

## Call for evidence on the Bankruptcy and Debt Advice (Scotland) Bill Stage Response of the Insolvency Practitioners Association

There follows the response of the Insolvency Practitioners Association (IPA) to the Scottish Government's Call for Evidence, prepared with the assistance of IPA members with particular interest and expertise in the field of Scottish personal insolvency.

This response is not intended to reflect the views of every member of the Association, who are themselves at liberty to submit their own responses, but rather to reflect the broadly agreed views of the IPA and the members with whom it has consulted. Further details about the IPA may be found at the conclusion to this document.

### What is your general view on the Bill and broadly, are you supportive of it?

A number of the initiatives in the Bill are welcomed and we are supportive of those elements. The concept that those debtors that can pay, should pay is endorsed and the adoption of a Common Financial Tool for the assessment of surplus income is considered a positive step, provided that it is developed with sufficient flexibility in order to be practicable in its application.

However, we have serious reservations about the AiB's proposed assumption of a number of additional decision making functions that are currently reserved to the sheriff. We are wholly unconvinced that these have been correctly characterised as ostensibly "administrative" and are very concerned that this is a usurpation of judicial functions by an executive agency. Whilst the number of instances of applications to the sheriff may be relatively few, we would suggest that this fact does not mitigate in favour of the removal of the Court from the decision making process (quite the contrary) and similarly it simply does not follow that because such applications may be rare, that they are straightforward or administrative in nature.

We would query whether it is at all appropriate for a party without legal qualification, training, or experience, nor professional licensing and regulation, to be performing judicial tasks. We would also suggest that for any government body to be both policy setter, decision maker and appeal body of first instance, is inherently unconstitutional and potentially contrary to the principles of natural justice.

IPs are highly qualified, specialist professionals that are unlikely to seek judicial clarification or determination without good cause. If such an application is warranted, for whatever reason, the practitioner, the debtor and/or the creditor concerned should be confident that the matter has been determined by an appropriate party.

Our practitioners report their confidence in the Court system and an absence of significant concern about speed of access to justice and the cost involved. The current proposals will remove direct access to a functioning system, potentially delay the resolving of complex issues and place the power to make Common law decisions with a branch of the executive. We consider this to be wholly unacceptable.

### Did you take part in the Scottish Government's consultation on the Bill and have your views been reflected?

Yes – and we welcome the adoption of a number of the comments and suggestions made within our consultation response, particularly insofar as relates to:

- Advice being a pre-cursor to entering any debt solution;
- Advice being delivered by existing money advisers (including IPs), and not by the AiB directly;

- Adoption of a moratorium during the advice stages;
- The abandonment of proposals for a complex multiplicity of “products”;
- Amendments to the LILA regime in the form of the proposed MAP solution, access to which is subject to limits on the debtor’s assets, liabilities, available income and prior insolvencies.

**What is your view on the following proposals within the Bill:**

Advice and education: provision of compulsory money advice from an approved money adviser for anyone considering accessing a statutory debt relief or debt management product; mandatory requirement for individuals to participate in financial education.

We are pleased to note that advice should be compulsory for all those wishing to enter a formal debt solution. We would have liked to have seen a specific reference to Licensed Insolvency Practitioners within the proposed Section 5C.

We have reservations about the cost-effectiveness of the proposed system for the provision of financial education. No evidence has been made available as to the effectiveness of such education and no detail is provided about how it will be funded.

Payments by debtor following bankruptcy: development of a common financial tool to be used to calculate the amount of any contribution to be made by an individual from any surplus income they have; allowing the Accountant in Bankruptcy to make an order fixing the debtor’s contribution towards their bankruptcy; requiring debtors, assessed as being able to make contribution towards their bankruptcy, to make such payments throughout payment period (48 months); allowing an assessed contribution to be deducted from the debtor’s wages; provision of a payment break up to six months.

We are broadly content with the proposals in this regard.

Bankruptcy where debtor has few assets: introduction of ‘minimum assets process’ to replace the ‘Low Income Low Asset’ route.

We are broadly content with the proposals in this regard.

Moratorium on diligence: introduction of six week single moratorium on diligence.

We are broadly content with the proposals in this regard.

Application for bankruptcy: requirement to sign a ‘Statement of Undertaking’ relating to the debtor’s duties and obligations during the bankruptcy process; removal of provisions from the Bankruptcy (Scotland) Act 1985 relating to incomplete and inappropriate debtor applications; application for bankruptcy from executors of the estate of insolvent deceased individuals; recall of award of bankruptcy.

We are broadly content with the proposals in this regard, subject to the comments contained below regarding the award of recall generally.

Administration of estate: introduction of a time frame (120 days) for creditor claims; variation in length of first accounting period to no less than 6 months; extending ‘aquirenda’ (any property or right acquired or received by a debtor after the date of bankruptcy, and at present, before date of discharge) period to 4 years.

We welcome the proposals to introduce a time frame for submission of creditors' claims. Variation in the length of the first accounting is also welcomed, though the rationale behind a minimum period of 6 months is not fully understood. Surely, if assets have been realised and creditors' claims have been agreed, the ability to make an earlier distribution would be beneficial?

We are broadly content with the other proposals in this section, including the proposed extension of the aquirenda period.

Discharge following bankruptcy: process for debtor's discharge from bankruptcy (application, review, appeal, repeal, deferral, unclaimed dividends, discovery of assets);

We are broadly content with the proposals in this regard.

Records: removal of power to prescribe the form of the Register of Insolvencies; modernisation of the sederunt book process; removal of requirement to publish in the Edinburgh Gazette.

We are broadly content with the proposals in this regard.

Functions of sheriff and Accountant in Bankruptcy in bankruptcy: transferring further bankruptcy processes from the courts to AiB; introduction of e-application process; recall of bankruptcy provisions; appointment, replacement, removal of trustee.

Our general concerns about the proposed extension of the AiB powers are noted above, and the following specific comments should be read in conjunction with those general concerns:

**Recall:** Whilst the additional clarity around the administrative aspects of the recall process is welcomed (e.g. in confirming receipt of funds), we have some concern surrounding the proposed granting of additional powers of recall to the AiB. This is a judicial function and these applications may be far from straightforward, particularly where there is any doubt or dispute about the sums due to creditors.

We do not consider that this activity (nor the ones commented upon below) can be correctly characterised as "administrative", as it involves the nullification of a binding legal process. Whilst accepting that provision has been made for appeal to the sheriff, those more complex cases where such an appeal may be warranted will have been delayed from appropriate judicial consideration, increasing cost and causing delay.

**Directions:** We understand that it is uncommon for Trustees to seek directions and, when they do, it is generally because the matter is complex and requires a legal ruling. Taking away this right and making it a requirement for Trustees to seek directions from AiB, who is not qualified to act in a quasi-judicial role, is an unnecessary and unhelpful complication of the process.

Further, providing that only AiB can then subsequently decide whether the matter merits reference to a sheriff is unacceptable. AiB has no legal qualifications to determine when matters require legal direction.

Finally, when directions are sought, they are generally sought as a matter of urgency. The new process will unnecessarily prolong matters. Our members report that they do not currently experience any real delay in having applications dealt with under the current system.

**Removal of Trustees:** The Bill provides for AiB to remove Trustees, a right currently reserved to the Court (noting that the Trustee is a duly appointed officer of the Court when acting as such). Implementation of this provision would provide AiB with considerably more powers than both the Official Receiver in England & Wales or the Recognised Professional Bodies who regulate practitioners, and is a usurpation of the Court's powers.

As drafted, a Trustee may be removed if he has *"so conducted himself that he should no longer continue to act in the sequestration"* or where *"cause has been shown"* on other circumstances. This is both vague and a draconian power to place in the hands of an executive agency. It would allow the removal of a Trustee, properly appointed by the Court or the creditors, without reference to them and on unspecified grounds.

The only right of appeal would be to ask the Accountant to review her own decision with a subsequent right on onward appeal to the Court once that review has been conducted. Again, the insertion of this review element prolongs a process which requires speedy resolution.

**Valuation of contingent claims:** The Bill, if enacted in its current form, requires creditors to apply to AiB instead of a sheriff to place a value on a contingent debt in order that the creditor may be able to claim that value in the sequestration. Again, there is provision for onward appeal to the Sheriff.

Valuation of a contingent debt almost inevitably involves complex accounting or legal input. This review process again is an unnecessary and unhelpful change to a procedure which works perfectly adequately at present.

We would question whether a creditor in such circumstances would be content for their debt to be valued in this manner and whether such a system will produce the requisite certainty for the parties to the process.

**Contractual powers:** Trustees currently have the power to adopt or refuse to adopt a contract entered into by the debtor, within a period of 28 days from the date of sequestration. If a longer period is required, a Trustee should make application to a Sheriff.

The Bill would amend the Act to require a Trustee to make application to AiB for an extension of time with the right of onward appeal to the Sheriff.

If an extension of time is required, it is generally because there are complex legal issues upon which a Trustee requires advice. Once again the insertion of this review merely extends a process in which speed is of the essence.

[Review of decisions made by Accountant in Bankruptcy: requiring appellant to seek AiB review of certain decisions prior to appeal to sheriff.](#)

See above. Adding an additional stage of self-review merely delays the outcome and increases costs. It also denies access to judicial processes to parties with a both legitimate right and reasonable expectation of access to them. Furthermore, for appeal to be to the decision making party is manifestly inappropriate.

[Miscellaneous amendments: as recommended by Scottish Law Commission bankruptcy consolidation review.](#)

No comments.

## About the IPA

The Insolvency Practitioners Association is a membership body recognised in statute for the purposes of authorising Insolvency Practitioners under the Insolvency Act 1986 Insolvency (Northern Ireland) Order 1989. It is the only recognised professional body to be solely involved in insolvency and for over fifty years, the IPA is proud to have been at the forefront of development and reform within the industry.

The IPA has over 2,000 members, of whom over 550 are currently licensed insolvency practitioners. In addition to its recognition under the Insolvency Act for the purpose of licensing IPs, the IPA is also a Competent Authority approved by the Official Receiver for the purpose of authorising intermediaries to assist with debtors' applications for Debt Relief Orders.

The IPA currently licenses approximately one third of all UK insolvency appointment takers, who are subject to a robust regulatory regime, applied by the IPA's dedicated regulation teams carrying out complaints handling, monitoring and inspection functions. Additionally, the IPA conducts inspection visits of those appointment-takers licensed by the Law Society (Solicitors Regulation Authority), one of the other recognised professional bodies under the Insolvency Act. The IPA also undertakes monitoring visit work for the Debt Resolution Forum, a membership body which sets standards for its members when involved in providing non-statutory debt solutions to insolvent individuals (such as Debt Management Plans).

The IPA has a longstanding and continuing commitment to improving standards in all areas of insolvency (and related) work. It was the first of the recognised bodies to introduce insolvency-specific ethics guidance for IPs, and the IPA continues to be a leading voice on insolvency matters such as the development of professional standards, widening access to insolvency knowledge and understanding, and encouraging those involved in insolvency case administration and insolvency-related work to acquire and maintain appropriate levels of competence and skills.

### **Insolvency Practitioners Association**

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