

POLICY NOTE

THE BANKRUPTCY FEES (SCOTLAND) REGULATIONS 2018

SSI 2018/127

1. The above instrument is made under the powers in sections 69A and 72(1A) of the Bankruptcy (Scotland) Act 1985, sections 205 and 225(2) of the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) and all other powers enabling the Scottish Ministers to do so. It is subject to the negative procedure.

Policy Objectives

2. The policy aim of the Bankruptcy Fees (Scotland) Regulations 2018 is to set out the charges levied by the Accountant in Bankruptcy (“AiB”), as set out in the Table of Fees in the schedule.
3. The Table of Fees is divided into 2 parts. Part 1 lists the fees payable to AiB in respect of functions carried out as interim and/or trustee in a bankruptcy. Part 2 lists the fees payable for all other statutory functions of AiB. This updates the fees set in the Bankruptcy Fees (Scotland) Regulations 2014 which will be revoked subject to the saving in regulation 12.
4. The Scottish Government carries out regular reviews of the bankruptcy fees structure to assess whether these are appropriate, fair and contribute towards minimising the call on the public purse. The Regulations in 2014 simplified the fee structure to introduce more transparent Fees Regulations by replacing a number of ad-hoc fees with a fixed fee approach.
5. Most bankruptcies produce no money to cover costs or pay a dividend to creditors. In 2016-17, of the 7,395 bankruptcies that were discharged, over 5,859 (79%) produced no dividend to creditors (including Minimal Asset Process (MAP) and Low Income Low Asset bankruptcies). Where cases cannot meet their costs, they need to be funded from elsewhere.
6. Maintaining fees at current levels would mean AiB faces a growing shortfall in income - which would have to be met by the Scottish Government and ultimately the taxpayer. In 2016-17, the £12.6m needed to run the agency came very largely from fees and charges (operating income) raised from the cases themselves, with a small “top up” of £134,000 from the Scottish Government.
7. The aim of Bankruptcy Fees (Scotland) Regulations 2018 is to move AiB onto a more sustainable path of future income through increases to its fees and charges. They replace 2017 regulations of the same name which did not come into force, taking account of views in the Scottish Parliament. In particular, the 2017 changes to increase thresholds for commissions payable on asset realisations have not been replicated and the provision for AiB to charge 8% interest on late payment of statutory fees has been removed. The cap applied to an individual audit fee has also been removed. The Regulations have been amended and aim to:-

- continue to set a fair and transparent fees structure, while reflecting the costs to AiB in the delivery and supervision of personal insolvencies;
- freeze debtor application fees for Minimal Asset Process and Full Administration bankruptcies so low cost, effective and accessible debt relief is available to those who need it most;
- ensure changes to fees and charges for creditors are balanced with demands on the public purse;
- take account of full cost recovery but appreciate that raising fees too greatly especially in any one year would not be desirable.

Background on bankruptcy

8. Bankruptcy or sequestration is the state of being legally and publicly declared unable to meet debts when they fall due. When the insolvent person is declared bankrupt, by a sheriff or AiB, that person's estate is removed from their control and set aside for the benefit of the person's creditors. Bankruptcy has the effect of removing from the debtor liability to pay the debts accumulated up to the date of their bankruptcy, with certain exceptions including certain types of student loan and fines.
9. A trustee, either AiB or an insolvency practitioner, will be appointed or nominated to administer the bankrupt's estate. A bankrupt will be able to keep some things essential for everyday living, but may be required to make some payment from income. It is the duty of the trustee to ingather funds, sell the debtor's non-essential assets or property and to use the money to:
 - pay the costs of managing the bankruptcy; and
 - pay creditors as much as possible of what the debtor owes them.
10. At the end of a bankruptcy where funds have been ingathered, the trustee will distribute these funds in order of priority laid out in section 129 of the 2016 Act. This allows for the fees and outlays of the trustee and the expenses of a petitioning creditor to be paid prior to any dividend to creditors, if sufficient funds are available.
11. Where AiB is appointed as trustee in bankruptcy proceedings and realisation of the estate does not hold sufficient funds to meet the costs of administration, fees are subsidised by the public purse, from the overall AiB budget from the Scottish Government. Where AiB is not appointed as trustee, the fees stated in Part 2 of the schedule are paid to AiB from the estate (whether or not there is any realisation).

Summary of Main Fee Changes from the 2014 Regulations

The standard administration fee

12. The main way in which the cost of administering bankruptcies can be recovered is through the standard administration fee charged in respect of AiB's functions as trustee. Fee levels are reviewed regularly based on the most up to date case volumes and expenditure figures and based on the most recent information this fee is increased from £1,100 to £1,700. The total direct cost of administering insolvencies where AiB is trustee in 2016/17 was £6.3m. This includes the cost of AiB staff, overheads, depreciation of assets and estimated insolvency practitioner fees. It excludes

commissions paid to insolvency practitioners and case outlays which are recovered separately.

Creditor petitions for sequestration

13. Currently AiB charges a fee for creditors petitioning for the bankruptcy of a person owing them money. The charge for submitting an application is £100 and if AiB subsequently is appointed trustee in that case a further £200 is charged. It is recommended that these fees be raised to £150 and £300.

Supervision of sequestration

14. AiB charges fees for supervising bankruptcies, payable on an annual basis. There are two rates, with a lower annual fee fixed in cases where a commissioner has been in post for the entire 12 month supervision period. This reflects AiB's reduced administrative function in these cases. The Regulations propose that the annual fee charged where no commissioner is in post should be £100 (increased from £70), and the lower fee chargeable where a commissioner is elected should be £70 per year (an increase from £50). This equates to fees amounting to £500 or £350 in a sequestration spanning a 5 year period. The annual supervision fee of £100 matches the rate charged for supervision of Protected Trust Deeds (PTDs).

Other minor changes

15. The fee for AiB acting as interim trustee in a bankruptcy where not subsequently appointed trustee increases from £200 to £300. The revised fees make minor changes to the costs of publishing notice of a PTD on the Register of Insolvencies (£35 to £40), registering a PTD (£36 to £40) and registering a court order for replacement trustee (£19 to £50).

Estimated Additional Income from Revised Fees

16. The table below sets out the estimated impact on AiB's income from the fee changes (the administration fee is generally realised when a case completes usually after 4 years, so the gain is effectively deferred to 2022-23):

| Source | Estimated increase in income | | | | |
|---|------------------------------|------------|------------|------------|------------|
| | 2018-19 | 2019-20 | 2020-21 | 2021-22 | 2022-23 |
| | £000 | £000 | £000 | £000 | £000 |
| Fixed administration fee | 0 | 0 | 0 | 0 | 693 |
| Creditor petition fee | 200 | 200 | 200 | 200 | 200 |
| Supervision of sequestration | 25 | 25 | 25 | 25 | 25 |
| Protected trust deed: Publishing notice in ROI | 30 | 30 | 30 | 30 | 30 |
| Protected trust deed: Registering PTD | 20 | 20 | 20 | 20 | 20 |
| Registering Court Order for replacement trustee | 17 | 17 | 17 | 17 | 17 |
| Total additional income through increase in fees and charges | 292 | 292 | 292 | 292 | 985 |

Comparison with Fees in England and Wales

17. Annex A includes a summary comparison of the comparable fees for AiB and the Official Receiver administering bankruptcy procedures.

Specific Provisions

18. Annex B to this note has further detail on the specific provisions.

Consultation

19. The current fee revisions were set out in a consultation paper that was circulated to AiB stakeholders. The respondents included:

- Citizens Advice and Rights
- Yuill & Kyle Solicitors
- City of Edinburgh Council Advice Shop
- Advice Services, Inverclyde Council
- Chartered Institute of Credit Management
- Money Advice Scotland
- North Lanarkshire Council
- Institute of Chartered Accountants of Scotland
- Citizens Advice Scotland
- R3 Association of Business Recovery Professionals

20. A summary and analysis of the responses to the consultation along with full details of the proposals for fees regulations are available on the [AiB website](#). The summary response shows that 70% of the respondents agreed that the proposals set out in the consultation and which have been brought forward here represented a fair way of generating additional income.

Impact Assessments

21. A Business and Regulatory Impact Assessment ("BRIA") has been completed on the effects of the instrument and has been published when this instrument was laid before the Parliament. A copy can be found on the [AiB website](#).
22. No equality issues were raised as part of the consultation process and it is considered that a full Equality Impact Assessment (EQIA) is not required. Fees are charged to all irrespective of their age, race, gender, disability or sexual orientation. The majority of the fees will only be charged where there are sufficient funds available in the bankrupt's estate to pay the costs. Consideration has been given to children's rights and interests, in particular the need to provide an adequate standard of living for child development. While there are no recorded instances of bankruptcy awarded against individuals under the age of 18, appropriate access to debt relief does impact on the children within the families involved. As highlighted above, the costs of accessing debt relief have been frozen and the Scottish Government considers that low cost, effective and accessible debt relief is available to those who need it most.
23. AiB administers each bankruptcy on an individual basis and has appropriate measures in place to ensure that the collation and transmission of statistics and information regarding individuals are completed sensitively. AiB regularly consults with stakeholders, service users and the general public on bankruptcy law reforms to ensure the needs of all groups of society who require to enter bankruptcy are considered and no particular groups are disadvantaged or excluded more than others.
24. In view of the Fairer Scotland Duty which exists under the public sector duty regarding socio-economic inequalities in the Equality Act 2010, the impact of these proposals on those with low wealth and low income has been considered. The decision to hold debtor application fees flat to allow access to debt relief has been taken to ensure this does not impact on the most vulnerable citizens. It also takes account of maintaining some level of responsibility on individuals not to enter unsustainable debt with adverse consequences for others in society, and that debtors should not lightly take the serious step of applying for bankruptcy.

Financial Effect

25. While in previous years AiB was self-financing, this was largely due to a peak in repayments to the public purse due to the volume of bankruptcies reaching a conclusion. This is no longer the case and there will be an increasing requirement to draw on Scottish Government resources if no action is taken to address the level of fees. The Scottish Government plans for AiB to review the Fees Regulations regularly in order that the fees levied are appropriate taking into account factors including administrative costs and volume of personal insolvencies cases.

The Accountant in Bankruptcy on behalf of the Scottish Government
20 April 2018

**Annex A – Summary Comparison – 2018 Bankruptcy Fees and England and Wales Fees structure
Comparison based on fees where AiB/Official Receiver is administering bankruptcy**

| Fee Category | 2017 Fees - Scotland | Current Fees – England and Wales |
|---------------------------------|--|--|
| “Up-Front” Fees | | |
| Bankruptcy – Debtor Application | £90 – Minimal Asset Process application £200 –Bankruptcy application | £90 – Debt Relief Order application £550 – Debtor’s Deposit (bankruptcy application) |
| Bankruptcy - Creditor Petition | £150 – Administration of Petition £300 – Administration where AiB appointed on award of bankruptcy | £990 – Petitioner’s deposit |
| Administration Fees | | |
| Bankruptcy | £1,700 – Fixed administration fee (where AiB appointed as trustee) Payment of Dividend (AiB appointed): 10% of first £10,000 5% of next £10,000 1% of further sums Audit fee – 17.5% on determination of fees/outlays | £1,990 – Official receiver’s administration fee following debtor application (applies in all cases) £2,775 – Official receiver’s administration fee following creditor petition (applies in all cases) £6,000 – Official Receiver’s general fee following creditor petition (applies in all cases) £150 – Income payment order/agreement fee (on making of IPA/O) |
| Commissions | | |
| Bankruptcy | Where AiB is appointed: Assets: 15% of first £10,000 5% on next £10,000 2% thereafter Contributions: 25% of funds ingathered | Where official receiver is appointed: Assets and Contributions - 15% of all receipts realised by official receiver |

Annex B - Specific provisions

Regulation 3: provides for the fees payable to AiB for the functions carried out where the AiB is the interim trustee and/or trustee in a bankruptcy. The rates are set out in Part 1 of the Table of Fees in the schedule. These fees are not payable in advance and are applied to a bankrupt's estate (where funds are available), to cover the administration of the estate.

Regulation 4: the types of outlays which might reasonably be incurred by AiB where AiB has to use third party suppliers. It also allows for other outlays, where reasonable incurred, which are not listed. This makes provision for outlays made by AiB in delegating their trustee functions to insolvency practitioner providers which exceed the general bankruptcy administration fee (prescribed at Part 1, item 2 of the table of fees).

Regulation 5: allows for the fees and outlays payable to AiB to be paid from the debtor's estate at certain times throughout the lifetime of the bankruptcy, such as at the annual accounting period.

Regulation 6: provides for the fees payable to AiB for the other functions carried out by AiB, such as the duty to supervise trustees in bankruptcy or PTDs. These fees are set out in Part 2 of the Table of Fees.

Regulation 7: clarifies that these "Part 2" fees are also payable by AiB in the case of those estates which he administers as interim trustee or trustee.

Regulation 8: specifies the manner in which fees payable to AiB for undertaking the functions (detailed in Part 2 of the Table of Fees). Paragraphs (a) and (b) set out when fees associated with AiB's supervisory functions in relation to bankruptcy and PTDs are payable. Paragraph (c) when fees associated with AiB's functions in relation to the election of replacement trustees by trustee vote are due and paragraph (d) when fees are due for functions that transferred from the Scottish Courts to AiB. Paragraph (e) is about the fees for debtor applications, including arrangements for collecting the balance of the higher fee where the administration of bankruptcy awarded under the MAP arrangements is converted to full administration. Fees due for other functions are payable when AiB carries out the service.

Regulation 9: provides that, where AiB supervises a trustee, the trustee is liable to pay the fee irrespective of whether there will be funds in the estate to cover those costs. This cost can normally be recovered through the fees charged by the trustee for administering the trust deed or bankruptcy.

Regulation 10: sets out the circumstances in which AiB may waive fees listed in Part 2 of the Table of Fees (either in whole or in part). These circumstances are limited to:

- the payment of the balance of PTD supervision fees where a debtor has failed to meet the obligations of the trust deed; and
- the balance of the debtor application fee where a bankruptcy is converted from MAP to full administration, other than where the debtor has provided false or misleading information.

Regulation 11: provides that a fee charged for an application for a Bankruptcy Restriction Order against a debtor, where the application is not granted on the grounds that it was not reasonable to make an application must be refunded.

Regulation 12: provides for transitional arrangements where the new fee rates will not apply. The 2014 Fees Regulations will continue to apply to sequestrations where a petition was presented or debtor application applied for prior to 1 June 2018. Similarly, the 2014 Regulations will continue to apply to trust deeds executed before that date.

Changes to the Schedule, Table of Fees from the 2014 Regulations

Part 1 – fees where AiB is trustee or interim trustee

Items 1 and 2 in Part 1 of the Table of Fees: the administration fee that can be charged by AiB in undertaking the functions of interim trustee or trustee. The standard fixed administration fee for AiB trustee bankruptcy cases is set at £1,700. This reflects the total cost incurred in the administration of the case.

Items 3 and 4: refer to the percentage amount of any funds realised through the sale of assets or the payment of contributions that can be charged to cover the cost of work undertaken by AiB. This now remains unchanged from the 2014 Regulations.

Item 5 refers to the percentage amount of any dividend funds, which may be available after payment of outlays and costs that can be charged to cover the cost of that work undertaken by AiB. This remains unchanged.

Part 2 – fees for other functions of AiB

Item 1(a) in Part 2 of the Table of Fees: provides for a creditor in a creditor or trustee petition for bankruptcy to pay a fee to AiB for administration of the creditor petition. This fee has increased from £100 to £150 and can be reclaimed by the creditor at the end of the sequestration process, if there are funds in the estate.

Item 1(b): provides for a fee of £300, increased from £200, payable by the creditor only when the bankruptcy is awarded and AiB is appointed trustee. Where there are funds in the estate, the creditor will recover this initial fee from the estate.

Item 2: sets out fixed supervision fees payable on an annual basis. There are two rates, a lower annual fee fixed in cases where a commissioner has been in post for the entire 12 month supervision period reflecting AiB's reduced administrative function in these cases. The annual fee charged where no commissioner is in post is £100 (increased from £70), and the lower fee chargeable where a commissioner is elected is £70 per year (an increase from £50). This equates to fees amounting to £500 or £350 in a sequestration spanning a 5 year period.

Items 3 and 4: relate to the fees for considering and issuing a determination in an appeal against the determination of commissioners as to the outlays and remuneration payable to the trustee, and for issuing a determination fixing the outlays and remuneration payable to an interim trustee or trustee. These remain unchanged.

Items 5, 6 and 7: fees levied only in specific circumstances. It would not be appropriate to incorporate these fees into the general fixed administration fee for supervision or administration of bankruptcy as they do not apply in all cases. They include AiB's attendance at any meeting of creditors, for calling a meeting of creditors and for attendance at any examination of the debtor. These fees remain unchanged.

Item 8: relates to the fees charged in relation to PTDs. Item 8(a) relates to publication of a notice in the register of insolvencies to gain protection of a trust deed. This has increased from £35 to £40. Items 8(b) and (c) include the fees for registering a PTD and the annual fee for the supervision of a trustee under a PTD. The Item 8(b) fee chargeable has increased from £36 to £40 and the Item 8(c) fee remains unchanged.

Items 9, 10 and 11: include the fees for auditing the accounts of a trustee under a PTD and fixing remuneration and for actions associated with lodging and uplifting unclaimed dividends that have been consigned in respect of each creditor. It is not thought appropriate to incorporate this fee within a fixed administration fee as this situation does not arise in a significant number of cases. These fees remain unchanged.

Items 12 to 19 (inclusive): introduce fees all set at £50 to meet the costs of functions which transferred to AiB from the Sheriff Court. They cover specific actions by the AiB which relate to the appointment or replacement of a trustee in bankruptcy, along with new powers to cure a defect in procedure or deal with an application for direction from a trustee. They are set so the costs involved do not exceed equivalent court fees.

Item 20: the fee levied for AiB to deal with an application for recall of bankruptcy in the circumstances prescribed in the Bankruptcy (Scotland) Act. The fee levied is £100 comparable to a Sheriff Court fee of £115.

Item 21: the fee levied for considering an order in relation to an application by a member State insolvency practitioner for conversion of a trust deed into sequestration.

Item 22: the fees for the determination of a debtor application for bankruptcy. This remains at £200 for full administration bankruptcy and £90 for debtors accessing bankruptcy through the MAP provisions. No other statutory fees apply to the administration of MAP bankruptcies, provided there are no circumstances that would result in the case being converted to full administration.

Item 23: is the fee levied for an application to the court or the AiB for a Bankruptcy Restriction Order (BRO). This fee remains unchanged.

Item 24: covers the fee for registering a court order appointing a replacement trustee. This fee has increased from £19 to £50.