

Final Business and Regulatory Impact Assessment

Title of Proposal

The Bankruptcy Fees (Scotland) Regulations 2017

Purpose and intended effect

- **Background**

Sections 69A and 72(1A) of the Bankruptcy (Scotland) Act 1985 (as amended) (“the 1985 Act”) and sections 205 and 225(2) of the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) provides Scottish Ministers with powers to prescribe the fees and outlays payable to the Accountant in Bankruptcy (“AiB”) in respect of the exercise of his statutory functions as described in the relevant Act.

The fees are levied to recover part of the administration costs incurred by the AiB in carrying out his statutory duties. For cases where the AiB is appointed as trustee, the fees are subsidised by the public purse as part of the overall AiB budget from the Scottish Government, in those cases where the realisation of the debtor’s estate does not hold sufficient funds. Where AiB is not appointed as trustee, the fees stated in Part 2 of the Schedule are paid to the AiB from the debtor’s estate irrespective of whether there is any realisation or not.

AiB has recognised the need to carry out regular reviews of the bankruptcy fee structure, in order to take assess whether these are appropriate, fair and contribute towards the recovery of the AiB’s costs in respect of his statutory duties.

The review of fees undertaken prior to the introduction of the Bankruptcy Fees (Scotland) Regulations 2014 simplified the fee structure and aimed to introduce more transparent fees regulations by removing a number of ad-hoc fees and replacing them with a fixed fee approach. AiB has kept this under review and has undertaken analysis to establish whether the fee levels set are appropriate.

AiB’s approach aimed at full cost recovery is based on the need to recover costs that relate to the administration of insolvency – that is, AiB does not seek to recover costs resulting from, for example, the development of policy. This is consistent with Scottish public finance best practice.

In 2014-15 and 2015-16, AiB was self-financing owing to the large caseload seen in the preceding years – with most income arising at the end of bankruptcy cases. The personal insolvency caseload of the AiB reached a record level in 2009-10 and remained at historically high levels until 2012-13, when a period of significant decline in case numbers started.

The decline in the personal insolvency caseload of the AiB has meant that there are fewer cases in which to recover costs that relate to the administration of insolvency. Overall, total personal insolvencies have declined by 63% from 22,998 in 2009-10 to 8,474 in 2015-16. Awards of bankruptcy cases, in particular, have seen a significant decline over this period from 13,810 to 3,765, a 73% decrease.

As a result of the fall in case numbers, the AiB is forecasting a fall in operational income of £1.3 million in 2017-18, £4.2 million in 2018-19 and £3.0 million in 2019-20 when compared with the forecasted income level in 2016/17.

Continuing to set fees at current levels means that the AiB will not recover its costs, and therefore, would not be consistent Scottish public finance best practice. The shortfall from not recovering costs in full would have to be met by the Scottish Government, and ultimately the taxpayer.

In recognition of the current economic climate and, in particular, the Scottish Government's policy of providing low cost, effective and accessible debt relief to those on low incomes who need it most, the 2014 fees review set the debtor application fee for the new 'Minimal Asset Process' ("MAP") bankruptcy at £90, while the debtor application fee for 'full-administration' bankruptcy remained at its 2012 level of £200. The debtor application fees for both MAP and full administration bankruptcy have not been altered in this fees review.

- **Objective**

The purpose of the Bankruptcy Fees (Scotland) Regulations 2017 is to set out the charges to be levied by the Accountant in Bankruptcy ("the AiB"). The table of fees in the Schedule to the Regulations is divided into 2 parts. Part 1 lists the fees payable for the functions of the AiB in respect of the functions carried out as interim and/or trustee in a bankruptcy. Part 2 lists the fees payable for all statutory functions of the Accountant.

The Bankruptcy Fees (Scotland) Regulations 2017 will:

- Maintain the transparent and streamlined fees structure introduced in the Bankruptcy Fees (Scotland) Regulations 2014;
- Deliver a fees structure that is fair;
- Form part of the AiB's regular review of fees to make sure they take full account of the need to minimise the call on the public purse from the operational costs for administering insolvency products – excluding AiB's policy functions and the administration of the Debt Arrangement Scheme;
- Maintain the commitments made during the development and consultation of the bill for the Bankruptcy and Debt Advice (Scotland) 2014 – particularly in relation to the costs of accessing bankruptcy through the MAP route.

- **Rationale for Government intervention**

To ensure access to fair and just processes of debt advice and debt management for the people of Scotland while taking into account the rights and interests of those involved, aligned to the delivery of the following National Outcomes:

- Realising our full economic potential with more and better employment opportunities for people.
- Tackling the significant inequalities in Scottish society.
- Having 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.

The Bankruptcy Fees (Scotland) Regulations 2017 continues to put in place a fee structure that is transparent and fair. This is achieved through the provision of low cost access to bankruptcy for those who need it, reasonable charges for bankruptcy administration processes that can facilitate a reasonable outcome for creditors and a system that minimises public subsidy towards the administration of Scotland's statutory insolvency mechanisms.

Consultation

- **Within Government – Fees Review**

A meeting with AiB Senior management was held in July 2016. The views captured at this meeting have been taken into account when preparing this review. AiB officials also consulted with Finance and Scottish Government officials during this fees review. A proposed revised fee structure was discussed with and agreed by AiB's Board for recommendation.

A rigorous financial mapping exercise took place including analysis of the anticipated volumes by insolvency product, including bankruptcy (MAP and full administration) and Protected Trust Deeds (PTDs). Additionally, the Fees Review took into account the estimated volumes of creditor petition bankruptcies and debtor applications and those that are likely to be administered by private trustees as opposed to AiB. These factors all influenced the expected income stream and the impact on cost recovery.

- **Public Consultation**

The current fees structure as introduced in 2014 was discussed and agreed by the AiB Board and was discussed during a series of AiB stakeholder events, which included a broad range of representatives from the money advice, creditor and insolvency sectors. There is no change to the basic fee structure as part of this review.

In advance of the finalisation of these proposals, AiB commenced a 6 week consultation on behalf of the Scottish Government in October 2016, inviting feedback on the proposed changes in these regulations. This consultation involved Recognised Professional Bodies, creditor representatives and Money

Advice Organisations.

The stakeholder feedback recognised and understood the need for certain fee increases in view of the issues highlighted above. No objections were received. The insolvency profession have welcomed the move to cap AiB fees for audit at a maximum of £5,000 per determination. The sector has previously raised concerns that an uncapped audit fee resulted in a disproportionate AiB fees in complex bankruptcies involving high fees and outlays.

- **Business**

In October 2016, a 6 week consultation on the proposed changes in these regulations was undertaken.

The current fee revisions were set out in a consultation paper that was circulated to AiB stakeholders and considered a meeting held in November 2016. The proposed fee alterations were agreed. The stakeholders included:

- Lloyds Banking Group
- RBS
- HMRC
- Insolvency Practitioners Association
- ICAS
- Deloitte LLP
- KPMG
- Grant Thornton UK LLP
- JP Morgan
- ABCUL
- Citizens Advice Scotland
- Money Advice Scotland
- The Carrington Dean Group
- Society of Messengers at Arms and Sheriff Officers

Options

Option 1 – No Change

Sectors and groups affected

- There would be no direct effect on debtors, creditors or insolvency practitioners. However, as highlighted above, continuing with unaltered fees would result in a significant burden on the public purse and ultimately the taxpayer to meet the forecast fall in operational income of £1.3 million in 2017-18, £4.2 million in 2018-19 and £3.0 million in 2019-20 when compared with the forecasted income level in 2016-17.

Benefits

- There will be no realisable financial benefit.

Costs

- This option would result in an increased financial burden for the taxpayer.
- Additional costs incurred would be those spent on the internal review of the fees structure.

Option 2 – Introduce the Bankruptcy Fees (Scotland) Regulations 2017

Sectors and groups affected

The proposed fees structure will impact on the following groups:

- Creditors
- Insolvency Practitioners

Benefits

The proposed model continues to support the goal of transparency and simplicity and delivers the following, additional benefits:

- The increase in standard administration fee will more accurately reflect the fixed costs associated with on-going administration of insolvencies.
- The increase to commission rates payable on the realisation of assets not only allows AiB to attract more competitive bids for the insolvency services contract (as these commission rates will be passed on to contracted firms), but allows AiB to benefit from the increase income on all in-house managed cases, thus minimising subsidy from the public purse.
- There are no changes to the existing MAP or debtor application fees meaning that the most vulnerable debtors with few assets and minimal income will continue to benefit from low cost access to bankruptcy.
- The revised fee for AiB's audit function has been capped at £5000 per determination. The review carried out concluded that the introduction of a cap ensures that AiB fees are fair and reasonable and transparent. This will increase the return to creditors in complex cases involving high levels of fees and outlays and has been welcomed by the insolvency profession.

Costs

The proposed fee of £1,500 for AiB trustee bankruptcy cases reflects the effect of decreasing case volumes and the resultant increase in the cost per case. In comparison with the current fee this will raise an additional £400 per case where sufficient funds are ingathered. This fee increase will have no effect in cases where contributions and assets realised are insufficient to meet the administration fee. The shortfall will be met by the public purse.

The increase in fees in relation to the administration of creditor petitions will be charged to creditors but can ultimately be recovered from any estate.

The fees are levied to recover part of the operational administration costs incurred by the AiB. Any shortfall would be subsidised by the public purse as part of the overall AiB budget from the Scottish Government.

Scottish Firms Impact Test

The attendees and members of the stakeholder group to which AiB presented the consultation paper on the proposed changes included:

- Lloyds Banking Group
- RBS
- HMRC
- Insolvency Practitioners Association
- ICAS
- Deloitte LLP
- KPMG
- Grant Thornton UK LLP
- JP Morgan
- ABCUL
- Citizens Advice Scotland
- Money Advice Scotland
- The Carrington Dean Group
- Society of Messengers at Arms and Sheriff Officers

The proposed change to the fee structure was discussed with these stakeholders. No issues were raised in relation to either the principles behind the fees review and the methodology of determining these fees or in respect of AiB's aim to be self-sufficient and to operate on the basis of maximising cost-recovery. Business stakeholders acknowledge that the fees charged must reflect the work undertaken.

The Scottish position, in comparison with the fees regime for bankruptcy operated in the rest of the UK is also positive. By way of comparison, the Insolvency Service has recently implemented a new fee structure which includes an official receiver's general fee of £6000 in all cases where funds are gathered. Debtor and Creditor petition administration fees are also considerably higher at £1,990 and £2,775 respectively – this is in addition to the initial debtor/creditor application costs of £550/£990. Commissions for cases administered by the official receiver are fixed at 15%. The commissions taken in a case with £100,000 of assets realised will total £15,000 in England and Wales, while in Scotland the equivalent commissions amount to £10,000. In view of this, the Scottish model proposed represents a very positive structure from both a debtor and a creditor's perspective

Competition Assessment

There should be no competitive advantage to any particular individual or group as a consequence of the amendments to the bankruptcy fees structure as the increase will apply equally to all.

Test run of business forms

No new forms will be introduced as a consequence of this review. AiB will continue to monitor the use of forms and the on-line bankruptcy case management system to ensure that the changes introduced as part of this

review are incorporated and fit for purpose.

Legal Aid Impact Test

The Scottish Legal Aid Board has confirmed they do not expect there to be an impact on the legal aid fund as a result of the provisions in the Bankruptcy Fees (Scotland) Regulations 2017.

Enforcement, sanctions and monitoring

The majority of the fees will only be collected where there are sufficient funds in the debtor's estate to recover the fees. Where there are insufficient funds available and the Accountant in Bankruptcy is the trustee the public purse covers the costs of the service provided. To mitigate the need to undertake enforcement, sanctions etc. some of the fees charged are required to be paid in advance of the service provided. There is a new provision allowing simple interest at the rate of 8% to be charged on outstanding fees which are unpaid after 30 days. The Scottish Government and AiB have a clear policy to encourage the prompt payment of invoices, with a target of paying 100% of invoices from our suppliers within 10 days. In line with Scottish Government policy, AiB's invoices currently state that payment is required within 30 days. This change only applies to fees which fall due after 3rd April 2017 once AiB has given formal notice that interest is due. Where a fee is due and not paid within the specified term, the AiB will pursue the non-payment through the Civil Court process. This rate of interest is consistent with the current judicial rate of interest used, in all jurisdictions across the UK, in other contexts where similar principles apply. In insolvency proceedings, this rate applies to the preferred and ordinary debts for the period between the date of sequestration and the date that the debt is settled.

Implementation and delivery plan

The 2014 Fees Regulations will continue to apply to any sequestration where a petition was presented or debtor application presented prior to 3 April 2017. Similarly, the 2017 Fees Regulations will have no effect on any trust deed which was executed before 3 April 2017. AiB will communicate all fees changes with a particular focus on the insolvency profession for whom the changes have most relevance. There are no changes in the fees for levied for debtors to access bankruptcy. All necessary changes will be implemented in AiB's case management IT systems.

Post-implementation review

AiB has made a public commitment to carry out regular fee reviews, These review will consider the amounts and the methodology of charging all future fees for the statutory functions undertaken by AiB and will take account of activity levels and forecast income. The rate of interest payable on outstanding fees highlighted above matches the current UK judicial rate of interest. This will be subject to review and a UK Government consultation is planned. The rate of interest applies in the Bankruptcy Fees (Scotland)

Regulations 2017 (and the Bankruptcy (Scotland) Regulations 2016) will be amended in due course to take account of the outcome of this review.

Summary and recommendation

It is recommended that **Option 2** be implemented.

• **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	There would be no realisable financial benefit.	There would be a significant burden on the public purse and ultimately the taxpayer would meet the forecast fall in operational income of £1.3 million in 2017-18, £4.2 million in 2018-19 and £3.0 million in 2019-20 when compared with the forecasted income level in 2016-17.
2	<p>This will more accurately reflect the fixed costs associated with on-going administration of insolvencies, reducing the burden on the public purse and ultimately the tax payer.</p> <p>It is estimated that this option will generate an additional £182k in 2017-18, £207k in 2018-19, 2019-20 and 2020-21 rising to £800k in 2020-21 when the increase in basic administration fee is expected to take effect. This is assuming volumes do not vary significantly from current levels.</p> <p>By not increasing the existing MAP or debtor application fees, this additional income will be generated without impacting on the most vulnerable debtors with few assets.</p>	<p>The fees are levied to recover part of the operational administration costs incurred by AiB. Any shortfall would be subsidised by the public purse as part of the overall AiB budget from the Scottish Government.</p> <p>There is no change to the administration processes; we therefore do not anticipate additional policy or administrative costs as a result of this option.</p>

Declaration and publication

- Sign-off for Final BRIAs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

Minister's name: Mr Paul Wheelhouse

Minister's title: Minister for Business, Innovation and Energy

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