Response to the Scottish Government Consultation on Bankruptcy Law Reform

Consultation Issued: 24 February 2012
Closing date: 18 May 2012

Introduction

There follows our response to the Scottish Government's Consultation on Bankruptcy Law Reform, as prepared by the Personal Insolvency Committee of the IPA; a committee comprised of IPA members with particular interest and expertise in the field of 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 Association and its Personal Insolvency Committee (PIC).

Overview of response and general remarks

Access to advice

The IPA welcomes a number of the initiatives under consultation and, in particular, is supportive of the concept that access to advice should be a pre-cursor to entering statutory and non-statutory debt solutions.

We believe that this advice should be provided by trained/educated and properly regulated practitioners, and that the private sector has a significant role to play in the provision of high quality, individually tailored advice.

Entry routes to sequestration

We understand that there is a concern amongst stakeholders about debtors entering sequestration without fully considering the alternatives, (alternatives which may generate better returns for their creditors.) This concern primarily results from the ability of debtors to apply directly to the AiB for sequestration, without first having obtained advice. Provided that insolvency has been demonstrated in these cases, the AiB is unable to deny entry or signpost to more appropriate alternatives.

By corollary, the certificated entry route to sequestration is understood to be operating well, and necessarily ensures that a debtor receives advice, as these applications must be made via authorised money advisers, who are themselves required to consider the options available and their suitability in individual cases.

We would suggest, therefore, that an extension of the certificate of sequestration route, to encompass all debtor-initiated bankruptcies, would address the concern that some debtors enter sequestration without first having been made fully aware of the consequences. Furthermore, it would do so without the need for the extensive, and potentially costly, changes which are proposed.

'Can pay, will pay'

The IPA further welcomes the concept that those who are able to pay their debts, should be encouraged to do so. A view we have expressed in a number of prior consultation responses. Engendering an ethos of 'repayment wherever possible', will assist advisers in managing the expectations of the debtor and improve returns to creditors.

Restriction of debtor choice

Notwithstanding the above, we have some serious reservations about the proposed restrictions to debtor-choice:

- Professional advisers have statutory, regulatory and contractual obligations to act in their clients' interest. To remove choice from the solutions (or 'products') available will create an inherent tension between the role of the adviser and the "advice" that they may then be bound to give;

- Debtors may be disinclined to seek assistance if they fear they will be compelled down a particular path, which would be counterproductive both in terms of improving access to debt relief and in generating returns to creditors;

- It would seem a likely, if unintended, consequence that the removal of choice will adversely impact upon the long term sustainability of the solution (or 'product') adopted. If solutions are not realistic and sustainable, their projected outcomes will not be achieved.

We believe that the solution adopted in each case should be tailored to the debtor's individual circumstances and proportionate to the size of the case (i.e. levels of debt) concerned. As these circumstances are infinitely variable, solutions need to be sufficiently flexible to accommodate these variations. The best outcomes are achieved where individuals have participated in an informed decision-making process, prior to voluntarily entering a realistic, fair and flexible process.

Complexity of proposed model

We have some concerns that the model currently proposed is overly complex and unduly prescriptive. It is envisaged that the sequestration regime will comprise a confusing array of 5 variants (or 'products'), to be applied according to apparent levels of income and/or debt at the inception of the process.

We believe that this would be confusing for both debtors and creditors, neither of whom will be aware of exactly which product they will receive when entering the process. Worse still, it may lead some debtors to seek to manipulate their circumstances in order that they fall into a more 'favourable' product category.

It is proposed to apply varying thresholds of debt and/or income to these products, resulting in broadly differing durations and administration regimes (ranging from 6 months to 8 years). These thresholds appear to have been applied with a view to categorising the time (and therefore, cost) which is expended upon the administration of the cases concerned, rather than ensuring that the debtor is in an appropriate process. Furthermore, it is not fully explained what will happen if a debtor is wrongly categorised within the regime, or if their circumstances change during the course of the administration.

The existing sequestration regime is flexible and appears to be working well, with the current LILA (Low Income, Low Asset) entry route reputedly successful. The only reported concern within the consultation document is that LILAs may be too broad in application, resulting in 'confusion on the part of stakeholders' as to what happens to individuals adjudged bankrupt via this process.

Whilst we can see some merit to the application of a maximum debt threshold to the LILA process (to limit instances of abuse), we do not consider that the further division of the sequestration regime into 5 products is likely to aid stakeholder understanding or result in equitable outcomes.

Extension of AiB remit

Another area of concern is the proposed extension of the AiB's remit. Were the proposals to be implemented in their current form, the AiB's office would be engaged in the activities of signposting, advice provision, order making, case administration, investigation, practitioner regulation and Official Receiver and quasi-judicial functions.

Whilst the potential for this expansion to generate situations of conflicting interest is acknowledged within the proposals, we have strong reservations that this very clear potential, or moreover the perception of it, can be adequately managed merely by the suggested application of departmental boundaries within the AiB's office. Furthermore, no information has been provided as to the likely cost of such an expansion as no impact assessment has been supplied.

ABOUT THE IPA

The Insolvency Practitioners Association is a membership body recognised by the Secretary of State for Business, Innovation & Skills for the purposes of authorising Insolvency Practitioners under the Insolvency Act 1986. 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.

As at April 2012, the IPA has over 2,100 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.

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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

The Insolvency Practitioners Association

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

Surname

N/A

Forename

N/A

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3. Permissions - I am responding as…

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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 ☐

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(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?

Making the current certificate route the only entry mechanism to a debtor-initiated sequestration would go a long way to achieving this.

However, whilst we consider that advice should be made available in all cases, delivered by a suitably qualified source, we envisage difficulty in adopting a system of compulsion to ensure that advice is then followed.

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

Yes ☐ No ☒

We do not think the concept of triage has been fully explained. It is unclear if what is envisaged is advice provision or merely signposting.

We are broadly supportive of a system of signposting debtors to appropriately qualified sources of advice provision.

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?

Yes ☒ No ☐

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

The AiB's role should be limited to the provision of information leaflets and signposting to suitably qualified and regulated practitioners.

Part 7 Education

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

Yes ☒ No ☐

We have reservations about the cost/effectiveness of such a system in practice.

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

We have no particular view as no evidence has been made available as to the effectiveness off such education – suitably qualified and authorised individuals.

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

Yes ☐ No ☒

It should be optional and available in all cases.

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

It should be delivered in a format that is accessible to those that need it. e.g. a fact sheet; and limited to the fundamentals of budgeting and domestic cost cutting.

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

Yes ☐ No ☒

Optional for everyone.

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

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

Yes ☐ No ☒

Financial education should be provided to help individuals regularise their affairs and ultimately limit instances of recurrence.

There appears to be an element of confusion within the consultation between discharge from debt and discharge from the restrictions of the debt-relief process.

We consider that discharge from debt ought to be subject to objective, statutory criteria. We are sceptical about a debt-relief process which does not guarantee debt-relief and renders it subject to a subjective determination of cooperation and/or education.

Criteria, such as cooperation with the office holder and/or a willingness to participate in education, may be more appropriate factors to take into account when considering discharge from the restrictions of the process, rather than the debts themselves.

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

The rate of recurrence of insolvency amongst individuals who had participated in education compared to the rate for those who had not.

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 ☐

Subject to it being used as a flexible guide, rather than fixed template.

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?

Yes – consistency of application would appear to be a fairer approach and we generally support the use of an industry standard.

However, as previously noted in response to the recent PTD consultation, we are concerned that whatever tool is adopted, it must be sufficiently flexible to cater for the broad variance in debtors' circumstances and also the occurrence of exceptional items of expenditure. There should also be an element of discretion afforded to the office holder in its application.

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

The tool should be a guide, providing a flexible scale which can be adapted to the debtor's location and individual circumstances, using the professional discretion of the practitioner. We strongly believe a percentage is not appropriate.

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 ☒

No evidence has been made available to indicate why a different tool is required. We are, therefore, not able to comment on whether it would be useful or necessary to develop such a tool.

We would envisage that creditors would prefer the uniform application of the same tool(s) in Scotland as in England & Wales.

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_[see 8.1b above]_____
☐ D) A percentage of the individual's income

We have no preference, except that a consistency of approach with England & Wales would encourage fairness to debtors and assist creditors.

We are concerned that whatever tool is adopted, it should provide sufficient flexibility and be applied with professional acumen, rather than in an unduly formulaic manner.

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_____

We do not consider that a fixed percentage is likely to be a viable or accurate measure of available income. The adoption of an arbitrary measure would be likely to affect the sustainability of any payment arrangement which was based upon it.

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

Yes ☒ No ☐

By extending the current Income Payment Agreement / Order model across the processes. Direct deduction should only be available in the event of a default by the debtor and after notice to the debtor, giving them an opportunity to remedy.

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 ☒

Advice should be freely available to all debtors but we do not consider it to be practicable to compel debtors to follow that advice and may be counter-productive to do so.

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

Yes ☒ No ☐

Applications should follow the current certification system.

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

Yes ☒ No ☐

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

Yes ☒ No ☐

This would be addressed if the certificate of sequestration approach was adopted.

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

Yes ☐ No ☒

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 ☐

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

Yes ☒ No ☐

Following a formal application for entry to an insolvency process being made, a moratorium would promote the principle of parri passu distribution.

However, there would need to be a mechanism by which creditors could access this information and sufficient safeguards to prevent abuse by debtors, such as application only via an authorised money adviser or Insolvency Practitioner.

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_____.

For the period between making the application and the making of the order. However should the application be dismissed, withdrawn or fail in any way, the moratorium should also come to an automatic end.

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

Yes ☐ No ☒

This may prevent a debtor with a trust deed which failed to gain protection from entering sequestration.

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

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

See 9.6 above.

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 ☐

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

Yes ☒ No ☐

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 ☒

Whilst we support the concept of debtors repaying as great a proportion of their debts as they are reasonably able, we are not persuaded that compulsion into a particular income-based route would ultimately be productive, or indeed necessarily in the interests of creditors.

There may be instances where both debtors and creditors would prefer to take a shorter route based on realisation of assets, rather than pay over such a long period of time and we are unclear about the rationale behind insisting upon an income-based model.

With regard to the model proposed:

- We believe that an 8 year DAS as a default procedure will disincline debtors from taking advice in the first place;

- We are not aware of any data being available on DAS failure rates. However, it is notable, that those on current schemes have entered them voluntarily. It seems probable that failure rates would increase substantially in the event of a compulsory system;

- Compelling debtors down a particular route undermines the adviser's ability to assist the debtor in entering the most appropriate route for their individual circumstances;

- Those with income and assets could significantly defer the repayment of their debts; this would not be in the interests of their creditors;

- It is noted that there is no suggestion of a DAS being imposed on a debtor adjudged bankrupt upon a creditor's application. There would, therefore, necessarily be circumstances where debtors might be "best advised" not to take any action to address their own situation and rather wait for a creditor to do so for them.

- It is noted that where a DAS is not successfully implemented, all of the interest and charges *since the commencement of the scheme* are written back. Depending upon the level of interest and charges applied, this could theoretically result in a debtor who had made payments for a number of years being worse off than when they started. Where creditors agree to a waiver of interest and charges voluntarily, as in a Debt Management Plan, this is not the case.

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

Yes ☐ No ☒

- The proposed 8 year duration has been fixed with reference to what debtors are currently agreeing to, rather than with reference to whether this period is appropriate or sustainable;

- Whilst accepting that debtors are currently agreeing to DAS schemes with an average duration of over 8 years, we are not aware of any data currently being available as to whether these "debtors of today" are ultimately able to maintain payments over such a long period of time. It may transpire that these 8 year schemes are simply not viable.

- The creation of a barrier to entry into statutory debt-relief solutions may incline debtors to ensure that their income and, perhaps even their debt levels, are such that they would qualify for 5 years of payments within a bankruptcy or PTD process as at the time of

assessment. i.e. Such a model would produce a financial motivator for debtors to earn less and/or owe more.

- The disparity between the proposed 8 years DAS period and proposed 5 year PTD/bankruptcy contribution periods is not fully explained, but would create anomalous situations where having higher debt levels were potentially beneficial to the debtor.

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

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

Entering a DAS should be voluntary, in which case, the prescribed maximum duration should be fixed with reference to the period it is considered reasonable for creditors to forego their rights to enforce against the assets of the debtor.

We are not in a position to comment on the views of the creditor community in this regard, but would expect (anecdotally) it to be a period of not more than 10 years.

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 ☒

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?

Yes ☒ No ☐

Fees on the current basis would be acceptable.

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 ☐

The appeal process should be independent of the AiB, particularly where they advise the DAS.

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

Yes ☐ No ☒

It is difficult to envisage how such a panel could be operated independently of the AiB, which would create a potential conflict of interests.

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

Creditors should have the right to apply to court in the small number of cases we would expect to be involved.

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

Yes ☐ No ☒

We oppose a composition be available in DAS schemes as the purpose of a DAS it to provide payment in full from surplus income as an alternative to realising assets. If composition of debts is to be provided, one of the more appropriate pre-existing statutory vehicles should be used.

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 ☐

n/a

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_____.

n/a

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 ☐

n/a

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

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

n/a

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

Yes ☒ No ☐

As stated above, we do not think a composition should be available in the DAS and would suggest a PTD would be the appropriate vehicle.

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

See 10.5 above.

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

Yes ☐ No ☒

Generally, the economics of PTDs determine the level at which they are a viable alternative and in the vast majority of cases, they will not be used where debt levels are very low.

Even where barriers are placed at the point where they do not impact upon the majority, there will necessarily be individual cases at the margins which will be adversely affected.

We are of the view that practitioners should be able to bring their professional acumen to bear upon the individual circumstances of the case and have a full spectrum of alternatives available in order to secure the most appropriate route for the individual and their creditors.

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

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

n/a

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 ☐

But only in cases of default. See 8.3 above.

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

The office holder

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

Yes ☐ No ☒

Minimum dividend requirements were widely utilised by creditors in IVAs in England and Wales and largely abandoned due to their adverse impact upon sustainability and success rates.

A debtor's circumstances may change significantly over the course of a PTD (whether it be 3 or more years) and, as has been seen with the current housing market, the value of their assets may decrease significantly during the term, through no fault of their own.

Additionally, history in relation to IVAs illustrated that a minimum dividend requirement acts as a motivator for debtors to 'optimistically' overstate their surplus income and/or asset levels in order to gain entry to the process.

In the case of IVAs, this resulted in an increase in the number of arrangements requiring subsequent variation, or else failing as a result of the minimum dividend not being met. This is not cost effective or in the interests of creditors.

We consider that a minimum dividend requirement within the PTD process could be even more injurious to success rates, given that there is no mechanism for the variation of a PTD.

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

Yes ☐ No ☒

See 10.10 above

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_____.

See 10.10 above.

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

Yes ☐ No ☒

A fixed term would be insufficiently flexible to cater for cases which fell outside the norm. A standard or expected term for income-based cases would be preferable.

Question 10.11a - If yes, what should this period be?

- ☐ A) 3 years
- ☐ B) 4 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

See 10.11 above.

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 ☒

Generally, no, as this would potentially result in the extension of the PTDs term in cases where the failure to meet the project dividend was not as a result of any fault on the part of the debtor.

However, some flexibility for a short extension or ‘payment holiday’ could be a useful mechanism to cater for cases where there is a short term fluctuation in income or unexpected item of domestic expenditure. Similar provision has been incorporated into the IVA protocol standard

terms and we understand that PTDs can be drafted to incorporate a degree of flexibility in any event.

Question 10.13 – Should the current process that deems consent to a trust deed becoming protected continue?

Yes ☒No ☐

The current system appears to work well.

Question 10.13a – If yes, are the current thresholds correct?

Yes ☒ No ☐

n/a

Question 10.13b – If the thresholds are not correct, what should they be?

n/a

Question 10.14 – If the current deemed consent process is not appropriate, what should replace it?

n/a

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 ☒

See 7.4 above

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 ☒

There will be circumstances in which this is not appropriate and it should be left to the discretion of the Trustee, perhaps in consultation with creditors.

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

Yes ☐ No ☒

But this could be satisfied by the debtor demonstrating this to an authorised Money Adviser, such as through the certificate process.

This would ensure that their circumstances had been independently verified and that they had received professional advice prior to their application.

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

Yes ☐ No ☒

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

Yes ☐ No ☒

Question 10.18b – If no, what should this level be?

- ☐ A) £1,500
- ☐ B) £2,000
- ☐ C) £5,000
- ☐ D) another amount, please specify_____.

n/a

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

Yes ☐ No ☒

Minimum debt levels may restrict access to the appropriate solution and varying minimum levels will result in confusion. However, we can envisage circumstances where guidance as to what would generally be expected practice may be helpful (such as in the case of PTDs).

Maximum debt thresholds for products such as the LILA may be effective in ensuring that the regime which is applied is proportionate to the size of the case, although we are not in favour of the large number of products with varying thresholds which are currently proposed.

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

Yes ☐ No ☒

It is not necessarily logical for these thresholds to be the same.

A creditor will be applying on the strength of the debt owed to them alone, whereas the debtor will be applying in respect of the totality of their debts.

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

Yes ☐ No ☒

Question 10.21a - If yes, what should that level be?

☐ A) £3,500
☐ B) £5,000
☐ C) £7,000
☐ D) another amount, please specify_____.

n/a

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?

Yes ☐ No ☒

We are not convinced of the benefits of developing a new product when the existing LILA regime is reportedly operating well. We would question why any necessary adjustments to the LILA criteria could not be made as a simpler and less costly alternative to developing new products.

More generally, the individual's circumstances may change from the time of application. The 'No Income' product, as proposed, may serve to motivate individuals to remain on benefits rather than seek employment and/or to understate their assets in order to qualify.

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

Yes ☒ No ☐

Whilst it is understood that the LILA model, which contains an asset threshold, is working well, there remains a risk that imposing thresholds as a precursor to qualification to a less “rigorous” regime may incline debtors to understate the value of their assets, whether inadvertently or deliberately.

We are of the view that the treatment of assets within the sequestration process should be consistent, with assets being included or excluded from the estate consistently.

If assets are treated consistently, there is arguably no need to set asset thresholds as entry barriers.

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_____.

n/a – see above

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

Yes ☐ No ☒

No – not unless some further enquiry will still be undertaken to confirm that the property is of no value to the creditors.

As heritable property is generally the most valuable asset of an individual’s estate, the situation concerning the property requires positive confirmation by the office holder. An automatic exclusion of heritable property from the “No income” product would create a clear potential for abuse and would potentially incline debtors with such assets to engineer a position of not having income at the time of application in order to meet the qualification criteria.

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

n/a

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 ☒

It appears inequitable for those in employment and seeking to repay their debts to be subject to a substantially longer or more rigorous regime than those on state benefits, particularly when it is envisaged compelling those that are able to repay their debts over an 8 year period, do so in full.

Any debtor on benefits may secure employment within an 8 year period (or such shorter period as is ultimately agreed upon). The debtor within this process, as proposed, would have avoided making any repayment of their debts, and therefore, be at a significant advantage.

Question 10.25a – If no, what should the period be?

- ☐ A) 9 months
- ☒ B) 12 months
- ☐ C) 18 months
- ☐ D) another period, please specify_____.

We consider that both the discharge period and the period during which the liability to make contributions from income remains open to re-assessment, ought to be evenly applied across the sequestration process.

Evidence from England & Wales would suggest that the fixed 12 month DRO period works well. The period during which income can be re-assessed (12 months) is applied to both the bankruptcy and DRO regimes, creating a "level playing field" for debtors. Furthermore, the early discharge provisions in the English & Welsh bankruptcy system (providing for discharge in less than the automatic 12 month period) are in the process of being abandoned as they appeared to generate unnecessary administration as well as potentially resulting in inequitable outcomes.

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

Yes ☒ No ☐

We don't think there should be a separate "no income" product.
However, a maximum debt level would ensure that entry into such a process was limited to smaller cases, which appears to be the intention.
We understand that the absence of a maximum debt level is one of the problems which has been identified with LILAs as creating a potential for abuse.

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

We do not object to £17,000, although would suggest that there would be

some logic to bringing consistency for debtors and creditors in applying the same £15,000 limit as applies to the DRO process in England and Wales.

Question 10.25b – If no, what should the level be?

- ☐ A) £10,000
- ☒ B) £15,000
- ☐ C) £20,000
- ☐ D) another amount, please specify_____.

See 10.26a above

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 ☐

Such individuals should be subject to the same credit restriction period as any other bankrupt. We consider that the period should be a minimum of 12 months.

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_____.

The credit restriction should apply only for the duration of the process, until discharge. Once discharged, the decision to extend credit is a matter for creditors.

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 ☐

Any restriction should only apply during the course of the bankruptcy. Unless a blanket restriction is imposed, a value will necessarily need to be set in order to bring certainty. £3,000 seems high for an allowable credit arrangement. £500 would be more appropriate and result in a consistent approach with England & Wales.

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

Yes ☐ No ☒

Generally, we would support the concept that a subsequent insolvency within a specified period should result in a longer duration being applied to that subsequent process.

However, we do not necessarily think debtors should be prohibited from entering the sequestration regime in the first place as this may prevent them from addressing a debt situation.

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_____.

n/a

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 ☐

See 10.29 above. Whilst noting that we do not think there should be a no income product.

Question 10.30a - If yes, what should the period be?

- ☐ A) 1 year
- ☐ B) 2 years
- ☒ C) 3 years
- ☐ D) another period, please specify_____.

Question 10.31 – Should a new Low Income product be developed for individuals who are assessed as unable to make a contribution?

Yes ☐ No ☒

See 10.22 above. We believe that the desired result could be achieved by adjusting the existing LILA entry route.

Question 10.32 - In order to access this Low Income product should the maximum level of assets be limited?

Yes ☒ No ☐

See 10.23 above. We believe that consistent treatment of assets is the priority in ensuring fairness and limiting the potential for abuse.

Question 10.32a - If yes, what level should it be?

- ☐ A) £5,000
- ☐ B) £7,000
- ☐ C) £10,000
- ☐ D) another amount, please specify_____.

n/a

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 ☐

See 10.25 above. We believe that the starting point should be that the discharge period should be applied evenly across the “products”, other than in instances where it is considered necessary to extend the period, due to conduct issues or repeated insolvency.

Question 10.33a – If no, what should the period be?

- ☐ A) 6 months
- ☐ B) 9 months
- ☐ C) 18 months
- ☐ D) another period, please specify_____.

See 10.25a above.

Question 10.34 - Do you think that this product should be available to individuals who own heritable property?

Yes ☐ No ☒

See 10.24 above.

Question 10.34a – If yes, should this be restricted to properties that have been repossessed or have negative equity?

n/a

Question 10.35 - Should there be a maximum debt limit to access a Low Income product?

Yes ☒ No ☐

A maximum debt level would ensure that entry into the process was limited to smaller cases, which appears to be the intention. We understand that the absence of a maximum debt level is one of the problems which has been identified with LILAs as creating a potential for abuse.

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_____.

We do not think there is a need for different limits to be set for “No Income” and “Low Income” products. Doing so will create confusion and may produce inequitable outcomes.

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 ☐

Debtors should always be able to access debt relief, although the form it takes (for instance, duration) could be adjusted in instances of capability and/or repeat use.

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 ☐

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_____.

3 years.

Question 10.38 - Should a new Payment product be developed for individuals who are assessed as able to make a contribution?

Yes ☐ No ☒

As detailed above, we do not consider that having a variety of products will aid stakeholder understanding and believe that it will create the potential for inconsistent and inequitable treatment of debtors.

The liability to make a contribution from income should be applied consistently using agreed criteria and should apply for the same period across the sequestration process.

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 ☐

If such a product is implemented, we do not understand the rationale in excluding the self-employed.

Question 10.40 - Should this product be unavailable to individuals who have debts exceeding a fixed sum?

Yes ☐ No ☒

Question 10.40a - If yes, what should this sum be?

- ☐ A) £250,000
- ☐ B) £500,000
- ☐ C) £750,000
- ☐ D) another amount, please specify_____.

n/a

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

Yes ☒ No ☐

Debtors and creditors require certainty with the process.

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?

Yes ☒ No ☐

Question 10.42a - If yes, at what intervals?

- ☐ A) quarterly
- ☐ B) 6 monthly
- ☐ C) annually
- ☒ D) another period, please specify_____.

The appropriate frequency of dividends will depend on the circumstances of the case. Consequently, dividends should be paid at the discretion of the office holder.

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

Yes ☐ No ☒

Insolvency Practitioners should administer such cases, although we do not consider that this should be a separate form of sequestration.

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

Yes ☐ No ☒

We can see the merits of fixed charges being applied to the administration of the income collection process.

However, the office holder should be at liberty to seek approval for remuneration for attending to any other aspects of the case, such as investigations and realisation of assets.

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 ☒

The discharge period should be linked to conduct rather than cost recovery.

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 ☒

As detailed above, we do not consider that having a variety of products will aid stakeholder understanding and believe that it will create the potential for inconsistent and inequitable treatment of debtors.

The debtor's assets and income should be made available in repayment of their debts using consistent criteria and an office holder's investigations and actions should be proportionate to the level of the debts, the value of the assets and the conduct of the debtor, in the individual circumstances of the case.

We consider that the division of the sequestration process into arbitrary categories would invariably produce instances where the debtor was incorrectly or inappropriately categorised.

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_____.

n/a

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

Yes ☒ No ☐

The common financial tool should be the starting point in all cases for setting the level of payments. However, this should be subject to the ability for departure from it, in appropriate instances. We would anticipate that higher value and/or more complex cases would be most likely to require a departure from a fixed formula, reinforcing the need for whatever tool is adopted to contain a sufficient level of flexibility.
In all cases, payments should be made 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_____.

Where income levels permit, income contributions should be ingathered for the same period in all sequestrations.

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 ☒

See 10.45 – this could produce highly inequitable results.

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

Yes ☒ No ☐

We do not consider that there should be a multiplicity of "products", however, were one to be implemented, there will clearly be a need for individuals who are in the "wrong" product, to be transferred between them.

We consider that the need for such systems reinforces our view that the proposed system is unduly complex and overly prescriptive.

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 ☒

We are of the view the existing DAS scheme would be appropriate for sole traders in simple cases. More complex cases should take the form of a PTD.

Question 11.2 – Should Business DAS exclude non-business debts?

Yes ☐ No ☒

We do not consider this to be legally feasible unless the business has independent legal personality.

Question 11.3 - Prior to entering Business DAS, should business advice be compulsory?

Yes ☐ No ☐

n/a

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

n/a

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

Yes ☐ No ☒

Such cases should take the form of a PTD or PVA.

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 ☒

Question 12.1a – If no, should only non-contested creditor applications be considered for award by AiB?

Yes ☐ No ☒

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?

n/a

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_____.

n/a

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 ☒

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Part 13 Debtor Co-operation

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

Yes ☐ No ☒

No - not automatically. Discharge should be subject to the ability to extend in the duration event of serious non-cooperation, upon the application of the office holder to an independent party, as currently operates.

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_____.

This depends upon the severity of the non-cooperation and the duration which would otherwise have applied. The duration should be appropriate to the circumstances of the case. Were the standard bankruptcy duration to be 3 years, then extension to 5 would seem appropriate. Were the standard duration to be 1 year, then an extension to 5 years would be disproportionate.

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

Yes ☒ No ☐

But only if there is evidence that they are avoiding the proceedings. There would also need to be minimum criteria demonstrated in tracing the individual and an automatic lifting once they have complied.

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?

Yes ☐ No ☒

Given the large number of sequestrations that are administered by the AiBs office, we consider that this presents too great a potential for additional conflict of interest. Deferral of discharge should be a matter for determination by the Court.

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_____.

Dispute resolution is a judicial rather than an administrative process.

Any involvement by the AiB's office in such a determination would carry a high perception of conflict of interests, not to mention an actual conflict in instances where the AiB was also the Trustee.

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

Yes ☐ No ☒

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 trust deed, should this debt be excluded from discharge?

Yes ☐ No ☒

Provision exists to recover preferences and transactions at an undervalue.

Beyond this, it is ostensibly a conduct issue which might run to deferral of discharge, but should not entitle creditors to differential treatment.

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_____.

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 ☐

However, this is largely a social policy issue.

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

Yes ☐ No ☒

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 ☒

This may create the potential for abuse.

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_____.

n/a

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 ☒

Any changes recommended should not be implemented without proper consultation.

Question 14.2 - Do you agree that a consolidation Bill follow the programme Bill through Parliament?

Yes ☒ No ☒

If these charges are implemented, legislative consolidation would seem appropriate.

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

Yes ☒ No ☐

Subject to an appropriate process for admission of late claims and exercise of office holder discretion.

Question 14.3a - If so, what should this timescale be?

- ☐ A) 60 days
- ☐ B) 90 days
- ☐ C) 120 days
- ☒ D) another period, please specify_____.

The time scale may need to be varied according to the process.

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

The current process appears to operate effectively.

The 'penalty' should be limited to exclusion from the current dividend, subject to a right to "catch up" in future distributions, if there are any.

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 ☐

To prevent "forum shopping". Although this may not be necessary in the event of greater conformity between Scotland & England & Wales

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

Actual residency supported by evidence.

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 ☐

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 ☐

This would aid identification. However, we have previously expressed concerns about the potential this might create for identity theft and consideration could be given to restricting access to the register to parties with a legitimate interest in the information.

Additionally, we would question whether including current address information might prejudice the "compliant" debtor as opposed to the "absconder" whose details will be unknown.

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

Full name, DOB, current address and any former addresses at which the debt have been incurred, and any unincorporated trading style used.

Question 14.8 - Should some details of an individual who is at risk of violence be withheld from the ROI?

Yes ☒ No ☐

Question 14.9 - Are there any other categories of individuals whose details should be withheld from the ROI? Please specify.

Yes ☒ No ☐

Potentially other types of individual, subject to an appropriate application process showing good cause.

Question 14.10 - Is the supplementary questionnaire effective as an interview aid, or is something else required to replace it?

Yes ☒ No ☐

Question 14.11 - Would the use of a common financial tool remove the need to collect further information on a supplementary questionnaire?

Yes ☐ No ☒

Question 14.12 - Where a recall of bankruptcy is granted, should the distribution process be clarified?

Yes ☒ No ☐

We understand that the current process is unsatisfactory in that it relies on subsequent implementation by the debtors, after the recall is granted.

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 ☐

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

Yes ☐ No ☒

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

Yes ☒ No ☐

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

Yes ☒ No ☐

In instances of payment in full.

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

Yes ☒ No ☐

Subject to retention of a suitable period, such as 10 years.

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

Yes ☒ No ☐

Question 14.16b – What should the key documents include?

We have not particular view.

Question 14.17 - Should the date of sequestration be the award date in both debtor applications and creditor petitions?

Yes ☒ No ☐

This would be consistent.

Question 14.17a – If no, should the discharge date be linked to the date the award was made by the sheriff?

Yes ☐ No ☐

Question 14.18 - Should the ability to apply for a payment holiday be introduced to all statutory debt relief products?

Yes ☒ No ☐

Flexibility of this type caters for unforeseen circumstances and aids sustainability, but should be subject to the exercise of the office holder professional discretions, not a right afforded to debtors.

Question 14.19 - Should the period of the payment holiday be fixed at 6 months as it is in DAS?

Yes ☐ No ☒

The period should be determined by the relevant circumstances of the case.

Question 14.20 - If a payment holiday is granted, should this period be added onto the length of the period before discharge?

Yes ☒ No ☐

Question 14.21 - Should the criteria for a payment holiday be the same for all statutory debt relief products?

Yes ☒ No ☐

Question 14.22 - Should bankruptcy processes be removed from the Sheriff Court where the process is mainly administrative?

Yes ☐ No ☒

This presents a conflict of interests in the AiB's role.

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 ☒

Question 14.23 - Should a panel, separate from the decision maker, decide the outcome of more complex applications and review disputed decisions?

Yes ☐ No ☒

The existing Court structure appears adequate for the task and the economic case for such a panel has not been made out.

Question 14.23a - If yes, should the panel have the power to make the final decision in low value, straightforward cases?

Yes ☐ No ☐

n/a

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 ☐

Were such a panel to be adopted.

Question 14.25 - Should all bankruptcy processes currently dealt with by the Sheriff Court be removed to AiB, subject to appropriate appeals?

Yes ☐ No ☒

As noted above, this presents a significant potential for conflict of interests, particularly in cases where the AiB is the Trustee.

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 ☒

See 14.23 – No major deficiencies in the current system have been identified and the economic case for this has not been made out.

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 ☐

We are unable to respond to this question as it is ambiguous.
We would comment that near monopolies do not generally promote a healthy competitive environment.

Question 15.1a – If no, should the AiB continue to act as a trustee in bankruptcies in Scotland?

Yes ☒ No ☐

But only in last resort cases and not in the event that the AiB takes on additional decision-making functions as this would present a further conflict of interest.

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

Yes ☒ No ☐

A publically funded mechanism for administering such cases is necessary.

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?

We are not in a position to respond to this question in the absence of an impact assessment which includes details of the current AiB running costs

and anticipated case level.

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

Yes ☐ No ☐

We have no view.

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

Question 15.3 - Should AiB to have a more proactive role in the supervision of all debt management products?

Yes ☐ No ☒

The OFT has issued detailed guidance on its expectations of those operating in the debt management sector and is the appropriate authority to handle any concerns about its application. Bodies such as DEMSA and DRF are also actively working to raise standards.

Licensed Insolvency Practitioners are monitored and regulated in their compliance as relates to PTD and IVA cases by their RPBs.

An extension of AiB powers would be an unnecessary increase in the regulatory burdens already placed on practitioners.

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 ☒

We are not aware of any specific instances of the practice complained of. However, were such matters to occur, they should be referred to the practitioner's RPB using existing complaints handling processes.

Question 15.5 - Should Scottish Ministers have the power to regulate Scottish Insolvency Practitioners ?

Yes ☐ No ☒

We consider that a UK wide regulatory system is appropriate to ensure consistency and fairness of approach, and to avoid the creation of another regulator.

Question 15.5a - If yes, should this be managed through Recognised Professional Bodies who would monitor and regulate Insolvency Practitioners?

Yes ☒ No ☐

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 ☒

The Memorandum of Understanding governs relationships between those bodies authorised to license insolvency practitioner. There are currently 7 such RPBs and further body is unnecessary. The AiB already sits as an observer on the Joint Insolvency Committee, and in the absence of a direct regulatory function, we do not consider that re-drafting the Memorandum is necessary or appropriate.

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 ☒

We have no objection to cooperating with the AiB, insofar as we are able to do so.

Regulatory bodies are provided certain statutory exclusion from responding to Freedom of Information Act requests in connection with their regulatory activities and our concern is that information shared with the AiB would not have the benefit of this protection and, therefore, there may be consequent confidentiality issues.

Additionally, as noted above, the AiB is an observer on the Joint Insolvency Committee (the industry's standard setting body) and would be entitled to information as a complainant in instances where a formal complaint about a practitioner had been made to his/her RPB. We consider that these arrangements themselves provide a flow of information.

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

Yes ☐ No ☒

This is an unnecessary extension of the AiBs role.

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 ☒

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

No economic case has been made out as to how this function could be performed in the event of independence.

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

We do not have access to the requisite information in order to comment or suggest a funding model.