Where an individual has been identified, the DAS Administrator could approach creditors to reduce or revoke the outstanding balance. We recognise that this proposal provides a greater element of debt relief than currently exists and this may be controversial.

Question 10.5 – Should the Debt Arrangement Scheme have an option of composition for individuals in DAS programmes?

Question 10.5a – If yes, should composition only be available where the programme has successfully run for over a fixed period, for example 12 years?

Question 10.5b - If yes, what should that fixed period be?
A) 10 years
B) 12 years
C) 15 years
D) another period, please specify_____.

Question 10.6 - Should composition only be available where the individual in the programme has paid a fixed percentage of the debt due?

Question 10.6a – If yes, what should that percentage be?
A) 50%
B) 60%
C) 70%
D) another percentage, please specify_____.

Question 10.7 - If composition was available, should this only be with the agreement of the creditors?

Question 10.7a – If no, should an automatic revocation of the outstanding balance be available where the individual has paid the agreed percentage?

10.5 Protected Trust Deeds

10.5.1 Trust deeds are voluntary agreements between individuals and creditors. They convey the individual's right to their assets to a trustee. Through the sale of assets, and contributions from an individual's income, the trustee (after paying their costs of administering the trust deed) will pay a dividend to creditors. The dividend may repay part or all of what the individual owes. Currently, a trust deed generally runs for a period of 3 years, although in some circumstances they can run for much longer.

10.5.2 A trust deed can become protected if a sufficient number of creditors either agree to the trust deed, or are deemed to have agreed to its terms. Once protected, the trust deed is binding on all creditors, who can then take no further action to pursue the debt owed, providing the individual complies with the terms of the trust deed. Upon completion of the trust deed, the individual is discharged from the debt included in the trust deed.

10.5.3 As noted in paragraph 10.2, the responses from the PTD consultation will be analysed and where potential changes in legislation are identified, these will be considered alongside the changes identified in this consultation.

10.5.4 Currently there is no minimum or maximum debt level required for an individual to be eligible to grant a trust deed. The average debt included in a protected trust deed in the year 2010/11 was £28,100. The lowest level of debt in an individual PTD was £4,600 over this same period. The costs associated with the administration of a trust deed can, in some cases, appear to be disproportionate to the level of debt owed by the individual. This may be due to additional work undertaken by the trustee which was not foreseen at the time of the granting of the trust deed. The proposed average fees and outlays charged in trust deeds protected during 2010/11 was £5,600. When the creditor receives a copy of the individual's trust deed, by not objecting to the protection of a trust deed, the creditors are effectively agreeing to the proposed trustee fees. Most complaints to the AiB regarding the fees charged by a trustee in a PTD are generally where most of the monies ingathered are used to pay trustee's fees and outlays. During the period of the PTD, creditors are circulated annual accounts and can ask for an audit at any time if not satisfied with the fees and outlays charged by the trustee. Therefore, there is a mechanism to challenge changes to outcome.

Question 10.8 – Should there be a minimum debt level for entry into a protected trust deed?

Question 10.8a - If yes, what should the level be?
A) £3,000
B) £4,000
C) £5,000
D) another amount, please specify_____.

10.5.5 Currently legislation requires trustees to provide certain information at the outset of the trust deed. This information includes details of the anticipated contributions from the individual, expected realisations from assets, the estimated trustee fees for administering the trust deed and the proposed dividend payments to ordinary creditors. Throughout the lifetime of the trust deed the costs and outlays associated with the administration can vary, which may result in a reduction of a dividend payable to creditors. The proposed dividend may sometimes not be realised due to difficulties in collecting the agreed contribution from the individual. One option may be to have a statutory mechanism to collect these agreed contributions directly from the individual's employer. Currently an individual would have to sign a separate mandate to allow deductions from their salary. However, where an individual is in employment, a statutory notice could be issued to their employer allowing the deduction of the agreed contribution direct from the individual's salary. This would be similar to mechanisms in DAS and bankruptcy.

Question 10.9 – Where an individual is in employment, should provision be made for a statutory notice to be issued to their employer allowing the deduction of the agreed contribution direct from the individual's salary?

Question 10.9a – If yes, who should notify the employer?

10.5.6 Currently a trust deed does not require a minimum dividend to be paid to creditors in order to achieve protected status. Of the PTDs which closed in 2010/11, 64% paid a dividend to creditors. The average dividend paid for these PTDs was 16.2p in the £. The Scottish Government raised the concept of a minimum dividend in a PTD previously in a consultation in 2006[17]. However, this was not taken forward at that time. We acknowledge that this was a controversial issue at that time and may still be very controversial today. Although creditors have been encouraged to take steps to ensure that there is an acceptable minimum level of return in a PTD, this still has not resulted in a significant return to creditors. Over a third (36%) of PTDs which closed in 2010/11 failed to pay any dividend to ordinary creditors.

10.5.7 In recent years some creditors have taken a greater interest in PTDs and have actively rejected the protection of trust deeds which propose a dividend of less than 10p in the £. To secure creditors' interests, we propose that in future all trust deeds must offer creditors a minimum dividend prior to the trust deed being eligible for protection. To improve returns to creditors we suggest that the minimum dividend should be 50p in the £. We acknowledge that this will mean that, in the majority of cases, individuals will have to pay a contribution to their trustee for a longer period.

[17] http://www.scotland.gov.uk/Publications/2006/01/20093732/0

10.5.8 Although flexibility in payment terms has long been regarded as a key feature of trust deeds, this has not delivered a substantial dividend to creditors and in practice the majority of PTDs last 3 years. It would be possible to legislate for a PTD to have a fixed term of 5 years. It may also be possible to consider linking the term of the PTD to the delivery of the dividend originally proposed or to a minimum dividend. This would ensure, subject to no changes in the individual's circumstances, that creditors received the dividend to which they agreed when they supported the protection of the trust deed.

Question 10.10 – Should there be a minimum dividend proposed in a trust deed for it to be eligible for protection?

Question 10.10a - If yes, is 50p in the £ an appropriate minimum amount?

Question 10.10b - If not 50p in the £, what would be an appropriate minimum amount?
A) 40p in the £
B) 30p in the £
C) 20p in the £
D) another amount, please specify_____.

Question 10.11 – Should there be a fixed term for completion of a protected trust deed?

Question 10.11a - If yes, what should this period be?
A) 3 years
B) 4 years
C) 5 years
D) another period, please specify_____.

Question 10.12 – Should there be a link between the term of the protected trust deed and the delivery of the minimum dividend originally proposed?

10.5.9 At present, creditors do not have to give positive consent to a trust deed becoming protected. The creditors will be notified normally by post of the trust deed along with information about the individual's circumstances, the proposed dividend and the anticipated fees and outlays. Based on this information the creditor will decide whether to object to the protection of the trust deed. Creditors have 5 weeks to respond. Where a creditor does not respond to the notification stating their objection to the trust deed becoming protected, they will be treated as being deemed to have acceded to it. The trust deed will become protected unless within the relevant period the trustee has received notification in writing from the majority in number or not less than one third in value of those creditors that they object to the trust deed.

10.5.10 It would appear that some creditors are being more proactive in agreeing to or objecting to the protection of a trust deed. This is particularly prevalent where creditors have systems in place to identify and take action on trust deed notifications. The current DAS system is administered, on the whole, via an electronic web based

system. Early indications are that creditors are engaging more, by responding to requests in greater numbers than through a paper based notification system.

10.5.11 Some small creditors who do engage, such as credit unions, and who do object to the protection of trust deeds, do not have sufficient value of debt to allow their objection to cause the protection to fail. Historically, active consent by creditors was required to allow the protection of a trust deed (when protected trust deeds were first introduced). This was changed to an objection model by the Bankruptcy (Scotland) Act 1993[18] because of the difficulty in obtaining active creditor consent and thus protection. A change back to active creditor consent was considered again in the 2006 consultation, but was rejected due to the concerns that it was not practical. Currently, under DAS where a creditor does not agree to the proposed debt payment programme, the DAS Administrator can use a fair and reasonable test to approve or decline the programme.

> Question 10.13 – Should the current process that deems consent to a trust deed becoming protected continue?
>
> Question 10.13a – If yes, are the current thresholds correct?
>
> Question 10.13b – If the thresholds are not correct, what should they be?
>
> Question 10.14 - If the current deemed consent process is not appropriate, what should replace it?

10.5.12 Normally, the individual will be discharged from the debt included in the PTD if they comply with the terms. If an individual refuses to comply with the terms of the PTD, the trustee can apply to make them bankrupt. However, this does not happen in all cases. Therefore, we propose to make this a mandatory step. Currently, the trustee can be discharged without discharging the individual, allowing the creditors to pursue the individual for the amount they are owed. If the individual cannot comply with the terms due to a change in their financial circumstances the trustee can still discharge the individual from their debts.

> Question 10.15 – Where a trustee in a PTD applies to make an individual bankrupt as a result of their non-compliance, should the trustee in the bankruptcy take the non-compliance into consideration when agreeing the individual's discharge from debt?
>
> Question 10.16 – If the PTD fails due to an individual's refusal to comply with the terms, should it be mandatory that the trustee applies to make the individual bankrupt?

Bankruptcy

10.5.13 Currently there are a number of different criteria used to determine whether an individual should be awarded bankruptcy. These include providing proof

[18] http://www.legislation.gov.uk/ukpga/1993/6/contents

of apparent insolvency[19], meeting the Low Income and Low Asset (LILA) criteria or using a certificate for sequestration.

10.5.14 We propose to introduce new Scottish statutory debt relief criteria for individuals and to define a range of products within bankruptcy. In order to do this we will ensure that the key principles of the service - that individuals who can pay their debts should pay and the best return for creditors should be secured - are adhered to. Therefore, we intend that one of the defining features of the range of products within bankruptcy will be whether an individual can or cannot pay a contribution. We believe that 'bankruptcy' should be split into different products subject to the individual's circumstances. For example, where an individual has previously traded, has been assessed as being unable to pay a contribution or in receipt of social security benefits. A flow chart showing the products along with the entry criteria is shown in Appendix 3.

10.5.15 We propose that the best way to achieve this is by ensuring that individuals get proper money advice prior to applying (see part 6) and utilising the common financial tool (see part 8). The common financial tool would determine whether the individual was able to make a contribution towards their debt, thus determining the product under which the individual's estate and debt are administered. This would provide individuals, money advisers and creditors with pertinent information at the point of application.

10.5.16 Since we propose individuals should have sought money advice from an authorised money advisor prior to applying for debt relief or debt management, the requirement for an individual to prove apparent insolvency would no longer be required. However, proof that the individual was unable to pay their debts as they become due would still be required by the adviser and would be a mandatory part of the application process. Creditors would still have to prove that a debt was owed – for example by demonstrating a decree and proof of issuing a charge for payment within the relevant period - when petitioning for an individual be made bankrupt.

> Question 10.17 - Should the requirement for an individual to prove apparent insolvency be removed as a route into bankruptcy?

<u>Qualifying debt:</u>

10.5.17 Currently the qualifying debt threshold required for an individual to be awarded bankruptcy, on a debtor application, is £1,500. The debt level for creditor petitions is currently £3,000.

10.5.18 Given the increase in consumer borrowing, and changing economic climate in the 18 years since the debt limit was set, this amount could be argued as being unrealistically low and in need of review. The Bankruptcy and Diligence etc. (Scotland) Act 2007 did make provision to increase the minimum limit to £3,000. However, this increase was not commenced for debtor applications. Therefore, an option could be to commence this section to increase the minimum level of debt for a debtor application in line with that of the creditor petition to £3,000.

[19]http://www.legislation.gov.uk/ukpga/1985/66/section/7

10.5.19 An analysis of all bankruptcy cases administered by the AiB, where the individual applied to be made bankrupt, during 2010/11 shows that 222 (3.7%) cases had debts of between £1,500 and £2,999. Further analysis showed that these cases also matched the LILA (see section 10.5.20 below) entry criteria.

Question 10.18 - Should the minimum debt threshold for an individual be increased?

Question 10.18a – If yes, should this level be £3,000?

Question 10.18b – If no, what should this level be?
A) £1,500
B) £2,000
C) £5,000
D) another amount, please specify_____.

Question 10.19 - Should there be different minimum debt thresholds for the different debt relief products?

Question 10.20 - Should the minimum debt threshold for an individual applying to become bankrupt be the same as that for creditors?

Question 10.21 - Should the minimum debt threshold for creditor petitions increase?

Question 10.21a - If yes, what should that level be?
A) £3,500
B) £5,000
C) £7,000
D) another amount, please specify_____.

Individuals who are unable to make a contribution

10.5.20 Part 1 of the Bankruptcy and Diligence etc. (Scotland) Act 2007[20] introduced changes to the existing legislation for personal insolvency. Amongst these changes was the introduction of the Low Income Low Assets (LILA) route into bankruptcy. Here, if the individual did not meet the apparent insolvency criteria as set by section 7 of the Bankruptcy (Scotland) Act 1985[21], as amended, but met the LILA criteria, they could submit a debtor application for their own bankruptcy. LILA bankruptcy cases, by nature, are not anticipated to yield any dividend to creditors. However, there have been occasions where a very small dividend has been paid where a small contribution is made from the individual's earned income. LILA bankruptcy cases, subject to no changes in the individual's circumstances, have minimal administration and individuals are automatically discharged after 12 months of the award being made.

[20] http://www.legislation.gov.uk/asp/2007/3/contents
[21] http://www.legislation.gov.uk/ukpga/1985/66/contents

10.5.21 The entry criteria for LILA are as follows:

- Individual's weekly income does not exceed the **gross** amount prescribed as the National Minimum Wage[22] (currently £243.20), or is in receipt of an income based benefit,
- An individual does not own any heritable property or land. This includes property which has been repossessed or surrendered and where title has not yet changed hands,
- An individual does not own any single asset worth over £1,000 (except a vehicle which is reasonably required and is valued at no more that £3,000) or combination of assets more than £10,000,
- Minimum level of debt for application is £1,500,
- An individual meets the qualifying criteria in terms of section 5 of the 1985 Act (habitual residence, not in a live trust deed etc).

10.5.22 The LILA route into bankruptcy has been very successful, with 68% of all bankruptcies awarded in the year 2008/09[23] being through the LILA route although this figure has gradually reduced in the subsequent years. In 2010/11 awards of bankruptcy through the LILA route accounted for 53%[24] of all bankruptcies awarded.

10.5.23 Currently, an individual who is in receipt of income based benefits is automatically awarded bankruptcy under LILA criteria, subject to them meeting the other eligibility criteria. (Income-based benefits include Pension Credit, Income Based Jobseeker's Allowance and Income-Based Employment and Support Allowance.) An individual in receipt of a contributory benefit such as Contributory Employment and Support Allowance, Contributory Jobseeker's Allowance and/or supplementary benefits such as Industrial Injuries Disablement Benefit and Disability Living Allowance would <u>not</u> automatically meet the LILA criteria. However, these benefits are not counted in the calculation of the individual's gross weekly income. These individuals are only able to use the LILA criteria where their weekly income other than their benefits is less than the National Minimum Wage. In all cases, where an individual has earned income, the trustee assesses whether the individual should pay a contribution towards their debts from any excess income. At no time is a contribution taken from an individual on state benefits only.

10.5.24 We acknowledge that the UK Government[25] is planning to introduce a universal credit process which is likely to radically change the current benefits system. This will be taken into consideration in the development of policy and future legislation.

10.6 <u>No Income Product - bankruptcy:</u>

10.6.1 We acknowledge that the criteria for LILA are perhaps too broad and it has sometimes resulted in some stakeholders being confused or uncertain about what

[22] http://www.direct.gov.uk/en/Employment/Employees/TheNationalMinimumWage/DG_10027201
[23] http://www.aib.gov.uk/publications/lila-one-year-review-2009
[24] http://www.aib.gov.uk/publications/annual-report-and-accounts-201011
[25] http://www.dwp.gov.uk/policy/welfare-reform/legislation-and-key-documents/welfare-reform-bill-2011/universal-credit-briefing/

happens to an individual who is made bankrupt through this route. Therefore, we propose to replace LILA. We plan to introduce both a 'No Income' product and a 'Low Income' product which is described later in this section. The No Income product will be a new product for individuals whose ONLY income is social security benefits (that is benefits paid by Department for Work and Pensions and does not include any tax credits) and who have limited assets. No asset will be worth more than £1,000 (except a vehicle which is reasonably required and is valued at no more that £3,000). The individual's total assets must not exceed £2,000 (excluding the vehicle). Individuals with heritable property would not be able to access this product, neither would those with debts over £17,000. Individuals would be discharged from this product, subject to their co-operation, after 6 months. As the individual is only in receipt of social security benefits no contribution would be payable. AiB would be the trustee in all these cases.

10.6.2 Therefore, anyone in receipt of an income-based, contributory or supplementary benefit would be automatically eligible for this product where they meet the other criteria. We would propose to define these individuals as having 'No Income.'

10.6.3 Any moveable assets such as life policies, shares, premium bonds and vehicles will vest in the trustee and may be sold for the benefit of creditors. As is the current practice, the trustee will use a cost benefit analysis on whether the asset will be realised. A vehicle which is reasonably required and is valued at no more that £3,000 will, as at present, be excluded.

Question 10.22 - Should a new No Income product be developed for individuals who are assessed as being unable to make a contribution and who are in receipt of Social Security benefits only?

Question 10.23 - In order to access this product should the maximum level of assets be limited, for example to £2,000?

Question 10.23a – If yes, what should this maximum level of assets be?
A) £1,000
B) £2,000
C) £5,000
D) another amount, please specify_____.

Question 10.24 - Should an individual who owns heritable property be able to access this product?

Question 10.24a – If yes, should there be any restrictions on the value of the property or, perhaps, equity?

Question 10.25 - As the individual is in receipt of social security benefits only, should they be discharged after 6 months, where they co-operate with their trustee?

Question 10.25a – If no, what should the period be?
A) 9 months
B) 12 months
C) 18 months
D) another period, please specify_____.

10.6.4 At present, there is no maximum debt threshold for individuals under any of the statutory debt relief mechanisms.

10.6.5 The LILA review[26] published in 2010 found that the average debt in a LILA bankruptcy case was £17,160, with over 70% of cases having up to £20,000. However, amongst the cases reviewed, 35 had debts totalling over £100,000, with one over £310,000.

10.6.6 In England and Wales, the Debt Relief Order[27] has a maximum debt limit of £15,000. Similarly, elsewhere in the world there are debt options which have a maximum debt level set. Where an individual is getting access to bankruptcy through a No Income or Low Income product, consideration could be given to introducing a restriction to the maximum amount of debt. We acknowledge that there may be some difficulties where additional debt is identified after an individual has accessed this product.

10.6.7 We propose that a maximum debt level of £17,000 be applied where an individual has 'No Income'.

Question 10.26 - To be eligible to apply for a No Income product, should there be a maximum debt level?

Question 10.26a – If yes, should the maximum debt level be £17,000?

Question 10.26b – If no, what should the level be?
A) £10,000
B) £15,000
C) £20,000
D) another amount, please specify_____.

10.6.8 Currently, where an individual is bankrupt they are restricted from obtaining further credit over certain limits without disclosing their status. Similarly, where it has been proven that an individual has incurred debt knowing that they were unable to repay it; a Bankruptcy Restriction Order or Undertaking[28] can be applied which limits their access to further credit. The individual would have to disclose that they had a Bankruptcy Restriction Order or Undertaking and it would be up to a creditor to determine whether they want to lend to them. We would like to introduce a default credit restriction for a set period post the individual's discharge.

[26] http://www.aib.gov.uk/publications/lila-one-year-review-2009
[27] http://www.legislation.gov.uk/uksi/2009/457/contents/made
[28] http://www.legislation.gov.uk/ukpga/1985/66/section/71B

10.6.9 At present, the legislation restricts an individual from applying for their own bankruptcy for a period of 5 years after the date of award. To prevent an individual from possibly regarding this debt relief solution as an 'easy option', where an individual has accessed debt relief through the No Income product once, for any subsequent applications to the No Income product we propose to restrict access or delay discharge. This could be achieved by increasing the period between applications. An alternative option would be to delay the individual's discharge for any subsequent bankruptcy.

Question 10.27 - Where an individual has no income and is discharged after 6 months, should they be subject to a default credit restriction for a set period post discharge?

Question 10.27a - If a credit restriction is appropriate, what should the period be?
A) 3 months
B) 6 months
C) 12 months
D) another period, please specify_____.

Question 10.28 - If a credit restriction is appropriate, should there be a specific value attached to this restriction, for example no credit over £3,000?

Question 10.29 - Should the period for an individual to apply for a subsequent No Income product be extended?

Question 10.29a - If yes, what should the period be?
A) 7 years
B) 10 years
C) once in lifetime
D) another period, please specify_____.

Question 10.30 - Where an individual has accessed debt relief through the No Income product once, should the individual's discharge for any subsequent bankruptcy be delayed?

Question 10.30a - If yes, what should the period be?
A) 1 year
B) 2 years
C) 3 years
D) another period, please specify_____.

10.7 Low Income Product - bankruptcy:

10.7.1 Currently under the LILA criteria, an individual in receipt of a contributory benefit such as contributory Employment and Support Allowance, Contributory Jobseeker's Allowance and/or supplementary benefits such as Industrial Injuries Disablement Benefit and Disability Living Allowance would not automatically meet the LILA criteria as the individual also may have another source of income.

However, these benefits are not counted in the calculation of the individual's gross weekly income for determining whether the individual meets the criteria.

10.7.2 Under the proposed new Low Income product, to replace LILA along with the No Income product detailed above, these individuals would continue to be defined as having Low Income where they have been assessed using the Common Financial Tool [part 8] as being unable to make a contribution. For example, as their income, including any benefits will be equal to or less than the National Minimum Wage. Where an individual does not earn any income and they are not eligible for benefits they would meet the Low Income criteria.

10.7.3 To access this Low Income product, individuals would have no single asset worth more than £1,000 (except a vehicle which is reasonably required and is valued at no more that £3,000). An individual's total assets would not exceed £10,000 (excluding the vehicle). Individuals with heritable property would not be able to access this product. The maximum level of unsecured debts would not exceed £30,000. Individuals would be discharged from this product, subject to their co-operation, after 12 months.

10.7.4 Although the individual would not make a contribution, any moveable assets they have, such as life policies, shares, premium bonds and vehicles will vest in the trustee and may be sold for the benefit of creditors. As is the current practice, the trustee will use a cost benefit analysis on whether the asset will be realised. A vehicle which is reasonably required and is valued at no more that £3,000 would be, as at present, excluded.

> Question 10.31 – Should a new Low Income product be developed for individuals who are assessed as unable to make a contribution?
>
> Question 10.32 - In order to access this Low Income product should the maximum level of assets be limited?
>
> Question 10.32a - If yes, what level should it be?
> A) £5,000
> B) £7,000
> C) £10,000
> D) another amount, please specify_____.
>
> Question 10.33 - As the individual in this product is not making any contributions should they be discharged after 12 months, where they co-operate with their trustee?
>
> Question 10.33a – If no, what should the period be?
> A) 6 months
> B) 9 months
> C) 18 months
> D) another period, please specify_____.

10.7.5 Where an individual has heritable property they cannot currently access bankruptcy through the LILA criteria. This is the case even where an individual's

heritable property has zero or negative equity. Where an individual's property has been repossessed or voluntarily surrendered but has not been sold, the individual may still legally own the property and their name is still retained on recorded title deeds or in the Land Register. In these cases, although the heritable property cannot be practically regarded as an asset, ownership still prevents the individual from accessing bankruptcy through LILA. Furthermore, where the property has been repossessed or voluntarily surrendered this can cause confusion for the individual who believes that they no longer own the property. This may cause them to provide false information to their money adviser or on their debtor application form, which would result in their application being rejected.

> Question 10.34 - Do you think that this product should be available to individuals who own heritable property?
>
> Question 10.34a – If yes, should this be restricted to properties that have been repossessed or have negative equity?

10.7.6 At present, there is no maximum debt threshold for individuals under any of the statutory debt relief mechanisms. Elsewhere in the world there are debt options which have a maximum debt level set. In the Citizens Advice Scotland report "Drowning in Debt"[29], published in 2009, their clients had an average of £20,193 of debt and almost one in ten owed more than £50,000.

10.7.7 We therefore propose to restrict access to a Low Income product to those individuals with a maximum total unsecured debt of £30,000.

> Question 10.35 - Should there be a maximum debt limit to access a Low Income product?
>
> Question 10.35a - If yes, where should this maximum total unsecured debt limit be set?
> A) £20,000
> B) £30,000
> C) £50,000
> D) another amount, please specify_____.

10.8 Last Resort Debt Relief - bankruptcy

10.8.1 Where an individual needs debt relief and cannot access any other statutory debt relief product, they will be able to apply for bankruptcy of last resort, through an approved money adviser. The individual would have to owe a minimum of £3,000.

10.8.2 Access would be available to individuals who are assessed, using the common financial tool, as not being able to make a contribution. The individual may have assets, including heritable property. It would be expected that the assets and heritable property, where appropriate, would be realised for the benefit of creditors. The individual would have debts ranging from £30,000 (Low Income product) and less than £500,000 (see High Value product detailed below). Individuals would be

[29] http://www.cas.org.uk/Publications/publications/cas-briefing-paper/drowning-in-debt

discharged from this product, subject to their co-operation, after a fixed period. Where the individual has previously been bankrupt or had accessed another statutory debt relief product within the previous 5 years their discharge period could be extended.

10.8.3 Currently, where an individual applies for their own bankruptcy, they will normally be discharged one year after the date the bankruptcy is awarded and we would envisage the same discharge period in this product. Where a creditor or a trustee under a trust deed has petitioned for an individual's bankruptcy, discharge will normally be one year after the date that the court issued the first warrant citing the individual to appear. The trustee in the bankruptcy can ask the sheriff to delay the individual's discharge for good cause, including where they do not co-operate with the trustee.

10.8.4 Where an individual's circumstances change during the term of the bankruptcy, we propose that the individual could be transferred from one bankruptcy product to another that is more appropriate. This change would take account of the individual's circumstances as well as the return to creditors and cost of delivery. For example, this would mean that should an individual start working and are assessed as being able to make a contribution they could be transferred to a payment product.

> Question 10.36 - Where an individual needs debt relief and cannot access any other bankruptcy product, should they be able to access the last resort debt relief product?
>
> Question 10.37 - Where the individual had previously been bankrupt or has accessed another statutory debt relief product within the previous 5 years, should their discharge period be extended?
>
> Question 10.37a - If yes, what period should their discharge be?
> A) 6 months
> B) 12 months
> C) 5 years
> D) another period, please specify_____.

Individuals who can make a contribution

10.9 Payment Product - bankruptcy

10.9.1 For those individuals that can pay something towards their debts but can not repay their debts in full in 8 years, the AiB has identified that a product similar to the DAS that allows a return for creditors is required. This product would ingather a regular payment from an individual's excess income, based on the common financial tool, over a fixed period of time.

10.9.2 The Payment product could be accessed where an individual has been assessed by the common financial tool as being able to make a contribution.

10.9.3 The Payment product could also be accessed where individuals have assets including heritable property. Any moveable assets such as life policies, shares, premium bonds and vehicles will vest in the trustee and may be sold for the benefit of creditors. As is the current practice, the trustee will use a cost benefit analysis on whether the asset will be realised. A vehicle which is reasonably required and is valued at no more that £3,000 will, as at present, be excluded. The heritable property would also vest in the trustee and may be sold for the benefit of creditors.

10.9.4 The main criteria for access to the Payment product would be that the individual has excess income and would be expected to make contributions for a fixed period, for example 4 years. The individuals would not have traded within the preceding 5 years and would not have debts exceeding £500,000 as these individuals would access the High Value product detailed later in this section.

10.9.5 We propose that the common financial tool would be used to determine the contribution the individual can pay over the fixed period. Where an individual is in employment, a statutory notice could be issued to their employer allowing the deduction of the agreed contribution direct from the individual's salary. This would be similar to current mechanisms in DAS and bankruptcy. There would be regular annual assessments.

10.9.6 It is anticipated that the creditors will receive regular dividend payments (for example 6 monthly) based on the money that has been ingathered. This will provide returns to creditors earlier. Where an individual has a change in circumstances where they become unable to pay their agreed contribution, for example they become unemployed, the Payment product will be reassessed. This may result in an agreed payment holiday, similar to that available in DAS.

10.9.7 Also similar to DAS, all creditor interest and charges will be frozen for the fixed period, subject to the individual co-operating with their trustee and making the agreed contributions.

10.9.8 We propose that both IPs and the Accountant in Bankruptcy could be trustee in these cases. However, administration charges could be fixed for this product. This will provide clarity for both applicants and creditors.

> Question 10.38 - Should a new Payment product be developed for individuals who are assessed as able to make a contribution?
>
> Question 10.39 - Should the Payment product be available to individuals who are currently trading or who have traded within the preceding 5 years?
>
> Question 10.40 - Should this product be unavailable to individuals who have debts exceeding a fixed sum?

Question 10.40a - If yes, what should this sum be?
A) £250,000
B) £500,000
C) £750,000
D) another amount, please specify_____.

Question 10.41 - Do you think the contribution should be for a fixed period?

Question 10.41a - If yes, for what period?
A) 3 years
B) 4 years
C) 5 years
D) another period, please specify_____.

Question 10.42 – Where monies have been ingathered, should creditors receive regular dividend payments?

Question 10.42a - If yes, at what intervals?
A) quarterly
B) 6 monthly
C) annually
D) another period, please specify_____.

Question 10.43 – Should both IPs and the Accountant in Bankruptcy be the trustee in Payment product cases?

Question 10.44 - For clarity for applicants and creditors, should there be a fixed charge for administering this product?

Question 10.45 – If the monies ingathered are insufficient to pay a dividend to creditors, should the individual's discharge be deferred until the costs of the administration of the bankruptcy are met?

Individuals who have traded or have high value debts

10.10 High Value Product - bankruptcy

10.10.1 Currently where an individual needs debt relief and does not qualify under another statutory debt relief product they may be able to apply for their own bankruptcy regardless of the maximum amount of debt run up.

10.10.2 During 2010/11, the AiB processed 89 bankruptcies where the level of debt was in excess of £500,000. Of these bankruptcies, only 3.4% were attributable to consumer debts whereas 96.6% of these cases were as a result of the individual trading either as a sole trader or in partnership.

10.10.3 The administration of cases with high level of debts can result in more time being spent investigating how the debt was incurred. The trustee will also investigate what has happened to any assets that had been purchased. The trustee

may also find it necessary to carry out an audit of the business accounts, where available, to ascertain if the business is still viable.

10.10.4 We propose that the High Value product is used where an individual is trading or has traded in the past five years or where an individual has unsecured debts in excess of £500,000. For access to this product it does not matter whether the common financial tool assesses whether the individual can make a contribution or not. However, where a contribution is assessed this would still be expected to be paid. Similarly, it would not matter whether the individual had an asset or not. Any moveable assets such as life policies, shares, premium bonds and vehicles will vest in the trustee and may be sold for the benefit of creditors. As is the current practice, the trustee will use a cost benefit analysis on whether the asset will be realised. A vehicle which is reasonably required and is valued at no more that £3,000 will, as at present, be excluded. Any heritable property would also vest in the trustee and may be sold for the benefit of creditors.

10.10.5 It is expected that where the common financial tool assesses that the individual can make a contribution that they continue to make payment for a fixed period, for example 4 years. The individual would be discharged after 4 years, subject to their co-operation.

10.10.6 We would envisage that insolvent entities, such as trusts and Scottish Charitable Incorporated Organisations[30] would be able to access debt relief through the High Value product. We expect that these types of cases, which could be complex to administer and may require a higher level of investigation, would fit more comfortably within this product.

Question 10.46 - Should a new High Value product be developed for individuals who are currently trading or have traded in the past 5 years or who have debts in excess of a fixed amount?

Question 10.46a - If yes, what should this fixed amount be?
A) £250,000
B) £500,000
C) £750,000
D) another amount, please specify_____.

Question 10.47 – Where the common financial tool assesses that a contribution should be made, should this be for a fixed period?

Question 10.47a - If yes, for what period?
A) 3 years
B) 4 years
C) 5 years
D) another period, please specify_____.

[30] http://www.oscr.org.uk/about-scottish-charities/scio/

Question 10.48 – If the monies ingathered are insufficient to pay a dividend to creditors, should the individual's discharge be deferred until the costs of the administration of the bankruptcy are met?

10.11 Transferring individuals between bankruptcy products

10.11.1 Currently, in the majority of cases the individual is in the appropriate debt relief solution. However, in some cases an alternative debt relief solution would appear to be more appropriate for the individual. As we are proposing to create a range of bankruptcy products, there should be a mechanism to transfer an individual from one product to another in a simple way. This would ensure that the individual was in the most suitable and cost effective product based on their circumstances, for example a No Income case where assets in excess of the limit were identified would transfer to a last resort bankruptcy or where an individual has debts in excess of £500,000 and these have been fully investigated showing that there is no value to the estate, the individual may be transferred to a Low Income product. This process will take account of the individual's circumstances as well as the return to creditors and cost of delivery.

Question 10.49 - Should there be a mechanism to transfer an individual from one bankruptcy product to another?

Part 11. Solution for Sole Traders and Partnerships

11. The Scottish Government has responsibility for most aspects of non-company insolvency regime. Such measures are currently available to both individuals as consumers or individuals operating a business as a sole trader. Partnerships also fall within personal insolvency where these partnerships are non-limited liability partnerships (referred to hereafter as "partnerships" for ease of reference).

11.1 The UK Government has responsibility for most aspects of corporate insolvency matters. This means that companies registered at Companies House as private or public limited companies, cannot be dealt with by the Scottish Parliament.

11.2 The proposals in this consultation relate only to personal insolvency – in other words to those individuals or businesses that would currently fall within the personal insolvency provision in Scotland.

11.3 Within Scottish personal insolvency, there is no separation of consumer debt, which is generally understood as debt incurred primarily for private, family or household purposes, from debt incurred as a result of carrying on a business.

11.4 Many countries seek to have insolvency provision that separates consumer debt from those liabilities arising from businesses and this is something that we in Scotland would also seek to do. The success of the Scottish economy depends on a thriving business sector. Providing an early intervention mechanism that delivers advice, guidance and debt management solutions will play a key role in avoiding

unnecessary business insolvency. This paper sets out proposals for a new debt management solution for sole traders and partnerships.

11.5 We propose that a new Business DAS be developed for viable businesses. This product would be for sole traders and partnerships for their business debt only, which would be separated out from individual consumer debt. Similar to the current DAS system a moratorium period would be available. We recognise that in many cases it would be difficult for sole traders and partnerships to separate their debt – for example, payment for business supplies may have been made with a personal credit card. However this separation may help individuals recognise their true financial situation.

11.6 We suggest a solution incorporating debt relief or composition where the sole trader or partners would draft a proposal to put to their creditors. The draft proposal would include an estimated outcome statement which would outline the likely outcome for creditors for each of the solutions available to the business, i.e. this new product, or bankruptcy, or carry on trading and do nothing. This product will only be available where the business is viable and where it may have disposable assets that can be turned readily into money in the short to medium term. Using this new product would allow the business time to sell such assets for better value than if the business had to go bankrupt. This solution will be linked to provision of business advice in conjunction with partnership ventures, such as Scottish Enterprise[31].

11.7 Whilst making a payment on a regular basis the partnership or the individuals involved can effectively consolidate all of their business debt and get on with their business in order to survive and trade out of their difficulties. Payment plans would be structured to allow the business to continue trading and would be based on sensible cash flows, sales and costs anticipating that things in the first year will be difficult and sales may indeed fall. The business would be liable for costs incurred in trading. The DAS Administrator or the continuing money adviser would not be liable for any on-going trading costs.

11.8 Where the business is not viable, access to a PTD or the high value bankruptcy would still be available. We also intend that where an individual accesses the new Business DAS for their viable businesses, they could simultaneously access a personal statutory debt relief or debt management product to deal with their personal debts. This could be linked to minimise duplication of costs and effort by the Business DAS administrator and trustee.

> Question 11.1 - Should a new Business DAS be developed for sole traders and non-limited liability partnerships where the business is assessed as viable?
>
> Question 11.2 – Should Business DAS exclude non-business debts?
>
> Question 11.3 - Prior to entering Business DAS, should business advice be compulsory?

[31] http://www.scottish-enterprise.com/about-us.aspx

Question 11.3a – If yes, who should provide that advice?

Question 11.4 - Should debt relief or composition be incorporated into the Business DAS and agreed with creditors at the proposal stage?

Part 12. Removal of non-contentious Creditor Petitions from Court

12. We propose that the courts are removed from non-contentious creditor and trustee in a trust deed petitions for bankruptcy (hereafter referred to as "creditor petitions" for ease of reference). At present, there is significant duplication of effort between two public sector organisations: the courts[32] and AiB. Removal of the courts from routine, uncontested procedures will minimise duplication and assist with our aims of effective government and equity. It is important to acknowledge that the courts will still play an important role in determining contested petitions.

12.1 Since the changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007, all creditor petitions for bankruptcy are presented to the Sheriff Court. At the same time as these petitions are presented to the court, a copy of the petition is sent to AiB. The court will issue a warrant to cite to attend a hearing. At this hearing the individual has an opportunity to show why bankruptcy should not be awarded. The sheriff has the right to reserve judgement on the award of bankruptcy and to request further information prior to making the award. The sheriff will decide whether to award or dismiss.

12.2 In the current creditor petition process two public sector organisations are involved in the administration of awards of bankruptcy, both requiring to maintain records and information, and both bearing the attendant costs. Furthermore, in some cases individuals become confused about who is dealing with their bankruptcy as they will be cited to appear by the court, then receive correspondence from the AiB.

12.3 To reflect a modern, efficient and cost effective method of enabling creditors to make an individual bankrupt, we propose to allow creditors to apply directly to the AiB to award bankruptcy against an individual. However, only non-contested creditor petitions would be considered for award by the AiB. The UK Insolvency Service are currently consulting on the same issue in England and Wales.[33] We understand that there has been some resistance expressed to this concept in England and Wales. Unlike in England and Wales, however, all debtor applications have been submitted directly to AiB for award since April 2008. This process has been very successful and resulted in substantial savings for the Court Service.

12.4 During 2010/11 there were 2,613 creditor petitions awarded[34]. These included petitions presented by; executors or individuals entitled to be appointed as an executor on a deceased individual's estate; a temporary administrator; a member

[32] http://www.scotcourts.gov.uk/
[33] http://www.bis.gov.uk/insolvency/Consultations/petition%20reform?cat=open
[34] http://www.aib.gov.uk/publications/annual-report-and-accounts-201011

State liquidator appointed in main proceedings; and a trustee acting under a trust deed.

12.5 Not all creditor petitions result in an award. Some petitions are withdrawn by the petitioner where the debt has been paid or arrangements have been agreed by the parties concerned. Approximately half of all creditor petitions presented to the court are not contested by the individual, resulting in the individual being made bankrupt.

12.6 We are proposing that in future all non-contested creditor petitions should be submitted to the AiB for an award decision to be made. As at present, the creditor must have completed due diligence and served on the debtor (by a sheriff officer) an intimation of the creditor's intention to apply for their bankruptcy.

12.7 We envisage that after the individual has been notified of the creditor intention to apply for bankruptcy, the creditor would complete an online bankruptcy application form. This would be submitted to the AiB, along with proof of the individual's apparent insolvency, proof of debt owed and proof of completed service of the intimation served on the individual.

12.8 We propose that the creditor must not make an application until at least 14 days have passed since service of the notice of intention to apply for bankruptcy. This time delay would allow the individual to make arrangement to pay what they owe or to indicate to AiB that they intend to contest the application. Where an individual indicated that they intended to contest the bankruptcy application, the AiB would refer this to the court and notify the interested parties.

12.9 The proposed process would be less cumbersome and time consuming for creditors. Currently creditors pay solicitors to present their petitions to court and pay court costs as well as paying a creditor petition fee to AiB. The proposed process could result in faster decision making and potentially financial savings for creditors as some of these costs would be removed.

> Question 12.1 - Should all creditor bankruptcy applications to make an individual bankrupt be submitted to the AiB?
>
> Question 12.1a – If no, should only non-contested creditor applications be considered for award by AiB?
>
> Question 12.2 – Where an application is submitted to AiB and the individual contests this, who should submit the application to the Sheriff Court for consideration?
>
> Question 12.3 - Where a creditor notifies an individual of their intention to make them bankrupt, what should the minimum period be that the creditor must wait before submitting the bankruptcy application to AiB?
> A) 14 days
> B) 21 days
> C) 28 days
> D) another period, please specify_____.

12.10 The current process to bankrupt the estate of an insolvent deceased individual is by petition of an executor, or a person entitled to be appointed as executor, to the court. If an executor does not bankrupt the estate within 6 months of the individual's death, the executor would then become liable for the debts.

12.11 We propose to change the process for making an insolvent deceased individual's estate bankrupt, by requiring an application to AiB. The application would still be initiated by the executor.

> Question 12.4 – Should the process of an executor petitioning to bankrupt the estate of an insolvent deceased individual be removed from the court, and replaced with an application to the AiB?

Part 13. Debtor co-operation

13. Currently, there are situations in which individuals in bankruptcy choose not to co-operate with their trustee. In such situations, the process for delaying their discharge requires an application to be made to the sheriff by the trustee or a creditor within 9 months of the date of sequestration. This is not always practical and may result in an individual receiving their discharge automatically.

13.1 In the future, we propose that co-operation of an individual is more closely linked to their discharge. The individual will be required at the start of the insolvency procedure on a debtor application to sign an agreement or contract setting out their duties and obligations during their bankruptcy. Where an individual is made bankrupt following a creditor petition, they will be given a notice to sign to agree to their duties and obligations. This will make it clear that failure to comply with the terms of the agreement may mean that their discharge will be deferred. In these cases the individual's access to debt relief will also effectively be deferred. Debt relief is a right that should be earned.

13.2 We propose that AiB will have the power to defer access to debt relief, where we or the trustee (if not the AiB) considers it appropriate, without the need to apply to a sheriff, by deferring discharge where an individual has not co-operated. An appeal process would be provided. This may be considered, for example, by a sheriff on appeal on point of law or tribunal or through the AiB's Policy and Cases Committee[35]. We acknowledge that there must be some form of separation of duties where AiB is trustee in these cases.

13.3 Where an individual has previously accessed a statutory debt relief product or there is evidence of reckless behaviour leading up to or during the term of the product, the trustee would consider whether a Bankruptcy Restriction[36] Undertaking or Order was appropriate. They could also consider whether to defer the individual's discharge.

[35] http://www.aib.gov.uk/publications/policy-and-cases-committee-terms-reference
[36] http://www.aib.gov.uk/guidance/publications/debtbankruptcy/bankruptcypostapril08/broguide

Question 13.1 – Should the co-operation of a bankrupt individual be linked to discharge?

Question 13.2 - If an individual has not co-operated, should there be a maximum period that discharge could be deferred?
A) 1 year
B) 3 years
C) 5 years
D) another period, please specify_____.

Question 13.3 - Where an individual cannot be located should discharge be deferred indefinitely?

Question 13.3a – If no, what period should the deferral of discharge be?
A) 1 year
B) 3 years
C) 5 years
D) another period, please specify_____.

Question 13.4 - Should the AiB have the power to defer discharge where an individual has not co-operated, without the need to refer to case to a sheriff?

Question 13.5 – Who should provide an appeals process?
A) the Sheriff Court
B) an independent tribunal
C) AiB's Policy and Cases Committee
D) other, please specify_____.

13.4 Treatment of debt

13.4.1 There are very few types of unsecured debt which are not able to be written-off through the bankruptcy process in Scotland. Currently, those debts that do survive bankruptcy include fines or other penalties due to the Crown, liabilities incurred by reason of fraud or breach of trust and obligations in respect of student loans.

13.4.2 Elsewhere in the world, where an individual has incurred a single debt in excess of £1,000, in the 90 days prior to them becoming bankrupt, these debts are not included in bankruptcy and not written-off. These excluded debts tend to be for non-essential luxury items or can be where the individual had no intention to repay. Currently, in Scotland, where there is evidence that an individual has been reckless leading up to bankruptcy, the trustee would consider whether a Bankruptcy Restriction Undertaking or Order report to AiB was appropriate.

13.4.3 We propose that the statutory debt relief products available in Scotland incorporate a similar exemption alongside the consideration of a Bankruptcy Restriction Undertaking or Order. This would mean that the individual would still be liable to repay these debts after their discharge.

Question 13.6 - Should other types of unsecured debts be excluded from the discharge?

Question 13.6a – If yes, what other types of unsecured debts should not be discharged and your reasons why?

Question 13.7 - Where an individual has incurred a debt within a specified period prior to their application for bankruptcy or the granting of a trust deed, should this debt be excluded from discharge?

Question 13.7a – If yes, should this be limited to debts for non-essential, luxury items or where it is proven that the individual had no intention to repay?

Question 13.8 - Where an individual has incurred a debt within a specified period prior to their application for bankruptcy or the granting of a trust deed and it is agreed that this debt will be excluded from discharge, what should the specified period be?
A) 4 weeks
B) 8 weeks
C) 12 weeks
D) another period, please specify_____.

13.5 The treatment of Child Maintenance Debts

13.5.1 Currently, in Scotland, arrears of child maintenance are included in a bankruptcy and any unpaid balance will be written off when the individual is discharged. The Child Maintenance and Enforcement Commission (CMEC)[37] believe that this disadvantages Scottish children whose parents live apart. Therefore they would like arrears of child support maintenance to survive the discharge of bankruptcy in Scotland as they do in England and Wales. They would also like this to apply to PTDs.

13.5.2 Claims for child maintenance arrears are accepted in Scottish bankruptcies and they allow an opportunity for the debt to be paid or part-paid, where sufficient monies are ingathered. Currently, claims are not accepted in England and Wales for child maintenance arrears. However, as part of welfare reform in England and Wales, we understand that consideration is being given to amend the legislation to allow arrears of child maintenance to be included in bankruptcy and to also survive bankruptcy.

13.5.3 The UK Government has raised this issue with the Scottish Government, asking that they legislate to make arrears of child maintenance survive bankruptcy and PTDs in Scotland. Scottish Ministers have asked CMEC to provide evidence to substantiate their claim that in England and Wales arrears of child maintenance that survive bankruptcy are paid after the bankruptcy has ended. To date no evidence has been provided.

[37] http://childmaintenance.org/

13.5.4 The Scottish Government has previously taken the view that bankruptcy should be available as a last resort for people who cannot pay their debts as they become due. This currently includes child maintenance arrears. We believe that it is important that bankruptcy should encourage financial rehabilitation, and this should include closure on outstanding debts. We do, however, recognise the impact that this may have on the parent with care, but in the absence of evidence this is difficult to substantiate.

13.5.5 Ministers are aware that current legislation may mean that an ex-partner may end up paying little or nothing of the maintenance arrears they owe to someone, but the bankruptcy process should ensure that they have paid what they can afford over a reasonable period, and that all creditors are treated fairly. Currently, where a trustee agrees a contribution from an individual's surplus income they allow for the payment of ongoing liabilities, including child maintenance.

> Question 13.9 - Should the child maintenance arrears continue to be claimable and to be discharged in bankruptcies and protected trust deeds when the individual is discharged?

13.6 The treatment of Credit Union Debts

13.6.1 Currently in Scotland, credit union debts are included in bankruptcies and PTDs and any unpaid balance will be written off when the individual is discharged. There are concerns that the effect of debts discharged in PTDs and bankruptcy could have adverse effects on the viability of credit unions. It has been suggested that credit unions could be afforded special protection from debt write-off.

13.6.2 As part of the review of PTDs taken in 2009[38], credit union debts were specifically examined. Of a total of 9,680 individual debts included in the sample, only 34 were owed to credit unions. From the information available the maximum number of cases per credit union amounts to five and the highest total debt due to any particular credit union was £14,462 spread over five cases. The total value of all debts owed to credit unions was £80,500. The largest individual credit union debt was £7,000 and the smallest individual debt was £450. In the review, credit union debts accounted for less than 0.2% of total value of debts owed in all PTDs in the sample.

13.6.3 Under the credit union legislation, credit unions are prohibited from charging more than 2% per month interest on their loan[39], which equates to around 26.4% APR. In a considerable number of cases, credit unions will only charge 1% per month. As a result of the low interest charged, credit unions are more likely to be impacted by unpaid debt than high interest lenders, as they must lend considerable sums to recoup their loses. For example a credit union would need to lend and recover over £350,000 in a year to cover the cost of £7,000 debt that is written-off.

[38] http://www.aib.gov.uk/publications/protected-trust-deed-review-2009
[39] http://www.scotland.gov.uk/Publications/2008/11/03160454/7

13.6.4 Credit unions have identified a number of cases where individuals have obtained a credit union loan immediately prior to becoming bankrupt or granting a trust deed that becomes protected. In some cases this period can be as little as two weeks.

Question 13.10 – Should credit union debts continue to be discharged in bankruptcies and protected trust deeds when the individual is discharged?

Question 13.11 – Should only credit union debts that were incurred by the individual within a specified period prior to them entering bankruptcy or granting a trust deed be excluded from discharge?

Question 13.11a – If yes, how long should this specified period be?
A) 4 weeks
B) 8 weeks
C) 12 weeks
D) another period, please specify_____.

Part 14. Modernisation of legislation

14. In order to ensure bankruptcy law in Scotland supports a modern service for debt advice, debt management and debt relief which is fit for the 21st century, the Scottish Government proposes to modernise parts of the current legislation which are outdated. Therefore, we will take forward consideration of the options regarding the unimplemented elements of the Bankruptcy and Diligence etc. (Scotland) Act 2007, e.g. Part 2 on floating charges[40]. Likewise, we will consider with stakeholders whether the devolved aspects of the Insolvency Act 1986 would benefit from further reform, following the limited amendments made recently by the Insolvency Act 1986 Amendment (Appointment of Receivers) (Scotland) Regulations 2011[41]. There is also a need to further re-evaluate some of the processes set out in the legislation. This will ensure that the legislation provides the mechanisms necessary to deliver an efficient and effective debt relief service and remove process steps that do not add value.

14.1 It is essential that bankruptcy law is accessible and practical to use and delivers procedures to assist those involved in bankruptcy. By utilising feedback from stakeholders, IPs and interested organisations we have identified a number of areas where the legislation requires modernising.

14.2 Consolidating Legislation

14.2.1 The essentials of the modern system of Bankruptcy had emerged by the Bankruptcy Act 1814. Successive Acts followed in 1839, 1851, 1856, 1913, 1985 and 1993. The 1985 Act was a major restatement of the law of bankruptcy in Scotland incorporating the Bankruptcy (Scotland) Act 1913, which had introduced summary sequestration, but otherwise had been a restatement of the Bankruptcy (Scotland) Act 1856. In turn the 1856 Act had been based on the Bankruptcy

[40] http://www.legislation.gov.uk/asp/2007/3/part/2
[41] http://www.legislation.gov.uk/ssi/2011/140/contents/made

(Scotland) Act 1839. The 1985 Act also repealed two Acts of the pre-Union Scots Parliament, namely the Bankruptcy Acts of 1621 and 1696.

14.2.2 As part of the modernisation programme, the Scottish Law Commission issued a consultation paper on the Consolidation of Bankruptcy Legislation in Scotland in August 2011[42]. The consultation period finished on 30th November 2011. The primary aim of consolidation is to bring earlier enactments on a given subject matter into one statute, making the law more accessible both to practitioners and to those affected by it. However, under Parliamentary procedures a consolidation Bill cannot make material policy changes. Any such changes would require a separate substantive Bill.

14.2.3 It is expected that the Commission will prepare a report containing recommendations for amendments to the existing legislation for modernisation resulting from the consultation responses. We aim to review these recommendations and incorporate them where appropriate. It is also our present intention that the consolidation Bill would follow the programme Bill, allowing for the whole to be brought into force together.

> Question 14.1 – Where material policy changes are identified by the Scottish Law Commission as part of their consultation on bankruptcy consolidation, should any recommendation they make regarding these be incorporated where appropriate?
>
> Question 14.2 - Do you agree that a consolidation Bill follow the programme Bill through Parliament?

14.3 Timeframe for Creditor claims

14.3.1 Trustees need to know the exact amount of debt that the individual owes in order to calculate the dividend due to each creditor and the amount to be ingathered from the individual's estate. At present there are varying timescales for the submission of creditor claims dependent on the debt relief product.

14.3.2 Creditors can release themselves from the burden of a debt owed by selling the debt on to a debt collection company. As a result the debt collection company would then be the creditor for this debt. It is common practice for some creditors to sell debt off after the individual has entered into a debt relief product.

14.3.3 Any delay in receiving a claim can impact on the calculation of dividends. If the evidence of debt claimed shows a different figure to that initially provided by the individual then a recalculation of a dividend would be required. This may mean that the trustee does not have the full information on which to base any decisions, such as whether to sell assets.

14.3.4 We propose that all statutory debt relief products should have the same requirement for creditors to submit a claim by a specified time. This issue was raised

[42] http://www.scotlawcom.gov.uk/news/making-bankruptcy-law-accessible/

at the Protected Trust Deed Working Group[43] and a timescale of 120 days was suggested and is included in the protected trust deed consultation[44]. Creditors should submit a claim within a specified number of days from notification by the trustee. This would enable trustees to make an earlier initial dividend payment where assets had been realised or sufficient contributions received. Where a claim was submitted outwith the specified number of days creditors would have to explain why this was not possible and possibly risk losing a dividend. The onus would be on the creditor to ensure that a claim is submitted complete with proof of debt, including their payment details, within the specified timescale.

Question 14.3 - Should creditors be required to submit a claim within a specified timescale?

Question 14.3a - If yes, what should this timescale be?
A) 60 days
B) 90 days
C) 120 days
D) another period, please specify_____.

Question 14.3b – If the creditor does not submit a claim within the agreed timescale, what should the penalty be?

14.4 Habitual Residence

14.4.1 The purpose of the habitual residence test is to ensure that persons from other nations do not actively take up residence in the UK with the sole aim of accessing debt relief.

14.4.2 Currently, the Bankruptcy (Scotland) Act 1985, as amended, states that an individual has to be habitually resident at the relevant time in order to gain the right to apply for bankruptcy. When deciding if an individual is habitually resident, consideration is given to their personal circumstances. Some of the factors considered include the individual's 'right to reside' in Scotland, their reasons for coming to Scotland and where the individual's 'centre of main interest' lies.

14.4.3 The term 'habitually resident' is not defined in legislation, but there is a substantial body of domestic and EU case law on what it means. As a result, while there are existing rules to apply, the criteria of 'habitual residence' can be complex, and open to interpretation.

14.4.4 We propose to introduce a habitual residence test with defined criteria for individuals who wish to apply for statutory debt relief in Scotland.

Question 14.4 - Should there be a defined habitual residence test for individuals who wish to apply for statutory debt relief in Scotland?

[43] http://www.aib.gov.uk/about/protected-trust-deeds-working-group
[44] http://www.scotland.gov.uk/Publications/2006/01/20093732/0

Question 14.4a - If yes, what aspects should be taken into account?

14.5 Modernisation of Information contained in the Register Of Insolvencies (ROI)

14.5.1 Historically the Court of Session was responsible for prescribing the form of the ROI by Act of Sederunt as the Accountant of Court was the Accountant in Bankruptcy and responsible for maintaining the ROI. Although changes have been made to bankruptcy legislation, the form the ROI must take has remained in the Act of Sederunt.

14.5.2 The information to be contained in the ROI is currently laid down in Appendix 2 of the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008[45]. If changes need to be made to the information contained in the ROI this must be put before the Sheriff Rules Council for their consideration.

14.5.3 We are considering removing Appendix 2 from the Act of Sederunt and placing it in regulations made by the Scottish Ministers subject to negative procedure in the Scottish Parliament under the Bankruptcy (Scotland) Act 1985. This is because we have progressively moved processes away from the court and this would be the next logical step. It will save on double handling by two public bodies whilst still retaining the system of checks and balances which will be provided by the Scottish Parliament.

Question 14.5 - Should the power to determine the form of the ROI be moved from the Act of Sederunt to regulations made under the Bankruptcy (Scotland) Act 1985?

14.5.4 There have been recent changes to the information to be recorded on the ROI to include the individual's date of birth (where known). We believe that this has helped users of ROI to correctly identify persons of interest. At present the ROI displays the individual's address at the date of bankruptcy as well as all known previous addresses. It does not, however, display any subsequent changes of address.

Question 14.6 - Should the ROI be updated after the award of bankruptcy to include the individual's current address where they have moved?

Question 14.7 – What, if any further information should be included on the ROI?

14.5.5 At present the ROI is a free public register which can be searched using an individual's name, town, or even general area. This may lead to a reluctance on the part of some individuals to apply for debt relief, even where it may be their best option, as they fear their details will publically available. This is a particular concern where individuals are at risk of violence.

[45] http://www.legislation.gov.uk/ssi/2008/119/schedule/appendix/2/made

14.5.6 We propose to make specific provision to allow certain details to be withheld from the ROI, especially where an individual is in fear of violence to themselves or a member of their household. Similar express legislation giving a clear basis for this exists in the England, Wales and Northern Ireland insolvency regimes as well as in other legislation where a person's details appear on a public register. There are also provisions in company legislation which provide for the individual's address to be withheld in situations where he/she may be at risk.

14.5.7 The ROI is primarily used by creditors who wish to find out if their customer is insolvent. We acknowledge that by withholding some details, for example an address, this may result in difficulties for creditors in identifying where they have an interest in a case or impact on other individuals. However, where a creditor could demonstrate to the AiB that they had an interest or potential interest in an individual, information could be released to them after some investigation.

> Question 14.8 - Should some details of an individual who is at risk of violence be withheld from the ROI?
>
> Question 14.9 - Are there any other categories of individuals whose details should be withheld from the ROI? Please specify.

14.6 Remove the supplementary questionnaire

14.6.1 The supplementary questionnaire (SQ) is used to gather further information from an individual during a face to face or telephone interview and contains questions relating to their financial circumstances. The SQ is used by AiB staff, their contracted insolvency providers where AiB acts as trustee in bankruptcy and by private IPs.

14.6.2 Currently, the SQ ensures a degree of consistency in the debtor interview process, but also duplicates some basic information already gathered from the debtor application form. The SQ is a useful tool in gathering information from individuals who were made bankrupt following a petition by their creditors as no background information as to the individual's circumstances is known prior to the award being made.

14.6.3 Since we propose that all individuals are assessed for a contribution using a common financial tool then we believe the SQ is no longer necessary. The SQ is not a statutory document and no changes to legislation would be required. AiB are seeking views however, given the proposed changes outlined in this document, whether the supplementary questionnaire should be retained.

> Question 14.10 - Is the SQ effective as an interview aid, or is something else required to replace it?
>
> Question 14.11 - Would the use of a common financial tool remove the need to collect further information on a supplementary questionnaire?

14.7 Recall in Bankruptcy

14.7.1 Changes to legislation introduced in 2008 required an application for recall of an award of bankruptcy to be made to the Sheriff Court rather than the Court of Session. This has led to some inconsistencies in the way the recall process is dealt with in the courts, with a lack of clarity as to who is responsible for distributing funds. For example, there have been cases where bankruptcy administration costs had not been recovered when recall was granted and funds distributed.

14.7.2 We are proposing that the legislation specifies who is responsible for distributing the monies to creditors where a recall of bankruptcy is granted.

> Question 14.12 - Where a recall of bankruptcy is granted, should the distribution process be clarified?
>
> Question 14.13 - Should the legislation be amended to ensure that the final interlocutor in a recall is withheld by the Court until it is confirmed that all relevant costs and creditors have been paid?

14.8 Interest rate on bankruptcy debts

14.8.1 When creditors are ultimately paid dividends on debts at 100p in the £ the current prescribed rate of interest payable on those debts, between the date of sequestration and the date of payment, is 8%. This post-procedure rate of interest has been prescribed since 1 April 1993, despite fluctuations in the Bank of England base rate.

14.8.2 The current provision setting out the prescribed rate is regulation 6 of the Bankruptcy (Scotland) Regulations 2008[46]. For commercial debts, the Late Payment of Commercial Debts (Interest) Act 1998[47] provides that interest is payable on debts due in order to protect suppliers whose financial position makes them vulnerable if their qualifying debts are paid late and to deter generally the late payment of qualifying debts.

14.8.3 In bankruptcy, there are very few cases where the dividend payable at the end of the bankruptcy is 100p in the £. Market conditions can delay the realisation of property or other assets for a long period. However, where sufficient assets are realised or contributions ingathered which allow a full dividend to be paid the time lapse in ingathering these funds can result in the interest charges being disproportionately high. Individuals entering a debt payment programme under the DAS have the interest on their debt frozen from the date of commencement although creditors may have to wait for a significant period before receiving the total due. However, these creditors are receiving regular payments towards the amount due. Although, dividends may be paid early in a bankruptcy case interest at 8%, or rate otherwise applicable, is prescribed where 100p in the £ is paid.

[46] http://www.legislation.gov.uk/ssi/2008/334/contents/made
[47] http://www.legislation.gov.uk/uksi/1998/2481/contents/made

14.8.4 In 2006, following a comprehensive review, the Scottish Law Commission's *Report on Interest on Debt and Damages*[48] was published. The draft Bill[49] that resulted from that work was the subject of a consultation exercise undertaken by the Scottish Government in 2008. Taking account of the responses to that exercise, we now propose that all post-procedure interest and charges are frozen on statutory debt relief products, similar to DAS.

Question 14.14 - Should the current prescribed rate of interest be retained?

Question 14.15 - Should all post-procedure interest and charges be frozen on statutory debt relief products?

Question 14.15a - If not, should the interest rate be linked to the Bank of England base rate?

14.9 Requirement for a sederunt book

14.9.1 The sederunt book is the national record of a bankruptcy in Scotland. Historically upon completion of a bankruptcy, the sederunt book was filed at the AiB and later forwarded to the National Archives and stored forever. In accordance with legislation one of the trustee's general functions is to maintain a sederunt book "during the term of office for the purpose of providing an accurate record of the sequestration process". The sederunt book can also be made available for inspection to interested parties.

14.9.2 The National Records of Scotland (formerly the National Archives of Scotland) have stated that storage space is no longer available for sederunt books. Furthermore, the sederunt book process is out-dated and time consuming on both the trustee and AiB considering the minimal number of interested parties who request access to view the sederunt book either during or post bankruptcy. More modern means of storage and retention of documents could be considered more appropriate.

14.9.3 We propose to only store key documents electronically. This information could be held in a secure area of the ROI, backed up off-site to ensure that the risk of losing key documents is minimised.

Question 14.16 - Should the requirement to keep a hard copy of a sederunt book be removed?

Question 14.16a – If yes, should the key documents be retained electronically?

Question 14.16b – What should the key documents include?

[48] http://www.scotlawcom.gov.uk/law-reform-projects/completed-projects/interest-on-debt-and-damages/

[49] http://www.scotland.gov.uk/Resource/Doc/209411/0055426.pdf

14.10 Change the date of sequestration – creditor petitions

14.10.1 Currently where an individual is made bankrupt following a debtor application, the date of sequestration is the date of award. Where a creditor or a trustee under a trust deed petitions for an individual to be made bankrupt, the date of sequestration is the date of the first warrant to cite. This is to protect creditors as any additional debt incurred by the individual during the period between the date of the first warrant to cite and the date of award will not be included in the bankruptcy. In some petitions, as an extra safeguard, the creditors ask the sheriff to appoint an interim trustee where the individual is trading or where there is a perceived risk of the individual disposing of assets.

14.10.2 The different dates has led to some practical difficulties in the handling of some bankrupt estates, especially where the sheriff has continued a hearing to consider additional information. This can result in a situation where an individual can be automatically discharged very soon after the award of bankruptcy. There have been occasions where an individual has reached their automatic discharge date prior to the award being made by the sheriff, ie the award was made over a year after the date of the first warrant to cite.

14.10.3 This has led to issues where the trustee has insufficient time to administer the bankruptcy or to allow them to apply to defer discharge of the debtor. To counter this problem the individual's discharge could be linked to when the award of bankruptcy is made by the sheriff, not the date of the first warrant to cite. This would mean that the period of the bankruptcy would still run for the full term and the creditor's interests would be safeguarded.

14.10.4 Alternatively, the date of sequestration could be the same as the date of award in all cases. In addition, as previously discussed, we propose to allow some debt to be excluded from any statutory debt relief product. This would provide some protection for creditors. A provisional trustee could also be appointed before the award to provide additional protection.

> Question 14.17 - Should the date of sequestration be the award date in both debtor applications and creditor petitions?
>
> Question 14.17a – If no, should the discharge date be linked to the date the award was made by the sheriff?

Introduce payment holidays into all statutory debt relief products

14.10.5 The Debt Arrangement Scheme (Scotland) Regulations 2011 introduced provision for a payment holiday variation of 6 months[50] for individuals who had experienced income shock. The legislation defines the criteria where an individual can apply for this (e.g. a period of unemployment, illness or divorce/dissolution of civil partnership.)

[50] http://www.legislation.gov.uk/ssi/2011/141/regulation/37/made

14.10.6 We propose to introduce a similar provision into all statutory debt relief products where a contribution is being made.

14.10.7 Introducing a payment holiday into statutory debt relief products would allow an individual to apply to their trustee for up to six months break from paying their agreed monthly contribution to allow them to recover from their situation. At the end of the period the individual's circumstances would be reassessed and an affordable contribution would be recommenced. It would be envisaged that the individual's discharge would be deferred for a period equal to the payment holiday, where appropriate, to allow the collection of further contributions.

> Question 14.18 - Should the ability to apply for a payment holiday be introduced to all statutory debt relief products?
>
> Question 14.19 - Should the period of the payment holiday be fixed at 6 months as it is in DAS?
>
> Question 14.20 - If a payment holiday is granted, should this period be added onto the length of the period before discharge?
>
> Question 14.21 - Should the criteria for a payment holiday be the same for all statutory debt relief products?

14.11 Removal of administration from the Courts

14.11.1 The Bankruptcy (Scotland) Act 1985[51], as amended (the 1985 Act), gives the Sheriff Court various roles in bankruptcy. Over and above creditor petitions for bankruptcy, there are around 2,000 orders made by the Sheriff Court each year in relation to applications under various sections of the 1985 Act. It is estimated that almost half of these interactions involve the sheriff or sheriff clerk in what can be considered an administrative role or, in some cases, a short chambers hearing. The remaining processes carried out by the courts are assigned to a sheriff who will hear arguments in open court from all parties involved and make a judicial decision.

14.11.2 Lord Gill, in the Scottish Civil Courts Review (SCCR)[52], described how many low value civil cases were being considered by busy sheriffs who were over-qualified to deal with them. Lord Gill recommended that a new third tier of judiciary should be created in Scotland, and made various recommendations for the kind of civil business which should fall within the competence of this third tier. The report also considered how legal disputes could be avoided in the first place or resolved without resort to the courts, as well as how to keep court procedures to the minimum necessary.

14.11.3 Courts are busier than ever and are under increasing pressure to process higher workloads with fewer resources. These pressures potentially mean that the

[51] http://www.legislation.gov.uk/ukpga/1985/66/contents
[52] http://www.scotcourts.gov.uk/civilcourtsreview/

service provided is less effective and access to justice may take longer than originally anticipated. This may result in more time being spent by sheriffs in chambers dealing with administrative-related work rather than higher value criminal and civil business.

14.11.4 We propose to remove the requirement for the Sheriff Court to deal with applications for various actions under the 1985 Act, by transferring responsibility for these processes to the AiB. Many of these processes are administrative in nature and are often dealt with in chambers, without the need for a hearing. Some applications to court under the 1985 Act result in a duplication of effort by two public sector organisations. By transferring these processes to AiB, court time could be freed up. However, any increase or decrease in the demand for legal services and court time cannot be quantified at present. The consultation process itself will help to clarify the position, with further work undertaken when working up the financial memorandum for any legislation subsequent to this consultation.

14.11.5 In recent years there has been increased concern about the number of applications processed by the Scottish Legal Aid Board and increasing costs to the public purse of legal aid fees. Where an individual has to attend a full court hearing, they may be able to apply for legal aid to cover some of their solicitor costs. Some of these actions could be dealt with by administrative processes and transferred to the AiB, which could result in savings for the public purse and to the court's time.

14.11.6 We acknowledge that there would need to be a separation of duties where AiB was also the trustee. This would be dealt with by a creating a stand alone division or decision making function to deal with these applications and orders, separate from day to day operation of AiB's case management functions.

14.11.7 In addition to making decisions on applications for orders that are mainly administrative in process, the AiB could potentially introduce a decision making, and adjudication function. The general principles behind this approach would be to provide the AiB with a system and framework for decision making which:

- is robust, transparent and fair,
- demonstrates and enhances accountability,
- is efficient, avoids duplication and unnecessary court costs and fees,
- contributes to effective learning and knowledge management/ transfer,
- promotes co-operative working/ shares elements of decision-making with stakeholders,
- promotes continuous improvement through opportunities to share and disseminate best practice,
- promotes consistency of practice,
- provides external scrutiny of the AiB's actions and decisions,
- ensures that the AiB continues to operate within Human Rights law.

14.11.8 Ultimately, the right of appeal to a sheriff in a wide range of circumstances could remain.

Administration only functions

14.11.9 We estimate that around three quarters of the court's current functions under the 1985 Act may be dealt with by sheriff in chambers and could be dealt with by an application and administrative decision-making process by AiB. This would account for around 1,500 of the 2,000 bankruptcy processes handled by the Sheriff Court each year (this figure does not include creditor petitions for bankruptcy). Around 900 of those 1,500 applications are made under section 63 (the power of a sheriff to cure a defect in proceedings).

14.11.10 These cases could come to a decision maker based at AiB, saving court time, reducing the length of time an applicant must wait for a decision, and may reduce legal costs. It is likely that efficiencies will be gained by handling all of these applications in a central location, as opposed to 50 Sheriff Courts. Contentious matters, defects arising in creditor petitions already before the courts and disputes over AiB decisions and appeals would still be referred to the sheriff.

> Question 14.22 - Should bankruptcy processes be removed from the Sheriff Court where the process is mainly administrative?
>
> Question 14.22a - If yes, should AiB have the power to make orders for these mainly administrative processes, with disputed decisions being referred to a sheriff?

Administration and extended decision making function

14.11.11 This option would see a wider range of applications being handled by AiB, including some that may currently be dealt with by a short hearing. A panel separate from the AiB decision maker, such as a new statutory Policy and Cases Committee[53] (made up of a number of representatives from industry bodies and from AiB), could consider both decisions on applications and review any AiB decision maker decisions that are disputed.

14.11.12 Some decisions on less serious matters could be final if reviewed and agreed by the Committee. It is likely that such a panel would sit at least monthly, and could be convened more often if required. There may be a case for some types of process currently based on chambers hearings, or matters that require advanced decision making (but not the full appeals process) to be passed to such a Committee.

> Question 14.23 - Should a panel, separate from the decision maker, decide the outcome of more complex applications and review disputed decisions?
>
> Question 14.23a - If yes, should the panel have the power to make the final decision in low value, straightforward cases?
>
> Question 14.24 - Should the make-up of this panel include representatives of a cross-section of stakeholders, such as IPs, Recognised Professional Bodies, Money Advisers, Solicitors, etc.?

[53] http://www.aib.gov.uk/publications/policy-and-cases-committee-terms-reference

Full decision making and hearing function

14.11.13 This option would see all bankruptcy processes currently dealt with by the Sheriff Court transferred to the AiB. Decisions would be made by a panel, such as a new statutory Policy and Cases Committee, where a hearing is currently required, with the panel having the discretion to hear parties if required. The panel would only refer to the sheriff on points of law or if it considered that a judicial decision was necessary. The panel would have a greater range of final decisions and would have to convene at least monthly. Consideration would also have to be given to the mobility of the panel, particularly if the applicant or any other party were domiciled in remote locations.

14.11.14 Where parties were required to be called, the panel could have the power to agree an adjustment period where parties could amend their applications prior to final decisions being made. This would give people time to amend their case based on any new information that had come to light and in some cases might avoid the need for a hearing at all.

14.11.15 Disputes raised in respect of decisions made by the panel could be considered by an independent adjudicator or tribunal, which would be entirely separate from the day to day operations of the AiB and separate from any decision maker.

> Question 14.25 - Should all bankruptcy processes currently dealt with by the Sheriff Court be removed to AiB, subject to appropriate appeals?
>
> Question 14.26 - If all bankruptcy processes were removed from the Sheriff Court, should an independent adjudicator or tribunal be formed to review disputed decisions?

Part 15. AiB role and powers

15. The proposed 'Financial Health Service' model includes a vision for AiB as the hub of the service. This position will allow us to take a strategic overview and ensure that AiB link in to world best practice to help inform continuous policy development.

15.1 AiB will aim to support and develop our staff to ensure that they are respected as a centre of knowledge and expertise in debt advice, management and relief. They will aim to work with partner organisations, encouraging efficient and effective delivery across the range of debt solutions, and to exercise their statutory role and ensure they act as an independent and honest broker. The new function of provision of advice would be effectively separated from the case administrative role in the bankruptcy and debt management processes, avoiding any conflict of interest.

15.2 AiB will work with the sector to develop a model for the provision of debtor education and rehabilitation, seeking to reduce the level of insolvency in Scotland and preventing repeat bankruptcies.

15.3 AiB will also strengthen our research capability to better understand the triggers of insolvency and will strive to improve the quality of service provided across the sector through our supervision of trustees.

15.4 AiB's role as a trustee in bankruptcies

15.4.1 The Bankruptcy (Scotland) Act 1993 amended the 1985 Act to allow the Accountant in Bankruptcy to act as a trustee in a bankruptcy. This change was to provide some control on the amount of public funds being spent on the bankruptcy process. Prior to this change public purse monies were used to pay private IPs to administer cases where there was insufficient funds to cover their costs and outlays.

15.4.2 It was envisaged at that time that private IPs would accept nomination as trustee only in those cases where there was funds in the bankrupt individual's estate to meet their fees and outlays. Alternatively, a creditor could underwrite the costs and outlays. In all other cases, where funds were not available, the AiB would act as trustee of last resort with the costs and outlays being met, wholly or in part, by the public purse.

15.4.3 Part 1 of the Bankruptcy and Diligence etc. (Scotland) Act 2007[54] introduced changes to the existing legislation for personal insolvency. Amongst these changes was the introduction of the Low Income Low Assets (LILA) route into bankruptcy. LILA bankruptcy cases (see part 10.5.20), by nature, are not anticipated to yield any dividend to creditors and as such AiB is deemed trustee in these cases.

15.4.4 For the year 2010/11, the AiB Annual Report and Accounts[55] shows that the AiB administers 87.5% of all bankruptcies, of which 53% are awarded through the LILA criteria. This year to the end of December 2011, there have been 8,414 awards[56] of bankruptcy, of which 3,608 have been made through the LILA route. Of the 4,806 awards that were not made through the LILA route, 41% have a private IP appointed as trustee. The AiB is trustee in 59%.

15.4.5 As the purpose of this consultation is to examine the principles and concepts of bankruptcy this is a good opportunity to test the rationale for AiB's role as trustee.

> Question 15.1 - Does the AiB acting as trustee in approximately 59% of bankruptcy cases, excluding LILA cases, have a positive impact on the existence of a healthy and competitive insolvency sector in Scotland?
>
> Question 15.1a – If no, should the AiB continue to act as a trustee in bankruptcies in Scotland?

[54] http://www.legislation.gov.uk/asp/2007/3/contents
[55] http://www.aib.gov.uk/publications/annual-report-and-accounts-201011
[56] http://www.aib.gov.uk/news/releases/2012/01/press-release-scottish-insolvencies-third-quarter-2011-12

Question 15.1b – If the AiB should continue to act as trustee, should she act only as trustee of last resort?

Question 15.2 – Where the AiB is trustee and asset realisations and contributions in a bankruptcy case do not meet the cost of case administration, how should any shortfall be funded?

Question 15.2a – Where the AiB is trustee, should bankruptcies which can cover the costs of administration subsidise those which cannot?

Question 15.2b – If no, should bankrupts be required to cover the minimum costs of administration?

15.5 AiB's supervisory powers

15.5.1 We intend to strengthen the powers of AiB in relation to supervision of trustees in all personal debt relief products. The current legislation gives AiB the powers to supervise trustees and to issue directions to them where necessary, although this power has not always been widely used to date, and there are some restrictions on its use. We propose that the AiB consider the use of her powers more actively and apply a more rigorous approach to tackling inappropriate actions by trustees described below.

15.5.2 The AiB has a statutory duty to supervise the performance of trustees and commissioners. As part of her role the Accountant, as detailed in section 1A of the Bankruptcy (Scotland) Act 1985, as amended (the Act), the AiB has a statutory duty to supervise the process of personal bankruptcy and PTDs to ensure those authorised to administer these processes act in accordance with the functions conferred on them by the Act or any other relevant legislation.

15.6 Accountant in Bankruptcy's current supervisory role

15.6.1 AiB's supervisory functions were enhanced by changes introduced in 2008[57] which gave AiB the authority to direct a trustee in the administration of a PTD.

15.6.2 The legislation also places trustees in a bankruptcy under a statutory duty to provide such information as the AiB considers necessary to enable her to discharge her functions under the Act. The Protected Trust Deed (Scotland) Regulations 2008[58] extended this requirement to trustees under a PTD in respect of specific documents that must be supplied to the AiB.

15.6.3 Whilst the AiB supervises other trustees, the level of supervision is not equal to that in PTDs. The current legislation restricts AiB's supervisory role for trustees of bankruptcies to ensure they complete their statutory obligations. Where the legislation so provides, trustees are allowed to use their discretion.

[57] http://www.legislation.gov.uk/ssi/2008/334/contents/made
[58] http://www.legislation.gov.uk/ssi/2008/143/contents/made

15.6.4 We consider that the current supervisory role may not always be sufficient to ensure that statutory obligations are being met by trustees in all cases. We consider that a more proactive role in the supervision of bankruptcy cases is now appropriate. We also consider that there may be modifications or enhancements required in the supervision of PTDs.

15.6.5 At present, there is no mechanism to gather information from bankruptcy cases where the trustee is an IP. As a result no robust information is ingathered on, for example, how many cases contain heritable property. Furthermore, it is difficult to identify trends or identify good or bad practice which could assist in producing updated legislation and guidance. A revised supervision regime would help to drive up standards across the sector and support trustee assertions that the sector is well managed, professional and that all staff are trained to high standards.

15.6.6 We propose, therefore, that the changes we intend to make to the current supervision regime will be to procedure and practice, rather than legislative. There is however scope to make legislative amendments, where it is identified that clarity in responsibilities and duties could be achieved.

15.6.7 Currently the legislation provides the AiB with a wide discretion in her duties of supervision, including allowing the AiB to give general directions to a trustee. Whilst the legislation compels the trustee to act on this direction, they may choose to disregard the direction, if based on their assessment of the circumstances of the case, they do not consider that creditors will benefit. This leads to uncertainty over the authority of the AiB in respect of trustees in bankruptcy.

15.6.8 We propose that a panel, such as the Policy and Cases Committee[59] (made up of a number of AiB and external representatives), or a supervision panel, could review cases where directions are not adhered to. This panel could advise AiB or formally be given the power to make an order on failure to comply with direction, and decide on an appropriate course of action - for example, remove the trustee from office, censure the trustee, or simply to refer the case to the Recognised Professional Body (RPB) which regulates an IP for action (see 15.7.4 below). This would be a separate decision making function from the supervision and compliance function and could apply to directions under both PTDs and bankruptcy, with contentious matters and disputes over decisions referred to the Lord Advocate or the sheriff as at present.

> Question 15.3 - Should AiB have a more proactive role in the supervision of all debt relief products?
>
> Question 15.4 - Where the AiB makes a direction which is not adhered to by the trustee, should an AiB panel decide on an appropriate course of action?

[59] http://www.aib.gov.uk/publications/policy-and-cases-committee-terms-reference

15.7 Regulation of Insolvency Practitioners in Scotland

15.7.1 The current UK regulatory system for IPs is reserved to Westminster, and falls within the functions of the UK Insolvency Service (UKIS)[60]. The UKIS oversees the regulation of IPs in England, Wales and Scotland, working with RPBs who authorise and monitor the work of IPs. The Secretary of State also directly authorises a number of IPs, a process managed by UKIS. We acknowledge, however, that this is currently being reviewed.

15.7.2 There are seven RPBs authorised by the UK Secretary of State. The UKIS monitors the regulatory activities of the RPBs to ensure that the sector is regulated effectively. These regulatory activities are carried out in accordance with a Memorandum of Understanding between the UKIS and the RPBs[61]. The Memorandum sets out the principles covering the granting of authorisations, ethics and professional standards, the handling of complaints, retention of records, and the disclosure of regulatory information to other RPBs and to the Secretary of State.

15.7.3 The UKIS therefore supervises the RPBs to ensure adherence to the principles set out in the Memorandum.

15.7.4 Those recognised bodies are:

- **ICAEW** - Institute of Chartered Accountants in England & Wales
- **ACCA** - Association of Chartered Certified Accountants
- **IPA** - Insolvency Practitioners Association
- **LS** - Law Society of England & Wales
- **LSS** - Law Society of Scotland
- **CAI** - Chartered Accountants Ireland (formerly known as the Institute of Chartered Accountants in Ireland)
- **ICAS** - Institute of Chartered Accountants of Scotland

15.7.5 An individual who is authorised as an IP under associate or affiliate schemes is subject to the relevant RPB's professional rules and regulations and their regulatory and disciplinary schemes[62].

15.7.6 Responsibility for taking regulatory or disciplinary action against an IP is that of the RPB. The RPBs have a range of sanctions they are able to take which are embodied in their professional rules and regulations. These range from withdrawing an IP's licence, imposing financial penalties or restricting an IP's licence (e.g. prohibiting the practitioner from accepting further appointments of a particular type of insolvency). Sanctions imposed on IPs vary between the RPBs.

15.7.7 For those IPs directly authorised to practice by the UK Secretary of State, UKIS may impose sanctions using powers determined by law. The UKIS may

[60] http://www.bis.gov.uk/insolvency
[61] http://www.bis.gov.uk/insolvency/insolvency-profession/Professional%20conduct/memos-of-understanding/mou-consistency-in-authorisation-of-IPs
[62] http://www.legislation.gov.uk/ukpga/1986/45/part/XIII/crossheading/restrictions-on-unqualified-persons-acting-as-liquidator-trustee-in-bankruptcy-etc

ultimately withdraw authorisation if the circumstances of the case indicate this level of sanction.

15.7.8 Where an IP challenges a decision of an RPB, the challenge is managed under the RPB's professional rules and regulations, and ultimately can result in judicial review of the RPB's decision. For those practitioners authorised by UKIS, a challenge to a decision to refuse or withdraw an authorisation can be referred to the IPs Tribunal.

15.7.9 The aim of the UK Memorandum of Understanding between UKIS and the RPBs is to achieve consistency in the authorisation and regulation of IPs.

15.7.10 It contains a general statement to the effect that an RPB will disclose 'relevant information', either when requested to do so by the UK Secretary of State, or when it appears to the RPB that the information should be disclosed to enable the UK Secretary of State to carry out his regulatory duties.

15.7.11 There are also more specific reporting requirements. These include a duty to notify the UK Secretary of State promptly when an RPB proposes to withdraw an IP's authorisation on the grounds that he or she is no longer fit to retain authorisation, when disciplinary or regulatory action has been taken, when an RPB becomes aware of any significant change in an IP's circumstances, or where an IP appeals against disciplinary or regulatory action.

15.7.12 At present, the Scottish Government has no formal role in respect of the regulation of IPs, although the AiB does have responsibility for supervision of the IPs' functions in bankruptcy. In terms of the Bankruptcy (Scotland) Act 1985, the AiB is responsible for supervising the performance of interim trustees and trustees other than the AiB, trustees under PTDs, commissioners, and also for investigating complaints against trustees and commissioners.

15.7.13 Trustees in bankruptcy are required to provide the AiB with specific documents, notices, statements, accounts and reports at various stages of the insolvency process. While there are various requirements on trustees and others to provide documents there is no requirement to provide the AiB with information on request, and no express requirement on the RPBs to provide the AiB with any information.

15.7.14 The AiB is unable to ascertain if action is being taken by the RPB in respect of any complaints received against their members. Consequently, the AiB does not know whether any RPB members have, for example, been issued with a directive to act, the reasons behind any given directive, or the findings of any examination into AiB cases.

15.7.15 There is currently no basis upon which RPBs could be compelled to provide the AiB with the same information provided to UKIS under the Memorandum. Furthermore, the provision of such information from UKIS to the AiB falls outside the stated purpose of the Memorandum.

15.7.16 As AiB have no power to insist on information from RPBs, and RPBs have no statutory requirement to provide information to AiB, there is difficulty in both identifying trends in practice and in responding to them when they are identified by sources outwith the sector. With no formal role in the regulation of IPs, the Scottish Government has a limited role in influencing change. Consequently, where it is identified that changes in practice are required, amendments to regulatory requirements do not proceed as promptly as some stakeholders would prefer.

15.7.17 AiB is responsible for supervising trustees on an ongoing basis, and must respond to letters and complaints received by the AiB or Scottish Ministers, by investigating the actions of the trustee where necessary. Whilst the supervisory role of AiB should complement the RPB monitoring process, there is a risk of the duplication of work where RPBs are already addressing concerns through monitoring, or dealing with complaints against IPs.

15.7.18 A Scottish framework for the regulation of IPs would result in more active management of the sector from a Scottish perspective and may allow for a swifter response to areas where changes to practice or legislation are required. As the regulation of IPs is a reserved matter, such a framework is not possible within the current devolved powers of the Scottish Government. It is clear however that alongside any proposals for further devolution, an opportunity to allow the Scottish Government, through the AiB, to regulate IPs in Scotland could be considered.

15.7.19 Whilst regulation in Scotland is an aspiration for the future, some of the challenges identified in duplication of monitoring work and the deficiencies in awareness of RPBs actions in respect of their members could be resolved now. The supervision process could ultimately be enhanced to ensure that it complements the RPB monitoring process, avoiding duplication in areas where it is clear that monitoring activity is taking place.

15.7.20 There could, for example, be an agreement between RPBs and the AiB to share certain types of information related to regulatory and supervisory activities. This could allow poor practice to be highlighted and dealt with at an early opportunity and allow for the sharing of information on best practice throughout the sector.

> Question 15.5 - Should Scottish Ministers have the power to regulate Scottish Insolvency Practitioners?
>
> Question 15.5a - If yes, should this be managed through Recognised Professional Bodies who would monitor and regulate Insolvency Practitioners?
>
> Question 15.6 - Do you think that the current Memorandum of Understanding between the UK Insolvency Service and Recognised Professional Bodies should be redrafted to allow the provision of information to AiB on regulatory activity related to Scottish cases?
>
> Question 15.7 – Should there be an information sharing agreement between AiB and the Recognised Professional Bodies which have members who take on insolvency work from clients based in Scotland?

15.8 Liquidator of last resort for Scotland

15.8.1 Compulsory liquidation, also known as winding up by the court, takes place when a petition is made to court for an order for a company to be wound up, normally because the company is unable to pay its debts. These petitions are generally presented by creditors who are due payment from the company where they believe it may be unable to pay its debts. Petitions may also be presented by, for example, the company itself, the UK Secretary of State or the Financial Services Authority.

15.8.2 Compulsory liquidations in England and Wales are dealt with by an Official Receiver (OR) who will manage the case and may arrange for the appointment of an IP to act as the liquidator, if appropriate. Whilst a creditor of a Scottish company can present a petition to a court in Scotland for the compulsory liquidation of a company, there is no OR in Scotland, nor is there an equivalent office holder.

15.8.3 The OR is a civil servant who acts on directions, instructions and guidance from the Inspector General of the UKIS. The OR is a statutory office holder and also an officer of the courts to which he or she is attached. The OR is therefore answerable to the courts for carrying out the courts' orders and for fulfilling his or her duties under the law. There are 42 ORs in England and Wales.

15.8.4 The role of the OR is currently carried out by the UKIS and this role covers both personal and corporate insolvency.

15.8.5 In English and Welsh personal insolvency cases, the OR may be appointed as interim receiver at any time after a petition for an insolvency order has been presented. In Scotland the equivalent role may be carried out by the AiB or an IP.

15.8.6 In corporate insolvency cases, the OR becomes the interim liquidator when the court makes a winding up order against a company in England and Wales. In Northern Ireland the role of the OR is a devolved power which is carried out by the Department of Enterprise, Trade and Investment. In Scotland the role of interim liquidator exists, but has to be carried out – as all corporate insolvency appointments are – by an IP. This can create challenges for Scottish companies and their employees. This is because, where there is no prospect of receiving a fee for work done as interim liquidator an IP may be understandably reluctant to take on the case, and it may be left in limbo without an OR to take on this role. Therefore, liquidation will not take place so the chance to investigate etc. is lost.

15.8.7 The company director(s) must give the OR information about their company's affairs, dealings and transactions and will be interviewed by the OR who will examine their business records and any other information about their financial affairs. The OR will also make background enquiries of banks, accountants, solicitors and others who have had dealings with the company. In every case, the OR reports to creditors and to shareholders in winding up cases giving details of the assets and liabilities listed by the director(s) or the partners.

15.8.8 Depending on the nature and monetary value of the assets, the OR may arrange a meeting of the creditors and a meeting of contributories in a company to consider appointing a private-sector IP as a liquidator in his or her place. Alternatively, the OR may consult the creditors but ask the Secretary of State to appoint an IP.

15.8.9 If an IP is appointed as liquidator, the OR will hand over the administration of the case to the IP. If no IP is appointed, the OR acts as the liquidator to sell any assets, distribute the proceeds to creditors and complete the administration of the estate.

15.8.10 Whether or not the OR continues as liquidator, he or she remains responsible for investigating the insolvent director's conduct and affairs. ORs have wide-ranging legal powers to acquire the information and documents they need, including the power to hold public examinations in court to obtain information[63].

15.8.11 When the OR has completed the administration as liquidator, and has been formally released from his or her duties, his or her responsibility as liquidator continues by virtue of the office. The OR will deal with enquiries and with any assets that may later come to light or had previously remained unsold.

15.8.12 The UKIS's current consultation 'Reform of the process to apply for bankruptcy and compulsory winding up'[64] (see section 12.3 above) is looking at removing creditor petitions and non contentious winding up petitions from the court service in England and Wales, with the UKIS, in most cases, taking over the administration of these petitions.

15.8.13 Should this change be adopted this would create a further disparity in the corporate insolvency process as creditors will have to continue petitioning for the liquidation of Scottish companies through the Scottish Courts.

15.8.14 Scottish Ministers are currently considering the proposals within the Scotland Bill[65]. The Scotland Bill is a UK Bill which is passing through the Westminster Parliament and seeks to re-reserve some aspects of corporate insolvency currently devolved to Scotland. Although Scottish Ministers are not supportive of these proposals, if they are accepted, policy responsibility for corporate insolvency will transfer back to UKIS.

15.8.15 The UKIS consultation asks for views on whether there is a need for a Liquidator of Last Resort in Scotland and asks whether the proposed reforms would work more effectively if there was such a Liquidator in Scotland.

15.8.16 In Scotland the compulsory liquidation procedure is similar to the process of compulsory liquidation in England, Wales and Northern Ireland but there are important differences. Under the Scotland Act[66], there is a complex division of

[63] http://www.legislation.gov.uk/ukpga/1986/45/section/133
[64] http://www.bis.gov.uk/insolvency/Consultations/petition%20reform?cat=open
[65] http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0079/lbill_2010-20120079_en_1.htm
[66] http://www.legislation.gov.uk/ukpga/1998/46/contents

responsibility in this area with in particular the process of winding up devolved, but many other aspects of corporate insolvency reserved to Westminster.

15.8.17 Compulsory liquidation is often used in Scotland to facilitate the sale of the business or the assets of a company that has become insolvent. It can be instigated by the company, the directors or by the company's creditors.

15.8.18 A creditor would usually start the process by serving a statutory demand for the payment of a debt of £750 or more. If the demand is not met, the creditor may petition the court to wind up the company. The court may subsequently make a winding up order.

15.8.19 As there is no OR in Scotland, all liquidations are dealt with by licensed IPs granting the winding up order the court appoints an IP as interim liquidator. The interim liquidator then convenes a meeting of creditors to appoint a liquidator, who may or may not be the same person as the interim liquidator. The IP is required to consent, in writing, to their nomination as liquidator. The court cannot grant a winding up order where no IP agrees to act as liquidator. This creates an unsatisfactory situation where the company, and its staff and creditors, are left in limbo.

15.8.20 In the financial year 2010/11 there were 733 compulsory liquidations recorded in Scotland. In recent years this has increased from around 400 per year. Currently, creditors in Scotland only have to pay their solicitor's costs and a petitioning fee to the court, which together is around £350 to £500. The costs of the IP appointed would be taken from the assets ingathered or be paid by the creditor, if the creditor has agreed to underwrite them. Although there are individual creditors that petition, the majority of compulsory liquidations are instigated by HMRC. Local authorities petition in only around 5% of cases.

15.8.21 Creditors are reluctant to petition for compulsory liquidation of a company if they are unsure of the value of assets, as the cost of IP fees can be prohibitive if assets cannot be realised. As a result there are around 150 to 200 companies in Scotland that cease trading every year, owing substantial sums to creditors, which are never formally wound up or investigated.

15.8.22 There would be clear benefits to the introduction of an OR role in Scotland. These benefits would particularly affect:

> Creditors – Each case investigated by a Scottish OR may result in a return for creditors. The investigation of a director's conduct may prevent rogue directors from setting up a new company and repeating bad practice. Currently there is no legislation to deal with the situation where the existing IP is unable to continue to act, and has been unable to find an alternative IP to take over the position. The winding up process is therefore left in limbo. The OR could take up the role in such a circumstance.
>
> Employees – Employees have no claim against the Redundancy Payments Office (RPO) for unpaid wages and entitlements where an employer/ company is not wound up. A company will not be deemed legally insolvent if it has not

entered an insolvency process. The alternative is to sue the company. If the company has no assets this is unlikely to succeed. If however the company is wound up, the employees can make a claim against the RPO, who will make payment to the employees. The RPO will stand in the shoes of the employee against the company up to the statutory level of payments to the employees. The employee will then have a claim against the insolvent company for the balance of unpaid entitlements. At least some funds flow to the employee within weeks of the winding up order.

Insolvency Practitioners – When appointed to a case by OR, IPs would have more certainty that taking on a case will result in realisable assets, and a means to recover their fees.

15.8.23 When a creditor presents a petition for the liquidation of a company in England and Wales, they must pay a deposit to cover the costs of investigating the company's finances. The UKIS has set a single case administration fee for compulsory liquidation cases which are recovered in part from the deposit paid by the creditor.

15.8.24 A similar model could be adopted in Scotland, with the balance of administration costs, if any, recovered from the assets realised in the case. However, as many as 50% of cases have few or no assets. If full cost recovery to the public purse is desired, the fees collected from cases with assets would require to be sufficient to cover the administration of those in which no assets are identified.

15.8.25 If AiB were to become the OR in Scotland, cases with no assets, or low value assets, could be formally wound up, with AiB responsible for the investigation of these companies. A minimum administration procedure could be adopted when, after initial investigation, it is clear that no assets exist. For these cases, the cost of administration could be minimised.

15.8.26 In addition, AiB could be appointed as liquidator in cases where the Secretary of State has made a decision to petition for winding up of a company in the public interest.

15.8.27 Whilst the AiB would fulfil the role of OR, the administration of cases could be dealt with by IPs under a contract similar to that which exists for personal insolvency. This would allow AiB to contract out cases where there was a likelihood of a small return to creditors, whilst controlling the cost of administering these cases.

Question 15.8 – Should there be an office of the Official Receiver in Scotland?

Question 15.9 - If the role of the Official Receiver in Scotland is devolved to the Scottish Government should this role be carried out by the Accountant in Bankruptcy?

Question 15.9a - If no, who should carry out this role?

Question 15.10 - If there was an office of the Official Receiver in Scotland, how should this be funded?

Appendix 1 - Common Financial Tool case studies

To assist readers' understanding of how a common financial tool currently works and how it compares with other models used to calculate an individuals' income and expenditure and potential contribution, an analysis of a small sample of current bankruptcy cases was undertaken. It is acknowledged that this sample is particular to cases where AiB is trustee and the results may differ where an insolvency practitioner is trustee.

The following pieces of information were recovered from a random sample of 100 bankrupt debtors, where AiB is the trustee and where an Income Payment Agreement is in place:

- Number of adults and additional adults
- Number of children under 14
- Number of children aged 14-18
- Presence of car
- Monthly income
- Monthly rent/mortgage
- Any other items termed essential expenditure by CFS rules (e.g. secured loans, buildings/contents/life insurance, council tax, gas/electricity/other fuel, TV licence, court fines, child support, Hire Purchase costs, child/adult care costs)
- Allowed expenses as calculated under CCCS rules, and contributions set.

The debtor sample data can be broken down into family groups as shown in table 1:

Table 1: Sample data broken down into household profile

Profile Category	Profile	Number of Cases
A	Single person, no dependents	41
B	Single person, one dependent	16
C	Single person, two dependents	14
D	Couple, no dependents	15
E	Couple, one dependent	4
F	Couple, two dependents	6
Other	Couple, three dependents	1
Other	Single person, three dependents	3

Table 2 breaks the data down by number of adults in the household:

Table 2: Sample data broken down by number of adults per household

Household profile	Number of Cases
1 adult	74
2 adult	26

Finally, note that 33% of the households have a car, and 29% of households have satellite TV.

CCCS Assessment Model

The Foundation for Credit Counselling is the umbrella charity for CCCS in the United Kingdom. CCCS is able to help people with debt problems wherever they live through its free national telephone service, ten regional centres and online CCCS Debt Remedy. CCCS produce budget guidelines on discretionary expenditure.

The assessment models from both CCCS and CFS contain budget guidelines for certain areas of discretionary expenditure. In assessing a particular case, individual budget items can exceed the relevant guideline or trigger figure if there is good reason to. This should still be accepted by creditors when the final contribution is set.

Average monthly income over the 100 sample households = £1,255.06.
Average total expenditure allowed by the CCCS assessments = £1,083.55
Average disposable income over the 100 sample households = £141.51

79 of the cases had a contribution set – 21 cases had no contribution set.

Total ingathered per month = £ 11,500.99
Total ingathered per year = £138,011.88

CFS Assessment Model

In 2000, the British Bankers' Association (BBA) and some of its members worked with the Money Advice Trust (MAT) and its Partner Agencies to pilot a 'Common Financial Statement' (CFS) to standardise the way money advisers and their creditors communicate with each other about repayment offers. Members of the BBA have agreed to accept the MAT/BBA financial statement principles.

Average monthly income over the 100 sample households = £1,255.06.
Average total expenditure allowed by CFS rules = £1,101.33.
Average disposable income over the 100 sample households = £123.73

CCCS versus CFS: real assessment comparison

In 46% of cases the CFS model was the most generous to the debtor.
In 37% of cases the CCCS model was the most generous to the debtor.
In 17% of cases it made no difference which model was applied.

Considering the variation between allowed expenses under the real CCCS assessments and the converted CFS assessments, on average the CFS model affords a debtor 1% more in total allowed expenditure.

Table 3: Comparison of CCCS and CFS models of total expenditure, with actual CCCS expenditure allowed, for both the total sample data and across the individual household profiles outlined in Table 1.

Sample profile	Average **CFS maximum** expenditure allowed	Average **CCCS guideline** expenditure allowed	Average **CCCS maximum** expenditure allowed	Average **actual CCCS** expenditure allowed
All cases	£1,371.54	£1,076.30	£1,257.52	£1,083.55
A	£1,067.90	£883.02	£1,008.24	£902.00
B	£1,374.56	£1,127.86	£1,325.99	£1,130.22
C	£1,474.12	£1,131.45	£1,378.30	£1,186.88
D	£1,510.34	£1,092.55	£1,251.55	£1,047.30
E	£1,942.42	£1,426.92	£1,694.92	£1,355.17
F	£1,886.96	£1,348.28	£1,637.28	£1,399.32

Table 4: Comparison of relative generosity of theoretical maximum expenditure under CFS and CCCS guidelines

Sample profile	Average % the CFS maximum expenditure is more generous than the CCCS maximum by
All cases	8.2
A	6.2
B	3.6
C	6.6
D	17.4
E	13.0
F	13.6

Table 5: Comparison of generosity of CFS assessments against real CCCS assessments for different household profiles

Sample profile	Most generous model?	By what average percentage?	Case percentage where CFS most generous	Case percentage where CCCS most generous	Case percentage where same generosity
All cases	CFS	1.0	46	37	17
A	CCCS	2.1	29.3	56.1	14.6
B	CFS	2.6	62.5	31.3	6.2
C	CFS	1.7	50	42.9	7.1
D	CFS	2.7	53.3	6.6	40.0
E	CFS	1.2	50.0	0.0	50.0
F	CFS	2.6	66.7	16.7	16.7

Fixed percentage of net income contribution model

The fixed percentage of net income contribution model simply assumes that all debtors pay a fixed percentage of their net income towards their bankruptcy. It makes no other differentiation between debtor's circumstances and it does not attempt to ascertain whether the debtor has sufficient surplus to pay. To compare such a model to the real CCCS data the fixed percentage applied is varied to see how much would be ingathered. At the same time, by determining the contribution from this percentage and subtracting it from the debtor's income an allowed expenditure can be calculated and then compared to that actually allowed under the real CCCS assessment, to see how the generosity compares between the two when the fixed percentage used increases.

The results of this comparison are displayed in table 6.

Table 6: Comparison of fixed percentage of net income contribution model against real CCCS data

Fixed % of net income	Total ingathered per year	% change compared to real CCCS ingathered per year	% cases where fixed rate model more generous to debtor	% cases where CCCS model more generous to debtor
5	£75,303.53	-45.4	54	46
6	£90,364.23	-34.5	52	48
7	£105,424.94	-23.6	48	52
8	£120,485.64	-12.7	45	55
9	£135,546.35	-1.8	44	56
10	£150,607.06	9.1	43	57
11	£165,667.76	20.0	40	60
12	£180,728.47	31.0	40	60

Table 6 shows that in order to ingather approximately as much as the CCCS model currently employed, the fixed percentage would need to be set at around 9%. Doing so would mean that, in 56% of the cases, debtors would be subject to harsher maximum expenditure limits than they currently are.

It may be argued that 9% of net income is too much to remove from the average debtor without due consideration of the actual expenditure of that household. However, reducing the fixed percentage applied would greatly impact on the amount ingathered, and at the same time it does not vastly decrease the proportion of cases where debtors would be subject to harsher maximum expenditure limits than currently are (it only decreases from 56% to 46% under a 5% fixed percentage). There is a reasonably well-defined split in the sample debtor population between those who have a very small surplus, and thus where their budget must be analysed very carefully to set a contribution, and those who have a very large surplus where perhaps it is more prurient to simply take a percentage of it rather than analyse their expenditure to the much more frugal standards of CCCS.

These two points together suggest that perhaps a sliding scale may be more appropriate in practice.

Sliding scale percentage of net income contribution model

The sliding scale percentage of net income contribution model attempts to correct for the fact that clearly some debtors are much more able to pay than others, and yet still maintains the desire to see everyone pay something, regardless of income and/or surplus available. To do so the percentage of net income taken as a contribution is set in relation to the total net income per year.

Creating such a model in reality would be a complex and detailed process in itself, and thus the sliding scale model here should be treated as an example of how it might work in practice.

The basic rationale is that the minimum income is Jobseekers' Agreement, which is currently set at £67.40 per week which equates to approximately £3,505 per year. Anyone with less income than this is considered not to have to make a contribution. For people on or just marginally above this level, they are required to pay a contribution of 6%. This sounds like a considerable amount but in reality equates to £4 per week. As the income increases the contribution percentage increases.

In reality the model is complicated by the various tax brackets and so perhaps a more accurate sliding scale model would work on gross incomes rather than net income, but the point is to introduce the idea at a first-principles level without getting bogged down in determining the exact contribution levels, when such an approach would require a considerably more detailed statistical methodology anyway.

Applying the contribution levels as defined in table 7 to the sample data, the total ingathered would be £156,948.92 per year, which is 13.7% more than the money ingathered under the CCCS assessments. In 45% of cases the sliding scale model affords the debtor larger expenditure and in 55% of cases the CCCS model allows the debtor larger expenditure, so arguably there might be some scope to increase the contribution percentage at some levels or decrease the threshold applied.

Table 7: Hypothetical example of "sliding scale" model for defining contributions from net income

Net income per year	Contribution percentage	Contribution (per month)
< £3505	0.0	£0
£3505 - £5000	6.0	£17.53 – £25.00
£5000 - £7250	6.5	£27.08 - £39.27
£7250 - £10250	7.0	£42.29 - £59.79
£10250 - £12000	8.0	£68.33 - £80.00
£12000 - £15000	9.0	£90.00 - £112.50
£15000 - £18000	10.0	£125.00 - £150.00
£18000 - £21000	11.0	£165.00 - £192.50
£21000 - £24000	12.0	£210.00 - £240.00
£24000 - £27000	13.0	£260.00 - £292.50
£27000 - £30000	14.0	£315.00 - £350.00
£30000 - £33000	15.0	£375.00 - £412.50

£33000 - £36000	16.0	£440.00 - £480.00
£36000 - £39000	17.0	£510.00 - £552.50
£39000 - £42000	18.0	£585.00 - £630.00
£42000 - £45000	19.0	£665.00 - £712.50
£45000 - £48000	20.0	£750.00 - £800.00
£48000 - £52000	21.0	£840.00 - £910.00
£52000 - £55000	22.0	£953.33 - £1008.33
£55000 - £58000	23.0	£1054.17 - £1111.67
£58000 - £61000	24.0	£1160.00 - £1220.00

Combined CCCS/CFS-averaged model

In the current CCCS model the discretionary expenditure is determined in a number of small and medium-sized categories, in effect trying to micro-manage some elements of debtor expenditure. It has been suggested that it may make some sense to use the guidelines to define an average discretionary expenditure for a particular household profile and then allow the household to spend its money as it sees fit, provided it does not exceed this limit.

Further, in order to determine this average discretionary expenditure the CCCS guidelines could be combined with the inherently more generous CFS guidelines. The advantage of this method is to combine the differing statistical methodologies of both models.

The most logical method of defining this combined average discretionary expenditure for each household profile seems to be to take the average of the CCCS guideline and CFS maximum values. Adding these values to the essential expenditure for each household allows a comparison of the total expenditure with that actually allowed under the original CCCS assessment.

Implementing this model would mean that the the proportion of cases where a contribution was set would reduce by 36%, from 79% in the case of the actual CCCS data, to 43% using the CCCS/CFS-averaged model. The total money ingathered per year would fall from £138,011.88 to £100,776.85, a decrease of 27%.

The average fraction of the surplus that would have to be recovered in order to equate the real monies ingathered would have to be approximately 81.7%.

CCCS-averaged model

For reference a similar suggestion to the previous subsection could be implemented by averaging the guideline and maximum CCCS allowances. Implementing this particular model would mean that the the proportion of cases where a contribution was set would reduce by 27%, from 79% in the case of the actual CCCS data, to 52% using the CCCS-averaged model. The total money ingathered per year would fall from £138,011.88 to £116,985.90, a decrease of 15%.

The average fraction of the surplus that would have to be recovered in order to equate the real monies ingathered would have to be approximately 70.7%.

Appendix 2 - Background to current debt relief and debt management processes

The following provides an outline of the various debt management and debt relief tools that may be used by individuals in Scotland who need some form of assistance with their debt.

Voluntary Debt Management Plan (DMP)

A DMP is an arrangement between a debtor and their creditors in order to repay single or multiple debts. A debtor can arrange their own DMP, but they are more often arranged by a recognised third party, usually private companies or charities like the Consumer Credit Counselling Service. DMPs can be free, but there is sometimes a set-up cost, or monthly charge for the service. Fees are usually deducted from the regular payment amount.

Unlike DAS, a DMP is not legally binding and can, subject to the terms of the agreement, be cancelled at any time.

A DMP is not suitable where the debtor is struggling to pay their essential living expenses and have no money left over for debt repayment.

The DMP process

The debtor will normally meet with a free or private sector money adviser who works out a budget with the debtor. Where possible, a proportion of the debtor's surplus income from the budget will be set aside for debt repayment. The adviser will then write to the debtor's creditors to arrange a regular repayment. If the creditors are agreeable, the debts are rescheduled to take the offer into account and the debtor makes a single regular payment which is distributed between the debtor's creditors by the adviser.

Debt management plans are beneficial to debtors as they are designed for people who can't afford to make full payments towards multiple debts, but can make a single reduced monthly payment, while reducing the overall amount of debt owed to all creditors included in the plan.

Debt Arrangement Scheme (DAS)

DAS is a government-run debt management tool which allows someone in debt to repay their debts through a debt payment programme (DPP). The DPP allows a debtor to pay off their debts over an extended period of time while giving them protection from their creditors taking action against them to recover debts included in the DPP. The DPP can last for any reasonable length of time and, if approved, will freeze all on-going interest, fees and charges on the debt included, resulting in them being written off if the debtor fully completes the DPP.

DAS is a debt repayment scheme and should not be confused with bankruptcy or trust deeds.

There are five parties involved in DAS

- **Debtor:** someone who has personal debts and has agreed to a DPP with a DAS approved money adviser,
- **DAS approved money adviser:** someone who meets the criteria specified in Regulation 8 in the Debt Arrangement Scheme (Scotland) Regulations 2011 or a money adviser approved by the DAS administrator who provides debt management advice to a debtor and applies for a DPP on behalf of the debtor. A DAS approved money adviser can work in either the free, or private sector,
- **Creditor:** someone who is owed money and has agreed or is obliged to accept payments under a DPP,
- **DAS administrator:** the Accountant in Bankruptcy who is responsible for the approval of a DPP, the approval of money advisers, payments distributors and maintaining the DAS register which contains details of all DPPs,
- **Payments distributor:** person or organisation who distributes the money gathered from debtors to creditors in line with the DPP.

<u>The DAS process</u>

Debt advice

Upon meeting the debtor, the money adviser will:

- Explore all debt management options and discuss DAS with the debtor to assess their suitability for the Scheme;
- Establish the debtor's level of debt;
- Examine the debtor's income and expenditure;
- Check how much money the debtor can spare each week/month to pay their debts.

Setting up a Debt Payment Programme (DPP)

If the debtor wishes to proceed with an application for a DPP, the approved money adviser makes an application to the DAS Administrator (AiB).

Once the case is in the DASH computer system, the case officer, who is either a civil servant working in AiB or an administrator working for a private company writes to creditors who then have 21 days to respond. Creditors can take one of three courses of action. They can:

1. Consent – The creditor replies within 21 days and agrees to the proposal;

2. Do nothing – The creditor fails to respond and is deemed to have agreed to the proposal;

3. Non-consent – The creditor writes back within the timescale to disagree with the proposal. This information is taken into account should the DAS Administrator require to make a decision whether the programme is 'fair and reasonable'.

The fair and reasonable test

If a creditor refuses to consent to the DPP, the DAS Administrator may apply a 'fair and reasonable test' to the DPP.

The DAS Administrator will consider various factors when considering whether the DPP is fair and reasonable, including:

- The total amount of debt;
- The length of time over which the programme will operate;
- The method and frequency of payments;
- The extent to which creditors have consented;
- Comments made by the approved money adviser;
- Assets the debtor may own which could be realised to pay debts included in the programme;
- Any other factor considered to be appropriate.

Approval

Upon approval of a DPP the following action is taken:

- The DPP is recorded on a public register,
- The debtor pays a pre-agreed sum to a payments distributor at intervals, usually weekly or monthly,
- The payments distributor distributes this money to creditors and can deduct a fee of up to 8% for making the payments.

Effect of approval

When a DPP is approved:

- Any on-going interest, fees, penalties or other charges are frozen;
- Creditors should not provide further credit to the debtor (except for specified exceptions such as funeral expenses);
- The debtor is protected against diligence for debt.

Variation and revocation

Either the debtor or the creditor can apply to vary a DPP. A DPP can be varied by consent or by the DAS administrator if the variation is 'fair and reasonable'. Grounds for variation can include:

- Changes in the debtor's circumstances;
- Reassessment of debts due at the date of approval;
- The debtor needs to apply for credit for some essential requirement.

If the debtor does not make payments or does not keep to any other agreement they made when signing the DPP application, a creditor can apply to revoke the DPP. If the DAS Administrator revokes the DPP based on an application, any interest, fees, penalties and other charges which were frozen are reinstated.

Review of debtor's circumstances

The approved money adviser maintains contact with the debtor periodically throughout the duration of the DPP. This allows the approved money adviser to review the debtors circumstances and to request a variation if appropriate.

Completion

A DPP is completed when all the payments due under the programme are made or when the creditors give written consent to early completion. The approved money adviser sends written notice of completion to the debtor and the creditors. On completion of a DPP any interest, fees, penalties or other charges which were frozen when the programme was approved are written off.

Trust Deeds

Trust deeds are voluntary agreements, granted by a debtor in favour of a trustee under which assets of the debtor are transferred to be administered for the benefit of creditors and the payment of debts. They provide, through realisation of assets or contributions from the debtor's income, for the repayment of part of what is owed to creditors over the course of the trust deed. Trust deeds generally run for a period of 3 years although some may extend to 5 years.

An ordinary trust deed is not binding on creditors who have not agreed to its terms and they can still decide to pursue their debt; only a protected trust deed is binding on all creditors.

Protected Trust Deeds

A trust deed can become 'protected' if a sufficient number of creditors do not object to the trust deed protection request and thus are deemed to agree to it. Once protected, the trust deed is binding on all creditors who can usually take no further action to pursue the debt owed providing the debtor complies with the terms of the trust deed. Upon completion of the trust deed the remaining unpaid debt is written off although secured lenders can still rely on their security.

The trustee in a trust deed

The trustee must be a person who is qualified to act as an IP. The trustee does not have to be resident in Scotland for trust deeds granted after 1 April 2008. Rules on the qualifications of insolvency practitioner are set out in Section 390 of the Insolvency Act 1986.

The Trust Deed Process

Debt Advice

Upon meeting with the debtor, the potential trustee must:

- ensure that the debtor is aware of the consequences of entering a trust deed;
- provide the debtor with a Debtor Information Pack; and
- sign a joint statement with the debtor confirming the first two conditions.

Setting up the trust deed

If the debtor wishes to proceed, they will meet with an IP to agree the terms of the trust deed. Once the IP has collected the information regarding the debtor's financial circumstances and what the debtor can afford to pay towards his debts, he advertises the trust deed in the Edinburgh Gazette and writes to the creditors to propose payment of some of what is owed – a dividend.

Protecting the trust deed

No later than 7 days following the publication of the notice in the Edinburgh Gazette the trustee must send a copy of the trust deed, Edinburgh Gazette notice, a statement of the debtor's affairs and a claim form to all known creditors. The proposal must detail the likely returns for creditors and the anticipated costs, i.e. the trustee fees and outlays.

If insufficient objections are raised within a 5 week period, the trustee sends a copy of all relevant statutory forms to the AiB who will enter the trust deed on the register of insolvencies, giving the trust deed protected status.

On receipt of the relevant documents, AiB will forthwith record the trust deed on the register of insolvencies. The date the trust deed is recorded on the register of insolvencies is the date from which the trust deed gains protected status.

As a result of the changes introduced by the BAD Act, the Protected Trust Deed (Scotland) Regulations 2008 require trustees to provide additional information, not previously supplied, in respect of trust deeds. They are now required to provide a Statement of the Debtor's Affairs and to complete Form 3, a Statement of Anticipated Realisations from a PTD. Form 3 details the anticipated contributions from the debtor, expected realisations from assets, the estimated cost of administering the PTD and proposed dividend to ordinary creditors.

The trustee must prepare a statement of his accounts and send a copy to the debtor, each creditor and the AiB. Once the trustee fees and outlays have been paid from the money ingathered, the trustee will pay a dividend to creditors, usually at the end of the trust deed.

Completion

When the administration of the trust deed is complete and the trustee has made the final distribution of the estate among the creditors, the trustee may seek his discharge from the creditors who agreed to the trust deed. The trustee will make an application to the creditors and may issue a certificate of discharge to the debtor.

Bankruptcy

Bankruptcy is considered to be the last resort for an individual, some businesses and partnerships, trusts and some unincorporated organisations who cannot repay their debts as they become due. If someone is declared bankrupt in Scotland either by

AiB or the courts, their estate transfers to a trustee to be realised for the benefit of their creditors.

If a debtor wishes to apply for their own bankruptcy, they must apply to AiB. A creditor, a trustee under a trust deed and certain others can petition the sheriff at the debtor's local sheriff court to make a debtor bankrupt.

Certain conditions need to be satisfied before bankruptcy can occur. The conditions are different depending on which party begins the process.

Creditor petitions

Creditors can ask a sheriff to make the debtor bankrupt if:

- The debtor owes a debt or debts of £3,000 – this will include any fees, interest or charges added to what is owed at the date of the petition; and
- they have provided the debtor with a copy of a statutory booklet called the "Debt Advice and Information Package"; and
- the debtor must be apparently insolvent. Apparent Iinsolvency is describe below.

If a debtor has signed a trust deed and fails to co-operate with the trustee, the trustee can ask the sheriff to make the debtor bankrupt. They have to show that an award of bankruptcy would be in the best interest of the creditors or that the debtor has failed to comply with their obligations under the trust deed.

Debtor applications

Debtors must apply to AiB for their own bankruptcy. The debtor must meet **all** of the following conditions:

- must owe a total debt of £1,500 or more;
- must be living in Scotland or have lived in Scotland sometime during the last year;
- must not have made themselves bankrupt in the last 5 years, **and**
- must pay the application fee, currently £100.

The debtor must also meet **one** of the following conditions. The debtor must:

- be apparently insolvent; **or**
- have signed a trust deed which failed to become protected; **or**
- have a Certificate for Sequestration; **or**
- meet the conditions for the Low Income, Low Assets (LILA) route.

Apparent Insolvency

Apparent insolvency is a legal term which demonstrates that a debtor apparently cannot pay their debts as they become due. The most common types of evidence used to prove Apparent Insolvency are:

> **An expired Charge for Payment** – this is a legal document with the words 'Charge for Payment' at the top. It means that the debtor owes money to a creditor and that they must pay them within 14 days. If the debt has not been paid within 14 days (and the debt is not disputed), it will expire and can be used to prove Apparent Insolvency.
>
> **An expired Statutory Demand** – this is a legal document with the words 'Statutory Demand' at the top. It means that the debtor owes money to a creditor and that they must pay them within a specified timeframe (usually within 21 days). It is a final formal demand for payment and if it is not paid within the time stated (and the debt is not disputed), it will expire and may be used to prove Apparent Insolvency.

Certificate for Sequestration

A 'Certificate for Sequestration' is granted by an authorised person and certifies that a debtor has demonstrated that they are unable to pay their debts as they become due. This may involve the debtor submitting evidence of income, assets (such as funds held in bank accounts) and evidence of liabilities (such as invoices and demand notices).

Most money advisers, IPs and some people who work for IPs are authorised to grant a certificate.

Once issued, a certificate must be used in an application for bankruptcy within 30 days of the certificate being granted or it will no longer be valid. There is no charge for obtaining a Certificate for Sequestration.

Low Income Low Assets (LILA)

Low Income

Low income means that the debtor's gross weekly income (before tax and other deductions) from any source is no more than the national minimum wage for a 40 hour working week.

The current national minimum wage rate is £6.08 per hour. This means that the criteria for low income is currently a weekly income of £243.20 before deductions. This is worked out as £6.08 x 40 = £243.20.

If a debtor receives income support, income-based jobseekers' allowance, working tax credits, pension credits, employment and support allowance, housing benefit or council tax benefit they are treated as meeting the low income test, even if their actual income is more than £243.20 a week.

When calculating income, to assess whether the debtor meets the low income criteria, social security benefits or tax credits received or any income received by another member of the debtor's family is disregarded.

Low Assets

A debtor must not own any asset worth more than £1,000. This excludes a vehicle worth up to £3,000 which is reasonably required by the debtor.

The debtor's total assets must not be worth more than £10,000. The debtor must not own, or jointly own a house or any other heritable property or land.

The bankruptcy process

When a debtor is made bankrupt, the debtor's estate passes to a trustee. The trustee administers the bankruptcy. Debtors can choose who their trustee will be, except where the bankruptcy has been awarded using the LILA criteria. AiB is trustee in all LILA bankruptcies and in all cases where the debtor does not nominate a trustee.

Creditors can nominate an IP to be the trustee or the Accountant in Bankruptcy will be trustee when they petition for a debtor's bankruptcy.

The role of the trustee

The trustee will collect information regarding the debtor's income, expenditure and details of their assets and will notify all known creditors of the bankruptcy within 60 days of the date of the bankruptcy order. The trustee may opt, or be required to hold meetings with creditors. Creditors can elect commissioners to oversee the administration of a bankruptcy at any meetings held.

The trustee dissolves any non-essential assets and take an amount from the debtor's income (income payment agreement (IPA)) where possible. They are required to produce accounts at the end of the first year and at regular intervals until they are discharged. Their accounts have to be approved by the Accountant in Bankruptcy or elected commissioners.

The trustee also charges fees for any work they do and can be remunerated for any expenses they have incurred. These are paid out of the debtor's estate.

Under Scottish law, the trustee must compile a permanent record of every bankruptcy. This is called the sederunt book and contains copies of court orders, accounts and records of meetings but not general correspondence. This is retained by the Accountant in Bankruptcy as a permanent public record of the bankruptcy.

Discharge, the end of a bankruptcy

Most bankruptcies last for a year, after which time the debtor may be discharged. If the debtor has been compliant, they are automatically discharged after a year. The

trustee must finish administering the bankruptcy, including dealing with any assets before they can be discharged. If the debtor is paying a contribution through an IPA, they must pay this for a maximum period of three years.

Upon discharge the debtor is released from the obligation of repaying the remaining balance of their debts. Some debts survive bankruptcy, these are

- fines, penalties, compensation and forfeiture orders imposed by any court;
- any liability due to fraud including benefit overpayments;
- any obligation to pay aliment;
- student loans; and
- money owed to someone who holds a security on a property, such as a mortgage or secured loan.

If the debtor's property has been not been sold and is considered worthless to the estate, it can be formally abandoned by the trustee and re-vested in the debtor.

Appendix 3 - Flow chart of proposed bankruptcy products

If you owe at least £3,000 and live in Scotland, you may be eligible for a Scottish statutory debt relief or debt management product[67]:

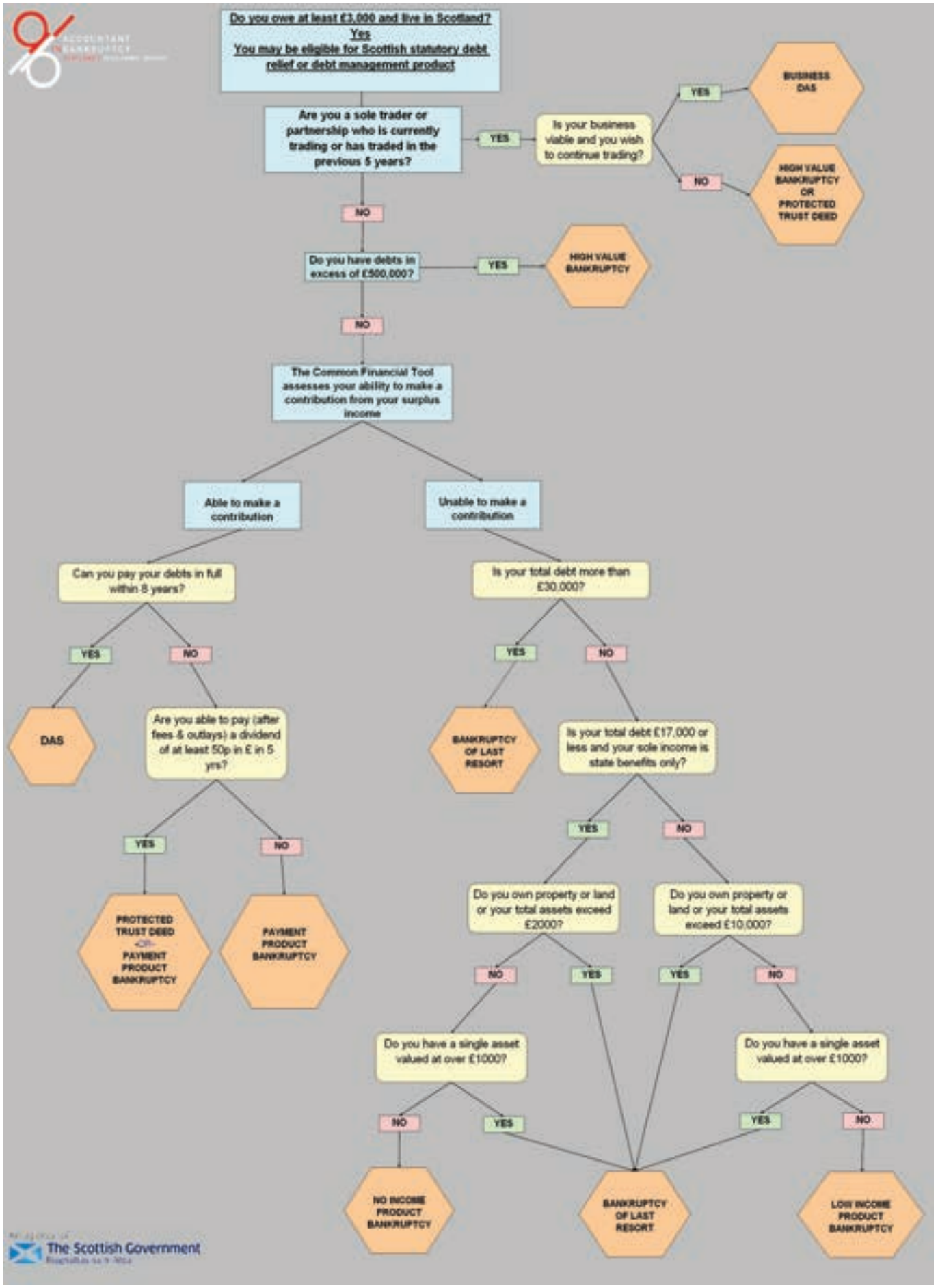
Are you a sole trader or partnership who is currently trading or has traded in the previous 5 years ?		
• Do you consider your business to be viable and wish to continue trading ?	→	**Business DAS**
• Is your business no longer viable ?	→	**Protected Trust Deed or High Value bankruptcy**

Do you have debts in excess of £500,000	→	**High Value bankruptcy**

Has the Common Financial Tool assessed that you are ABLE to make a contribution from your surplus income?		
• Can you pay your debts in full within 8 years ?	→	**DAS**
• Are you able to pay (after fees and outlays) a dividend of at least 50p in £ in 5 years ?	→	**Protected Trust Deed OR Payment Product bankruptcy**
If not	→	**Payment Product bankruptcy**

Has the Common Financial Tool assessed that you are UNABLE to make a contribution from your surplus income ?		
• Is your total debt in more than of £30,000 ?	→	**Bankruptcy of last resort**
• Is your total debt £17,000 or less and your sole income is state benefits only and o You do not own property or land and your total assets do not exceed £2,000 and o You have no single asset valued over £1,000	→	**No Income Product bankruptcy**
• Is your total debt is £30,000 or less and o You do not own property or land and your total assets do not exceed £10,000 and o You have no single asset valued over £1,000	→	**Low Income Product bankruptcy**
If not	→	**Bankruptcy of last resort**

[67] In all cases where an individual has a car worth no more than £3,000, which is reasonably required, this will not be counted as an asset when deciding which product an individual will be eligible for


Do you owe at least £3,000 and live in Scotland?
Yes
You may be eligible for Scottish statutory debt relief or debt management product
Are you a sole trader or partnership who is currently trading or has traded in the previous 5 years?
YES
Is your business viable and you wish to continue trading?
YES
BUSINESS DAS
NO
HIGH VALUE BANKRUPTCY OR PROTECTED TRUST DEED
NO
Do you have debts in excess of £500,000?
YES
HIGH VALUE BANKRUPTCY
NO
The Common Financial Tool assesses your ability to make a contribution from your surplus income
Able to make a contribution
Unable to make a contribution
Can you pay your debts in full within 5 years?
YES
NO
DAS
Are you able to pay (after fees & outlays) a dividend of at least 50p in £ in 5 yrs?
YES
NO
PROTECTED TRUST DEED -OR- PAYMENT PRODUCT BANKRUPTCY
PAYMENT PRODUCT BANKRUPTCY
Is your total debt more than £30,000?
YES
NO
BANKRUPTCY OF LAST RESORT
Is your total debt £17,000 or less and your sole income is state benefits only?
YES
NO
Do you own property or land or your total assets exceed £2000?
NO
YES
Do you have a single asset valued at over £1000?
NO
YES
NO INCOME PRODUCT BANKRUPTCY
Do you own property or land or your total assets exceed £10,000?
YES
NO
BANKRUPTCY OF LAST RESORT
Do you have a single asset valued at over £1000?
YES
NO
LOW INCOME PRODUCT BANKRUPTCY
The Scottish Government

Appendix 4 - Glossary of Terms

A

Apparent Insolvency
Apparent insolvency is a legal term which demonstrates that a debtor apparently cannot pay their debts as they become due. The most common types of evidence used to prove Apparent Insolvency are an expired charge for payment or a statutory demand for payment.

Asset
Property, including heritable property (land or buildings) and moveable property (eg cash, stocks and shares, or vehicles) that belong to a person or entity.

Award
The court order declaring a person to be bankrupt and sequestrating their estate.

B

Bankruptcy
A form of debt relief. The Scottish legal term for personal bankruptcy is sequestration. This is where an individual, sole trader or partnership, and certain other entities, who cannot repay the debt they owe to creditors is formally declared bankrupt and any assets they have will transfer to an appointed trustee.

Benefits
These are benefits paid to a debtor by the Department for Work and Pensions.

Binding
For example, an agreement, which cannot be legally avoided or stopped.

Budget
A list of all a debtor's income and expenditure.

C

Certificate for Sequestration
A document issued by certain authorised money advisers and insolvency practitioners which certifies that an individual cannot pay their debts as they become due. This can be used by an individual to apply for their own bankruptcy.

Charge for Payment
A formal demand by a creditor giving 14 days notice to repay a debt. The Charge must be in proper form and be served by a Sheriff Officer. Failure to pay or to deny the debt within the timescale makes the debtor apparently insolvent.

Credit
A contractual agreement in which a borrower receives something of value now and agrees to repay the lender at some later date.

Creditor
A creditor is an individual or a company that is owed money by another person (the debtor).

D

DAS Administrator
The DAS Administrator is a civil servant appointed by Scottish Ministers, she is also the Accountant in Bankruptcy. The DAS Administrator is responsible for maintaining the DAS Register which contains details of debt payment programmes (DPPs), and for the approval of DAS authorised money advisers, payments distributors and DPPs.

DAS approved money adviser
A DAS approved money adviser is authorised by the DAS Administrator to act on behalf of a debtor to propose and in some cases administer a DPP through DAS.

Debt
Debt means any money that is owed by a debtor.

Debt Arrangement Scheme (DAS)
The Debt Arrangement Scheme (DAS) is a government run debt management scheme which allows debtors to repay their debts through a DPP.

Debt management
A plan for dealing with debt where the debtor can repay their debt (including interest and penalty charges) in full – over an extended period of time. The debtor may keep control of their assets and, most importantly, they will keep their home.

Debtor
A debtor is an individual who owes money to another person or company (creditor).

Debt payment programme
An agreement under the Debt Arrangement Scheme that allows a debtor to repay their debt, based on their disposable income, over an extended period of time. The programme can be for any amount of money and for any reasonable length of time.

Debt relief
The last resort for a debtor when dealing with debt, where the debtor cannot pay their debt – normally trust deeds and bankruptcy. The debtor will lose control of their assets, possibly including their home and their credit rating will be greatly affected, but they will be relieved of liability for most debts.

Disposable income
This means the amount of money left over when necessary expenditure is subtracted from a debtor's income.

Dividend
This is the payment of a share of monies ingathered based on the amount of debt due to be paid to a creditor. This is normally expressed in pence in the pound.

E

Earnings arrestment
If a borrower stops repaying his debt to a particular lender, then the lender can ask for an earnings arrestment from the court in certain circumstances, to recover his monies. If the borrower is working and has a reasonable salary then by taking this action the creditor receives a part of that salary until the debt has been paid off.

H

Habitually resident
To have your main residence in a particular country, for example, if you live and work in Scotland, it could be reasonably said that you are habitually resident in Scotland. This definition excludes anyone temporarily residing in the country or here on holiday.

Heritable Property
Property in the form of land, houses, and buildings, so called because by law in Scotland, it passes to the heir on the owner's death.

I

Insolvency practitioner
A person (usually, but not necessarily, a chartered accountant) licensed and authorised to act as a trustee in sequestrations (bankruptcy) or trust deeds, as well as corporate insolvency procedures.

L

Liabilities
Obligations to transfer future economic benefits as a result of past transactions or events. Ongoing Liabilities are liabilities incurred in the normal course life, including fuel bills, council tax and child maintenance.

Low Income Low Assets (LILA)
A route into bankruptcy, introduced to provide debt relief to debtors who could not enter into bankruptcy as they could not prove apparent insolvency. This was because creditors were reluctant to take any legal action against them. One reason for this was because of the administrative and legal costs incurred by creditors, often without them receiving any dividend at the end due to the debtor’s circumstances.

M

Maximising income
A money adviser will assess a debtor's income to ensure that they are receiving any benefits or tax credits they are entitled to potentially increasing the amount of income they earn.

Money adviser
Someone who is trained to offer advice on debt management and relief options. A money adviser will assess a debtor's income and expenditure and help them work out what their options are and, where needed, negotiate affordable payments and set up repayment plans with their creditors.

Moveable Assets
All property not classed as heritable. Moveable property (property that has a physical existence) such as furniture, vehicles and animals can be handled or moved. Moveable property which has a legal but no actual physical existence, such as debts and company shares, is classed as incorporeal property.

N

National Minimum Wage
The National Minimum Wage (NMW) is a minimum amount per hour that most workers in the UK are entitled to be paid. In the context of this paper, earnings that are “equal to or less than NMW” are earnings of a value equal to or less than 40 hours of the highest rate of NWW.

Net income
Income taken home after income tax, national insurance contributions, payments towards a pension scheme or any other deductions have been made, usually by an employer, when an individual gets paid.

P

Payments distributor
An independent company which gathers in money from the debtor and then distributes money out to the creditors.

Petition
The legal term for a formal application to the court.

Policy and Cases Committee

The Committee is made up of AiB staff and key stakeholders. The main function of the Policy and Cases Committee is to provide the Accountant in Bankruptcy with advice on challenging cases and policy issues. The Committee meets around six times a year.

Protected trust deed
A trust deed which transfers all of a debtor's estate to a trustee, expect in circumstances where their sole or main dwelling house has been excluded, and is not objected to by their creditors can become a protected trust deed. It is binding on all creditors and prevents creditors from taking any action to recover debts included in the protected trust deed.

Q

Qualified creditor or creditors
A creditor to whom you owe at least £3000 (or a number of creditors to whom you owe at least £3000 in total).

R

Register of Insolvencies (ROI)
A public register where details are recorded of all bankruptcies awarded by the Scottish Courts and the AiB. It also contains details of protected trust deeds and details of companies in receivership or liquidation.

S

Secured loan
A loan which is secured against the borrower's home or other property in order to decrease the risk taken on by the lender. Mortgages and some personal loans are secured loans. If the borrower does not maintain their repayments, their property can be at risk of repossession.

Sederunt Book
The official and permanent record of the bankruptcy process maintained by the permanent trustee.

Sequestration
The Scottish legal term for personal bankruptcy.

Sheriff
The judge in a Sheriff Court who is an experienced solicitor or advocate appointed by the Queen.

Sole trader
An individual proprietor of the simplest form of business, eg a shop owned by a single person.

Solicitor
A British lawyer who gives legal advice and prepares legal documents.

Standard Security
The legal instrument by which a secured debt over heritable property is created.

Statutory demand
A formal demand by a creditor giving 21 days notice to repay a debt. The demand must be in proper form and be served by a Sheriff Officer. Failure to pay or to deny the debt makes the debtor apparently insolvent.

T

Third Sector
A Charity/voluntary organisation is sometimes described as a third sector organisation.

Triage
In the context of this paper ‘triage’ refers to the information gathering and action taken at the beginning of the process to determine which debt relief solution, if any, is the most appropriate for the individual.

Trust deed
A form of debt relief where a debtor is unable to pay their debt but they either have money tied up in assets, such as a house or has disposable income which is used to repay part of all of their debts. Creditors can agree that the debtor transfers all or some of their assets to a trustee under a trust deed, which is legally binding on all creditors who have agreed to it.

Trustee
Person who administers a bankruptcy or trust deed. Your trustee can be either the Accountant in Bankruptcy or a private insolvency practitioner (normally a chartered accountant who specialises in personal bankruptcy). A trustee acts for the benefit of the creditors by managing the estate in any trust deed or bankruptcy.

U

Unsecured creditor
A creditor who does not hold security (such as a mortgage) for money owed.

V

Vesting
A legal term meaning 'becoming the property of a person'. A debtor's sequestrated estates are 'vested in' the trustee, that is, they become the property of the trustee for the purposes of administration of the sequestrated estate.

ANNEX A

THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically, Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses.

Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (e.g. analysis of response reports) can be accessed at: http://www.scotland.gov.uk/consultations

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Annex B

Consultation on Bankruptcy Law Reform

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title **Mr** ☐ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Dr** ☐ ***Please tick as appropriate***

Surname

Forename

2. Postal Address

Postcode	**Phone**	**Email**

3. Permissions - I am responding as…

Individual ☐ / **Group/Organisation** ☐

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate ☐ **Yes** ☐ **No**

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) The name and address of your organisation ***will be*** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your ***response*** to be made available?

Please tick as appropriate ☐ **Yes** ☐ **No**

(d) 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?

Please tick as appropriate ☐ **Yes** ☐ **No**

CONSULTATION QUESTIONS

Part 6 Advice

Question 6.1 - Do you think that money advice should be compulsory for those considering any form of statutory debt relief?

Yes ☐ No ☐

Question 6.1a - If yes, who should give this money advice?

Comments

Question 6.2 - Should AiB have a role in the provision of money advice?

Yes ☐ No ☐

Comments

Question 6.2a – If yes, what format should that take?

Comments

Question 6.3 – Would you support an 'triage' system to signpost individuals to possible debt relief or debt management options available to them?

Yes ☐ No ☐

Comments

Question 6.3a – If yes, what format should this 'triage' system take?

Comments

Part 7 Education

Question 7.1 - Should financial education be an integral part of any Scottish statutory debt relief option?

Yes ☐ No ☐

Comments

Question 7.1a - If yes, who should deliver financial education?

Comments

Question 7.2 - Should this financial education be mandatory for all those who access a statutory debt relief option?

Yes ☐ No ☐

Comments

Question 7.2a – If yes, what format should the financial education take?

Comments

Question 7.3 - Should financial education be optional based on specific criteria, such as where the individual has previously been bankrupt?

Yes ☐ No ☐

Comments

Question 7.3a – If yes, what should that criteria be?

Comments

Question 7.4 - Should participation in financial education be linked to discharge from debt?

Yes ☐ No ☐

Comments

Question 7.5 - How could the effectiveness of financial education be evaluated?

Comments

Part 8 Common Financial Tool

Question 8.1 - Should a single common financial tool be used to calculate an appropriate contribution from individuals?

Yes ☐ No ☐

Comments

Question 8.1a – If yes, should the same common financial tool be used in the determination of contributions in the Debt Arrangement Scheme, Protected Trust Deeds and Bankruptcy?

Comments

Question 8.1b – If no, how should contributions be calculated?

Comments

Question 8.2 - Should AiB, in conjunction with key stakeholders, develop a specific Scottish Common Financial Tool to calculate the appropriate contribution from an individual?

Yes ☐ No ☐

Comments

Question 8.2a – If no, what figures should be used to calculate the appropriate amount of contribution from an individual?

- ☐ A) CCCS guidelines
- ☐ B) BBA CFS figures
- ☐ C) Other figures, please specify_____
- ☐ D) A percentage of the individual's income

Comments

Question 8.2b - If a contribution is based on a percentage of an individual's income, what should that percentage be?

- ☐ A) fixed percentage – 9%
- ☐ B) fixed percentage – 12%
- ☐ C) sliding scale percentage based on the individual's income
- ☐ D) other percentage, please specify_____

Comments

Question 8.3 - Should legislation be amended to allow an assessed contribution to be deducted directly from an individual's wages?

Yes ☐ No ☐

Comments

Part 9 Application Process

Question 9.1 – If money advice should be sought prior to entering any statutory debt relief or debt management product, should applications only be made to AIB through an electronic web portal?

Yes ☐ No ☐

Comments

Question 9.1a If yes, should an electronic application web portal be accessed only by authorised money advisers?

Yes ☐ No ☐

Comments

Question 9.2 -Should applicants be able to submit paper application forms?

Yes ☐ No ☐

Comments

Question 9.2a – If yes, should the applicant demonstrate that they had money advice prior to submitting their application?

Yes ☐ No ☐

Comments

Question 9.3 - Where money advice is provided by authorised money advisers, should evidence of apparent insolvency still be required?

Yes ☐ No ☐

Comments

Question 9.4 - Where money advice is provided should the authorised money adviser still certify that the individual cannot pay their debts as they become due?

Yes ☐ No ☐

Comments

Question 9.5 – Should a moratorium period be introduced for bankruptcy?

Yes ☐ No ☐

Comments

Question 9.5a – If yes, what should the proposed moratorium period be?

- ☐ A) 4 weeks
- ☐ B) 6 weeks
- ☐ C) 8 weeks
- ☐ D) other period, please specify_____.

Comments

Question 9.6 – Should the individual only be able to access one moratorium period in a 12 month period?

Yes ☐ No ☐

Comments

Question 9.6a – If no, how many moratorium periods should the individual be allowed?

- ☐ A) 2
- ☐ B) 3
- ☐ C) 4
- ☐ D) other, please specify_____.

Comments

Question 9.7 – Where an individual intends to apply for bankruptcy, should information about the individual be displayed in a public register during the moratorium period?

Yes ☐ No ☐

Comments

Question 9.7a – If yes, should access to the information on the register be restricted to those parties that have an interest?

Yes ☐ No ☐

Comments

Part 10 Solutions for Individuals

Question 10.1 – Where it is assessed that an individual could repay their debts within a fixed period (such as 8 years), should DAS be the default option for the individual?

Yes ☐ No ☐

Comments

Question 10.1a – If yes, should the period that is used be 8 years?

Yes ☐ No ☐

Comments

Question 10.1b – If no, what should the period be?

☐ A) 4 years
☐ B) 6 years
☐ C) 10 years
☐ D) another period, please specify_____.

Comments

Question 10.2 - Should the mechanism for charging for a DAS Application be aligned to other statutory debt relief options and an up-front fee charged?

Yes ☐ No ☐

Comments

Question 10.2a – If yes, what should the fee cover?

Comments

Question 10.3 – Should AiB be able to charge any other fees for the administration of the debt payment programme?

Yes ☐ No ☐

Comments

Question 10.4 - Should another appeal or review process in DAS be created to allow an individual or creditor to appeal a decision made by the DAS Administrator?

Yes ☐ No ☐

Comments

Question 10.4a – If yes, should these appeals be made to an independent panel?

Yes ☐ No ☐

Comments

Question 10.4b – If these appeals are not made to an independent panel, where should these appeals go?

Comments

Question 10.5 – Should the Debt Arrangement Scheme have an option of composition for individuals in DAS programmes?

Yes ☐ No ☐

Comments

Question 10.5a – If yes, should composition only be available where the programme has successfully run for over a fixed period, for example 12 years?

Yes ☐ No ☐

Comments

Question 10.5b - If yes, what should that fixed period be?

- ☐ A) 10 years
- ☐ B) 12 years
- ☐ C) 15 years
- ☐ D) another period, please specify_____.

Comments

Question 10.6 - Should composition only be available where the individual in the programme has paid a fixed percentage of the debt due?

Yes ☐ No ☐

Comments

Question 10.6a – If yes, what should that percentage be?

- ☐ A) 50%
- ☐ B) 60%
- ☐ C) 70%
- ☐ D) another percentage, please specify_____.

Comments

Question 10.7 - If composition was available, should this only be with the agreement of the creditors?

Yes ☐ No ☐

Comments

Question 10.7a – If no, should an automatic revocation of the outstanding balance be available where the individual has paid the agreed percentage?

Comments

Question 10.8 – Should there be a minimum debt level for entry into a protected trust deed?

Yes ☐ No ☐

Comments

Question 10.8a - If yes, what should the level be?

- ☐ A) £3,000
- ☐ B) £4,000
- ☐ C) £5,000
- ☐ D) another amount, please specify_____.

Comments

Question 10.9 – Where an individual is in employment, should provision be made for a statutory notice to be issued to their employer allowing the deduction of the agreed contribution direct from the individual's salary?

Yes ☐ No ☐

Comments

Question 10.9a – If yes, who should notify the employer?

Comments

Question 10.10 – Should there be a minimum dividend proposed in a trust deed for it to be eligible for protection?

Yes ☐ No ☐

Comments

Question 10.10a - If yes, is 50p in the £ an appropriate minimum amount?

Yes ☐ No ☐

Comments

Question 10.10b- If not 50p in the £, what would be an appropriate minimum amount?

- ☐ A) 40p in the £
- ☐ B) 30p in the £
- ☐ C) 20p in the £
- ☐ D) another amount, please specify_____.

Comments

Question 10.11 – Should there be a fixed term for completion of a protected trust deed?

Yes ☐ No ☐

Comments

Question 10.11a - If yes, what should this period be?

- ☐ A) 3 years
- ☐ B) 4 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

Comments

Question 10.12 – Should there be a link between the term of the protected trust deed and the delivery of the minimum dividend originally proposed?

Yes ☐ No ☐

Comments

Question 10.13 – Should the current process that deems consent to a trust deed becoming protected continue?

Yes ☐ No ☐

Comments

Question 10.13a – If yes, are the current thresholds correct?

Yes ☐ No ☐

Comments

Question 10.13b – If the thresholds are not correct, what should they be?

Comments

Question 10.14 – If the current deemed consent process is not appropriate, what should replace it?

Comments

Question 10.15 – Where a trustee in a protected trust deed applies to make an individual bankrupt as a result of their non-compliance, should the trustee in the bankruptcy take the non-compliance into consideration when agreeing the individual's discharge from debt?

Yes ☐ No ☐

Comments

Question 10.16 – If the protected trust deed fails due to an individual's refusal to comply with the terms, should it be mandatory that the trustee applies to make the individual bankrupt?

Yes ☐ No ☐

Comments

Question 10.17 - Should the requirement for an individual to prove apparent insolvency be removed as a route into bankruptcy?

Yes ☐ No ☐

Comments

Question 10.18 - Should the minimum debt threshold for an individual be increased?

Yes ☐ No ☐

Comments

Question 10.18a – If yes, should this level be £3,000?

Yes ☐ No ☐

Comments

Question 10.18b – If no, what should this level be?

- ☐ A) £1,500
- ☐ B) £2,000
- ☐ C) £5,000
- ☐ D) another amount, please specify_____.

Comments

Question 10.19 - Should there be different minimum debt thresholds for the different debt relief products?

Yes ☐ No ☐

Comments

Question 10.20 - Should the minimum debt threshold for an individual applying to become bankrupt be the same as that for creditors?

Yes ☐ No ☐

Comments

Question 10.21 - Should the minimum debt threshold for creditor petitions increase?

Yes ☐ No ☐

Comments

Question 10.21a - If yes, what should that level be?

- ☐ A) £3,500
- ☐ B) £5,000
- ☐ C) £7,000
- ☐ D) another amount, please specify_____.

Comments

Question 10.22 - Should a new No Income product be developed for individuals who are assessed as being unable to make a contribution and who are in receipt of social security benefits only?

Comments

Question 10.23 - In order to access this product should the maximum level of assets be limited, for example to £2,000?

Yes ☐ No ☐

Comments

Question 10.23a – If yes, what should this maximum level of assets be?

- ☐ A) £1,000
- ☐ B) £2,000
- ☐ C) £5,000
- ☐ D) another amount, please specify_____.

Comments

Question 10.24 - Should an individual who owns heritable property be able to access this product?

Yes ☐ No ☐

Comments

Question 10.24a – If yes, should there be any restrictions on the value of the property or, perhaps, equity?

Comments

Question 10.25 - As the individual is in receipt of social security benefits only, should they be discharged after 6 months, where they co-operate with their trustee?

Yes ☐ No ☐

Comments

Question 10.25a – If no, what should the period be?

- ☐ A) 9 months
- ☐ B) 12 months
- ☐ C) 18 months
- ☐ D) another period, please specify_____.

Comments

Question 10.26 - To be eligible to apply for a No Income product, should there be a maximum debt level?

Yes ☐ No ☐

Comments

Question 10.26a – If yes, should the maximum debt level be £17,000?

Comments

Question 10.25b – If no, what should the level be?

- ☐ A) £10,000
- ☐ B) £15,000
- ☐ C) £20,000
- ☐ D) another amount, please specify_____.

Comments

Question 10.27 - Where an individual has no income and is discharged after 6 months, should they be subject to a default credit restriction for a set period post discharge?

Yes ☐ No ☐

Comments

Question 10.27a - If a credit restriction is appropriate, what should the period be?

- ☐ A) 3 months
- ☐ B) 6 months
- ☐ C) 12 months
- ☐ D) another period, please specify_____.

Comments

Question 10.28 - If a credit restriction is appropriate, should there be a specific value attached to this restriction, for example no credit over £3,000?

Yes ☐ No ☐

Comments

Question 10.29 - Should the period for an individual to apply for a subsequent No Income product be extended?

Yes ☐ No ☐

Comments

Question 10.29a – If yes, what should the period be?

- ☐ A) 7 years
- ☐ B) 10 years
- ☐ C) once in lifetime
- ☐ D) another period, please specify_____.

Comments

Question 10.30 - Where an individual has accessed debt relief through the No Income product once, should the individual's discharge for any subsequent bankruptcy be delayed?

Yes ☐ No ☐

Comments

Question 10.30a - If yes, what should the period be?

- ☐ A) 1 year
- ☐ B) 2 years
- ☐ C) 3 years
- ☐ D) another period, please specify_____.

Comments

Question 10.31 – Should a new Low Income product be developed for individuals who are assessed as unable to make a contribution?

Yes ☐ No ☐

Comments

Question 10.32 - In order to access this Low Income product should the maximum level of assets be limited?

Yes ☐ No ☐

Comments

Question 10.32a - If yes, what level should it be?

- ☐ A) £5,000
- ☐ B) £7,000
- ☐ C) £10,000
- ☐ D) another amount, please specify_____.

Comments

Question 10.33 - As the individual in this product is not making any contributions should they be discharged after 12 months, where they co-operate with their trustee?

Yes ☐ No ☐

Comments

Question 10.33a – If no, what should the period be?

- ☐ A) 6 months
- ☐ B) 9 months
- ☐ C) 18 months
- ☐ D) another period, please specify_____.

Comments

Question 10.34 - Do you think that this product should be available to individuals who own heritable property?

Yes ☐ No ☐

Comments

Question 10.34a – If yes, should this be restricted to properties that have been repossessed or have negative equity?

Comments

Question 10.35 - Should there be a maximum debt limit to access a Low Income product?

Yes ☐ No ☐

Comments

Question 10.35a - If yes, where should this maximum total unsecured debt limit be set?

- ☐ A) £20,000
- ☐ B) £30,000
- ☐ C) £50,000
- ☐ D) another amount, please specify_____.

Comments

Question 10.36 - Where an individual needs debt relief and cannot access any other bankruptcy product, they should be able to access the last resort debt relief product?

Yes ☐ No ☐

Comments

Question 10.37 - Where the individual had previously been bankrupt or has accessed another statutory debt relief product within the previous 5 years, should their discharge period be extended?

Yes ☐ No ☐

Comments

Question 10.37a - If yes, what period should their discharge be?

- ☐ A) 6 months
- ☐ B) 12 months
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

Comments

Question 10.38 - Should a new Payment product be developed for individuals who are assessed as able to make a contribution?

Yes ☐ No ☐

Comments

Question 10.39 - Should the Payment product be available to individuals who are currently trading or who have traded within the preceding 5 years?

Yes ☐ No ☐

Comments

Question 10.40 - Should this product be unavailable to individuals who have debts exceeding a fixed sum?

Yes ☐ No ☐

Comments

Question 10.40a - If yes, what should this sum be?

- ☐ A) £250,000
- ☐ B) £500,000
- ☐ C) £750,000
- ☐ D) another amount, please specify_____.

Comments

Question 10.41 - Do you think the contribution should be for a fixed period?

Yes ☐ No ☐

Comments

Question 10.41a - If yes, for what period?

- ☐ A) 3 years
- ☐ B) 4 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

Comments

Question 10.42 – Where monies have been ingathered, should creditors receive regular dividend payments?

Yes ☐ No ☐

Comments

Question 10.42a - If yes, at what intervals?

- ☐ A) quarterly
- ☐ B) 6 monthly
- ☐ C) annually
- ☐ D) another period, please specify_____.

Comments

Question 10.43 – Should both insolvency practitioners and the Accountant in Bankruptcy be the trustee in Payment product cases?

Yes ☐ No ☐

Comments

Question 10.44 - For clarity for applicants and creditors, should there be a fixed charge for administering this Product?

Yes ☐ No ☐

Comments

Question 10.45 – If the monies ingathered are insufficient to pay a dividend to creditors, should the individual's discharge be deferred until the costs of the administration of the bankruptcy are met?

Yes ☐ No ☐

Comments

Question 10.46 - Should a new High Value product be developed for individuals who are currently trading or have traded in the past 5 years or who have debts in excess of a fixed amount?

Yes ☐ No ☐

Comments

Question 10.46a - If yes, what should this fixed amount be?

- ☐ A) £250,000
- ☐ B) £500,000
- ☐ C) £750,000
- ☐ D) another amount, please specify_____.

Comments

Question 10.47 – Where the common financial tool assesses that a contribution should be made, should this be for a fixed period?

Yes ☐ No ☐

Comments

Question 10.47a - If yes, for what period?

- ☐ A) 3 years
- ☐ B) 4 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

Comments

Question 10.48 – If the monies ingathered are insufficient to pay a dividend to creditors, should the individual's discharge be deferred until the costs of the administration of the bankruptcy are met?

Yes ☐ No ☐

Comments

Question 10.49 – Should there be a mechanism to transfer an individual from one bankruptcy product to another?

Yes ☐ No ☐

Comments

Part 11 Solution for Sole Traders and Partnerships

Question 11.1 - Should a new Business DAS be developed for sole traders and non-limited liability partnerships where the business is assessed as viable?

Yes ☐ No ☐

Comments

Question 11.2 – Should Business DAS exclude non-business debts?

Yes ☐ No ☐

Comments

Question 11.3 - Prior to entering Business DAS, should business advice be compulsory?

Yes ☐ No ☐

Comments

Question 11.3a – If yes, who should provide that advice?

Comments

Question 11.4 - Should debt relief or composition be incorporated into Business DAS and agreed with creditors at the proposal stage?

Yes ☐ No ☐

Comments

Part 12 Removal of Non-Contentious Creditor Petitions from Court

Question 12.1 - Should all creditor bankruptcy applications to make an individual bankrupt be submitted to the AiB?

Yes ☐ No ☐

Comments

Question 12.1a – If no, should only non-contested creditor applications be considered for award by AiB?

Yes ☐ No ☐

Comments

Question 12.2 – Where an application is submitted to AiB and the individual contests this, who should submit the application to the Sheriff Court for consideration?

Comments

Question 12.3 - Where a creditor notifies an individual of their intention to make them bankrupt, what should the minimum period be that the creditor must wait before submitting the bankruptcy application to AiB?

☐ A) 14 days
☐ B) 21 days
☐ C) 28 days
☐ D) another period, please specify_____.

Comments

Question 12.4 –Should the process of an executor petitioning to bankrupt the estate of an insolvent deceased individual be removed from the court, and replaced with an application to the AiB?

Yes ☐ No ☐

Comments

Part 13 Debtor Co-operation

Question 13.1 – Should the co-operation of a bankrupt individual be linked to discharge?

Yes ☐ No ☐

Comments

Question 13.2 - If an individual has not co-operated, should there be a maximum period that discharge could be deferred?

- ☐ A) 1 year
- ☐ B) 3 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

Comments

Question 13.3 - Where an individual cannot be located should discharge be deferred indefinitely?

Yes ☐ No ☐

Comments

Question 13.3a – If no, what period should the deferral of discharge be?

- ☐ A) 1 year
- ☐ B) 3 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

Comments

Question 13.4 – Should the AiB have the power to defer discharge where an individual has not co-operated, without the need to refer to case to a sheriff?

Yes ☐ No ☐

Comments

Question 13.5 – Who should provide an appeals process?

- ☐ A) the Sheriff Court
- ☐ B) an independent tribunal
- ☐ C) AiB's Policy and Cases Committee
- ☐ D) other, please specify_____.

Comments

Question 13.6 - Should other types of unsecured debts be excluded from the discharge?

Yes ☐ No ☐

Comments

Question 13.6a – If yes, what other types of unsecured debts should not be discharged and your reasons why?

Comments

Question 13.7 - Where an individual has incurred a debt within a specified period prior to their application for bankruptcy or trust deed, should this debt be excluded from discharge?

Yes ☐ No ☐

Comments

Question 13.7a – If yes, should this be limited to debts for non-essential, luxury items or where it is proven that the individual had no intention to repay?

Comments

Question 13.8 - Where an individual has incurred a debt within a specified period prior to their application for bankruptcy or the granting of a trust deed and it is agreed that this debt will be excluded from discharge, what should the specified period be?

- ☐ A) 4 weeks
- ☐ B) 8 weeks
- ☐ C) 12 weeks
- ☐ D) another period, please specify_____.

Comments

Question 13.9 - Should the child maintenance arrears continue to be claimable and to be discharged in bankruptcies and protected trust deeds when the individual is discharged?

Yes ☐ No ☐

Comments

Question 13.10 – Should credit union debts continue to be discharged in bankruptcies and protected trust deeds when the individual is discharged?

Yes ☐ No ☐

Comments

Question 13.11 – Should only credit union debts that were incurred by the individual within a specified period prior to them entering bankruptcy or granting a trust deed be excluded from discharge?

Yes ☐ No ☐

Comments

Question 13.11a – If yes, how long should this specified period be?

☐ A) 4 weeks
☐ B) 8 weeks
☐ C) 12 weeks
☐ D) another period, please specify_____.

Comments

Part 14 Modernisation of Legislation

Question 14.1 – Where material policy changes are identified by the Scottish Law Commission as part of their consultation on bankruptcy consolidation, should any recommendation they make regarding these be incorporated where appropriate?

Yes ☐ No ☐

Comments

Question 14.2 - Do you agree that a consolidation Bill follow the programme Bill through Parliament?

Yes ☐ No ☐

Comments

Question 14.3 - Should creditors be required to submit a claim within a specified timescale?

Yes ☐ No ☐

Comments

Question 14.3a - If so, what should this timescale be?

☐ A) 60 days
☐ B) 90 days
☐ C) 120 days
☐ D) another period, please specify_____.

Comments

Question 14.3b – If the creditor does not submit a claim within the agreed timescale, what should the penalty be?

Comments

Question 14.4 - Should there be a defined habitual residence test for individuals who wish to apply for statutory debt relief in Scotland?

Yes ☐ No ☐

Comments

Question 14.4a - If yes, what aspects should be taken into account?

Comments

Question 14.5 - Should the power to determine the form of the Register of Insolvencies (ROI) be moved from the Act of Sederunt to regulations made under the Bankruptcy (Scotland) Act 1985?

Yes ☐ No ☐

Comments

Question 14.6 - Should the ROI be updated after the award of bankruptcy to include the individual's current address where they have moved?

Yes ☐ No ☐

Comments

Question 14.7 - What, if any further information should be included on the ROI?

Comments

Question 14.8 - Should some details of an individual who is at risk of violence be withheld from the ROI?

Yes ☐ No ☐

Comments

Question 14.9 - Are there any other categories of individuals whose details should be withheld from the ROI? Please specify.

Yes ☐ No ☐

Comments

Question 14.10 - Is the supplementary questionnaire effective as an interview aid, or is something else required to replace it?

Yes ☐ No ☐

Comments

Question 14.11 - Would the use of a common financial tool remove the need to collect further information on a supplementary questionnaire?

Yes ☐ No ☐

Comments

Question 14.12 - Where a recall of bankruptcy is granted, should the distribution process be clarified?

Yes ☐ No ☐

Comments

Question 14.13 - Should the legislation be amended to ensure that the final interlocutor in a recall is withheld by the Court until it is confirmed that all relevant costs and creditors have been paid?

Yes ☐ No ☐

Comments

Question 14.14 - Should the current prescribed rate of interest be retained?

Yes ☐ No ☐

Comments

Question 14.15 - Should all post-procedure interest and charges be frozen on statutory debt relief products?

Yes ☐ No ☐

Comments

Question 14.15a - If not, should the interest rate be linked to the Bank of England base rate?

Yes ☐ No ☐

Comments

Question 14.16 - Should the requirement to keep a hard copy of a sederunt book be removed?

Yes ☐ No ☐

Comments

Question 14.16a – If yes, should the key documents be retained electronically?

Yes ☐ No ☐

Comments

Question 14.16b – What should the key documents include?

Comments

Question 14.17 - Should the date of sequestration be the award date in both debtor applications and creditor petitions?

Yes ☐ No ☐

Comments

Question 14.17a – If no, should the discharge date be linked to the date the award was made by the sheriff?

Yes ☐ No ☐

Comments

Question 14.18 - Should the ability to apply for a payment holiday be introduced to all statutory debt relief products?

Yes ☐ No ☐

Comments

Question 14.19 - Should the period of the payment holiday be fixed at 6 months as it is in DAS?

Yes ☐ No ☐

Comments

Question 14.20 - If a payment holiday is granted, should this period be added onto the length of the period before discharge?

Yes ☐ No ☐

Comments

Question 14.21 - Should the criteria for a payment holiday be the same for all statutory debt relief products?

Yes ☐ No ☐

Comments

Question 14.22 - Should bankruptcy processes be removed from the Sheriff Court where the process is mainly administrative?

Yes ☐ No ☐

Comments

Question 14.22a - If yes, should AiB have the power to make orders for these mainly administrative processes, with disputed decisions being referred to a sheriff?

Yes ☐ No ☐

Comments

Question 14.23 - Should a panel, separate from the decision maker, decide the outcome of more complex applications and review disputed decisions?

Yes ☐ No ☐

Comments

Question 14.23a - If yes, should the panel have the power to make the final decision in low value, straightforward cases?

Yes ☐ No ☐

Comments

Question 14.24 - Should the make-up of this panel include representatives of a cross-section of stakeholders, such as insolvency practitioners, Recognised Professional Bodies, money advisers, solicitors, etc?

Yes ☐ No ☐

Comments

Question 14.25 - Should all bankruptcy processes currently dealt with by the Sheriff Court be removed to AiB, subject to appropriate appeals?

Yes ☐ No ☐

Comments

Question 14.26 - If all bankruptcy processes were removed from the Sheriff Court, should an independent adjudicator or tribunal be formed to review disputed decisions?

Yes ☐ No ☐

Comments

Part 15 AiB Role and Powers

Question 15.1 - Does the AiB acting as trustee in approximately 59% of bankruptcy cases, excluding LILA cases, have a positive impact on the existence of a healthy and competitive insolvency sector in Scotland?

Yes ☐ No ☐

Comments

Question 15.1a – If no, should the AiB continue to act as a trustee in bankruptcies in Scotland?

Yes ☐ No ☐

Comments

Question 15.1b – If the AiB should continue to act as trustee, should she act only as trustee of last resort?

Yes ☐ No ☐

Comments

Question 15.2 – Where the AiB is trustee and asset realisations and contributions in a bankruptcy case do not meet the cost of case administration, how should any shortfall be funded?

Comments

Question 15.2a – Where the AiB is trustee, should bankruptcies which can cover the costs of administration subsidise those which cannot?

Yes ☐ No ☐

Comments

Question 15.2b – If no, should bankrupts be required to cover the minimum costs of administration?

Comments

Question 15.3 - Should AiB to have a more proactive role in the supervision of all debt management products?

Yes ☐ No ☐

Comments

Question 15.4 - Where the AiB makes a direction which is not adhered to by the trustee, should an AiB panel decide on an appropriate course of action?

Yes ☐ No ☐

Comments

Question 15.5 - Should Scottish Ministers have the power to regulate Scottish Insolvency Practitioners ?

Yes ☐ No ☐

Comments

Question 15.5a - If yes, should this be managed through Recognised Professional Bodies who would monitor and regulate Insolvency Practitioners?

Yes ☐ No ☐

Comments

Question 15.6 - Do you think that the current Memorandum of Understanding between the UK Insolvency Service and Recognised Professional Bodies should be redrafted to allow the provision of information to AiB on regulatory activity related to Scottish cases?

Yes ☐ No ☐

Comments

Question 15.7 – Should there be an information sharing agreement between AiB and the Recognised Professional Bodies which have members who take on personal insolvency work from clients based in Scotland?

Yes ☐ No ☐

Comments

Question 15.8 – Should there be an office of the Official Receiver in Scotland?

Yes ☐ No ☐

Comments

Question 15.9 - If the role of the Official Receiver in Scotland is devolved to the Scottish Government, should this role be carried out by Accountant in Bankruptcy?

Yes ☐ No ☐

Comments

Question 15.9a - If no, who should carry out this role?

Comments

Question 15.10 - If there was an office of the Official Receiver in Scotland, how should this be funded?

Comments

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