

Business and Regulatory Impact Assessment

Title of Proposal

The Bankruptcy and Debt Arrangement Scheme (Miscellaneous Amendment) (Scotland) Regulations 2023

Purpose and intended effect

These Regulations will make provision to ensure that legislation relating to Scottish statutory debt solutions is fit for purpose and provides the necessary support and protection to the people of Scotland.

Background

The Scottish Government committed to a policy review of the statutory debt solutions (moratorium protection, bankruptcy, Protected Trust Deeds and the Debt Arrangement Scheme) with the aim of further enhancing and improving our system. This policy review was organised into three stages. The first stage review concluded with immediate changes being introduced through the [Bankruptcy \(Miscellaneous Amendments\) \(Scotland\) Regulations 2021](#). These included important measures to improve access to bankruptcy to reduce or remove application fees for those in need of debt relief. The second stage was undertaken by stakeholder led working groups. Their remit was to look at the operation of existing statutory debt solutions, aimed at providing recommendations and options for improvement. Included within their recommendations was the removal of the minimum debt level for entry to a Minimal Asset Process (MAP) bankruptcy.

In addition to this review the Scottish Parliament's Social Justice and Social Security Committee produced a report: [Robbing Peter to pay Paul: Low income and the debt trap](#) following an inquiry into 'Low income and debt problems'. The report recommended the minimum debt level for MAP bankruptcy be removed. The Scottish Government recognises that the removal of the minimum debt level entry for a MAP bankruptcy is a positive step in widening access to debt relief for those most financially vulnerable, particularly given the current cost of living concerns.

The Social Justice and Social Security Committee also recommended that the bankruptcy application fee be removed for individuals who have been assessed as having no surplus income using the Common Financial Tool. The Scottish Government agrees with this recommendation and recognises that the application fee for the most financially vulnerable could potentially be a barrier to accessing debt relief and given the increased cost of living, the removal of such a potential barrier would be a positive step.

Cost of living increases have the potential to impact on those who are utilising the Debt Arrangement Scheme (DAS) to pay debts over an extended period. Reductions in disposable income can threaten the sustainability of payment programmes under DAS – successfully completed DAS payments programmes create benefits for creditors and those who have paid the debts. This additional

measure will allow breaks in payment, which will include where living costs have impacted on the ability to meet contributions. Those participating in DAS benefit from the prevention of debt recovery action, freezing of interest and charges and the ability to protect assets including the family home. There is a risk that cost of living increases may put significant numbers of these payment programmes at risk of revocation, placing those involved in a vulnerable position. Increasing flexibility in the criteria for an individual to apply for a variation to defer payments in DAS would provide greater levels of protection for those who have experienced an unforeseen increase in their expenditure.

The action on increasing the creditor petition deposit is necessary to ensure that AiB administration costs where it acts as the trustee in bankruptcy are recovered where possible, thereby avoiding any significant additional burden on the public purse. This is important considering the fiscal constraints currently being faced. In approximately half of current creditor petition bankruptcy awards administered by AiB, there are no funds collected that can pay either the debt or the cost of AiB's role in administering the case. In the absence of any mitigating action, these costs are met by the public purse.

Objective

The cost of living crisis is having an effect on individuals within society, in particular the most vulnerable.

These proposals will help people in severe financial difficulty to alleviate some of their concerns while potentially giving them a fresh start by having easier access to debt relief. Additionally, they will provide a mechanism help ensure that DAS payment programmes may remain in place during challenging periods of increased living costs.

The measures included are as follows:

- Remove the minimum debt level to access MAP bankruptcy;
- Extend the criteria for applying for a payment break in DAS to allow for a reduction in disposable income including, for example, where this is due to increases in living costs;
- Extend the application fee waiver for individuals who have been assessed by the Common Financial Tool as having no surplus income; and
- Increase the fee (deposit) payable for the administration of sequestration where AiB is appointed trustee following the award of sequestration from £300 to £750.

Rationale for Government intervention

The Scottish Government recognises the responsibility it has to take action to help the people of Scotland by ensuring its debt management and debt relief solutions are fit for purpose and are accessible to those who need help, particularly with the current cost of living.

These Regulations contribute to the Vision, Ambition and Programmes set out in Scotland's National Strategy for Economic Transformation aimed at building a wellbeing economy:

Vision: A Wellbeing Economy - by ensuring our statutory debt solutions are available and fit for purpose for those who need it

Ambition: Fairer – by ensuring that our statutory debt solutions are designed to help people in severe financial difficulty and give them a fresh start and improved life chances, while helping provide predictability and confidence for lenders.

Programmes for Action: A Fairer and More Equal Society - by making our statutory debt solutions as accessible to as many people as possible and sustainable to meet the needs of the people of Scotland.

Consultation

The timescale for these regulations has not allowed for full consultation on all proposals, which would apply under normal circumstances. However, a significant level of stakeholder consultation has been conducted and there is stakeholder agreement that these reforms are both beneficial and essential to support the people of Scotland, particularly in the context of the current cost of living crisis.

In 2019 the Scottish Government committed to take forward a wide-ranging review of Scotland's statutory debt solutions. The initial stage of this review culminated in immediate changes being introduced through the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021. The second stage of this policy review brought together three stakeholder led working groups to examine the existing statutory debt solutions and determine where improvements could be made. The working groups comprised of sector specialists with involvement in debt advice and the operation of debt solutions and included money advice professionals, insolvency professionals, creditor bodies and academics. In its final report the group concentrating on bankruptcy and cross-cutting issues recommended that the minimum debt threshold in MAP bankruptcy be removed, allowing anyone experiencing problems of unsustainable debt, particularly the most financially vulnerable, to access to debt relief. The Scottish Government accepted the recommendation made and has proposed that this change be introduced. This formed part of the response to the recommendations put forward by the working groups which was published for consultation on 12 August 2022. The responses highlight strong support for this change, with 66% of respondents agreeing with the proposal and only 15% of respondents indicating disagreement.

Further consultation has been undertaken by the Scottish Parliament through the recent inquiry into low income and debt conducted by the Social Justice and Social Security Committee. This inquiry included testimonies, via focus groups, from people on low incomes who have experience of debt. There was also evidence taken at Committee sessions from debt advisers, public sector and third sector organisations, creditors, regulators and the Accountant in Bankruptcy. The Committee's final report "[Robbing Peter to pay Paul: Low income and the debt](#)

[trap](#)” recommended that the minimum debt threshold for access to MAP bankruptcy be removed. While welcoming the action taken to reduce and remove fees for debtor application bankruptcy, the report also recommended that fee waivers be extended to applicants who had been assessed as having no surplus income using the Common Financial Tool.

The requirement to take further action to promote the sustainability and success of debt payment programmes under DAS has been identified by AiB as the DAS administrator and key stakeholders involved in the delivery of the scheme. The existing options for applying for a deferral of payments (or payment break) of up to 6 months are limited and do not allow for significant and unplanned increases in expenditure resulting in difficulty meeting scheduled payments under DAS. The issue was discussed at the most recent meeting of the DAS Review Board held in August 2022. This is a sector specialist group, chaired by AiB, which brings together a range of stakeholders with an interest in DAS delivery. This includes debt advice specialists, insolvency and DAS professionals and creditor organisations. There was consensus on the need to take further action on payment breaks to provide some additional protection to clients that have entered a DAS debt payment programme and who have been impacted by the on-set of the cost of living crisis.

There has been targeted consultation on limited reform to the fee arrangements associated with bankruptcy administration. This work is necessary to ensure that AiB administration costs where it acts as the trustee in bankruptcy are recovered where possible, thereby avoiding any significant additional burden on the public purse considering the fiscal constraints currently being faced. In approximately half of current creditor petition bankruptcy awards administered by AiB, there are no funds collected that can pay either the debt or the cost of AiB’s role in administering the case. In the absence of any mitigating action, these costs are met by the public purse. The proposal to increase the deposit creditors must provide where AiB is nominated as trustee has been discussed with stakeholders. A considerable proportion of creditor petition bankruptcies are instigated by local authorities for council tax debt and there has been specific consultation with COSLA on this reform. No specific concerns have been raised. The fee levied in these cases is, in effect, a deposit which will be returned to the petitioning creditor in full, with priority over other creditors, where funds have been realised in the bankruptcy.

The Minister for Public Finance, Planning and Community Wealth hosts a regular cross sectoral working group involving key stakeholders. This met most recently on 3 November 2022 where the proposals included in this instrument were discussed. There was a high level of support for reform in these areas.

Options

There are 3 main options here:

1. Immediate action is taken to draft and lay secondary legislation. This would enable provisions that are predominantly aimed at mitigating some of the impacts of cost of living in relation to debt solutions to be implemented as soon as possible.

2. Deferring implementation of reforms and considering alongside other issues coming forward as part of the more general review of debt solutions – this would delay the implementation of these measures.
3. Do nothing. The measures here have been widely welcomed and some are included as recommendations of the Social Security and Social Justice Committee. There are benefits to progressing this legislation in early course.

Scottish Firms Impact Test

AiB and Scottish Ministers have engaged with stakeholders through various working groups. The majority of stakeholders are in favour of introducing this secondary legislation. Consequently, no significant concerns have been raised in relation to the proposals contained in the Bankruptcy and Debt Arrangement Scheme (Miscellaneous Amendment) (Scotland) Regulations 2023.

Sectors and groups affected – Debtors, creditors, insolvency practitioners, the money advice sector and the broader Scottish economy.

Funding Implications

Any changes being introduced to the bankruptcy application fee structure will impact on the funding of AiB and the operation of the existing fees order. The fee structure in place at the moment is designed to ensure where possible that AiB's costs incurred through determining bankruptcy applications, acting as trustee in bankruptcies and in supervising all the debt solutions are met by an appropriate fees order. This is designed to ensure AiB's costs are recovered without AiB becoming reliant on core government funding: any change to the fee structure could impact on this. As such, the financial impact of the proposed changes is outlined below.

These regulations propose further measures to remove bankruptcy application fees – extending the criteria for fee waiver from those in receipt of certain benefits to all those that have been assessed as having no surplus income using the Common Financial Tool.

The primary impact of fee reduction and waiver in relation to AiB funding was seen following the introduction of the initial action in this area – first introduced through the Coronavirus (Scotland) (No.2) Act 2020 and made permanent through the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021. The provisions in this instrument will further reduce fee income – the changes in effect remove all application fees for MAP bankruptcy. The reduction in income is dependent on activity levels – the estimate is that the new application fee waiver criteria will result in a reduction in income in the range of £15,140 to £46,680 (based on low to high activity level estimates).

The more significant issue relates to the AiB administration costs in cases where AiB is the trustee following bankruptcy awarded in the sheriff court and where no funds are subsequently generated to recover these costs. Analysis of all of these

bankruptcies that closed in the financial years 2019-20, 2020-21 and 2021-22 shows that 56.6% of these cases resulted in no recovery of the administration costs – at an average cost to the public purse for each case of £1,997.36 in the absence of any mitigating action through petitioning creditor fees (deposits).

This data has been used to forecast impact on AiB income and the associated requirement for the public purse to meet the cost of bankruptcy administration. The table below highlights scenarios on AiB income under the current and revised fee arrangements based on low, medium and high activity levels – based on actual figures in recent years.

Table: Creditor Petition and MAP fee analysis

Example cases volumes awarded [note 1]	Low	Medium	High
Number of Creditor Petitions (CP) awarded	164	994	1,721
Total CP fee ingathered under current structure (£) [note 2]	73,800	447,300	774,450
Total CP fee ingathered under proposed structure (£) [note 3]	147,600	894,600	1,548,900
Number of MAP bankruptcies awarded	1,514	2,181	4,668
Total MAP fee ingathered under current structure (£) [note 4]	15,140	21,810	46,680
Total MAP fee ingathered under proposed structure (£) [note 5]	0	0	0
Total fees ingathered under current structure (£)	88,940	469,110	821,130
Total fees ingathered under proposed structure (£)	147,600	894,600	1,548,900

Notes:

note 1: Low, Medium and High volume years are based on historic case volumes in 2020-21, 2018-19 and 2011-12 respectively. It should be noted that MAP did not exist in 2011-12 and therefore the example volume for this year is based on LILA bankruptcies

note 2: The current Creditor Petition fee structure refers to the total fee of £450. This includes the initial fee of £150 and the subsequent fee of £300.

note 3: The proposed Creditor Petition fee structure refers to a proposed total fee of £900. This includes the initial fee of £150 and a subsequent fee of £750.

note 4: The current MAP fee structure refers to the fee of £50. From the Official Statistics published by AiB, we know that approximately 80% of MAP cases do not require an application fee to be paid due to exemptions. This has been taken into account when calculating these figures and therefore the total MAP fee ingathered is based on 20% of these estimated volumes being subject to a fee.

note 5: The proposed MAP fee structure refers to the removal of all application fees for MAP bankruptcy.

Taking into account the assessment on the cost to the public purse arising in the estimated 56.6% of creditor petition bankruptcies that do not realise the funds to

recover costs, the total cost to the public purse without any mitigating action would be:

£185,754 – low activity
£1,124,514 – medium activity
£1,945,429 – high activity

This shows that the proposed action to increase the subsequent creditor petition fee from £300 to £750 will not fully mitigate the cost to the public purse under each of the scenarios presented – however, there is a significant shortfall that would need to be met in the absence of any action. This would amount to an £1,124,299 annual shortfall in a high activity scenario based on the difference between the total cost to the public purse of £1,945,429 less the fees ingathered under the current structure which total £821,130. This sum reduces to £396,529 with the revision to the fee structure in force.

While there is an impact arising from the increase in the fees levied against creditors in court bankruptcies where AiB is appointed as trustee, these costs are fully recoverable where sufficient funds are realised in the bankruptcy.

The equivalent creditor fee/deposit in force in [England and Wales](#) was increased from £990 to £1,500 with effect from 1 November 2022.

Whilst we recognise the increase in creditor petition fees will have financial impact on creditors, on account of the issues set out here, and of the nature of the petition fee as a deposit that is returnable where there are sufficient funds in the debtor's estate, we consider this is reasonable and proportionate in the circumstances.

Competition Assessment

The Competition and Markets Authority competition filter questions have been considered – in particular, whether the proposals limit suppliers either directly or indirectly and reduce their ability and/or incentives to compete.

We can confirm that these changes will apply equally to all who engage with the Scottish insolvency and statutory debt solutions system. There should be no competitive advantage to any particular individual or group as a consequence of the introduction of these Regulations. These reforms proposed are to improve access to debt solutions and alleviate the pressures on those seeking to repay their debt through DAS.

Test run of business forms

The changes being introduced will only require minor adjustments to existing statutory forms and guidance – no new forms are envisaged.

Legal Aid Impact Test

The Scottish Legal Aid Board has confirmed that they do not foresee any impact on the legal aid fund as a result of the provisions in the regulations.

Enforcement, sanctions and monitoring

The Scottish Government will carefully monitor how these regulations are working in practice by carrying out reviews and seeking feedback from stakeholders.

Accountant in Bankruptcy (AiB) has an existing pool of engaged stakeholders representing all sectors with an interest in debt and the money advice sector in Scotland.

Implementation and delivery plan

If approved by the Scottish Parliament, the Bankruptcy (Miscellaneous Amendment) (Scotland) Regulations 2023 will come into force on 6 February 2023.

AiB will publish the introduction of the regulations on their website. The new regulations will also be incorporated in the legislation published on the legislation.gov.uk website. AiB will, where appropriate, prepare and publish, on their website, guidance to support stakeholders when implementing the new legislation.

Post-implementation review

To evaluate the impact of the new legislation the Scottish Government has given an undertaking that AiB will carry out a review of these provisions after they have been in place for an appropriate amount of time. This will involve the analysis of statistical data and feedback from stakeholders collated by AiB.

The Scottish Government will review the findings of this research and consider whether any changes are necessary to the legislation or the associated guidance in light of its findings. Any changes identified will be brought to the attention of the Scottish Parliament and Parliamentary committees where necessary. A final report detailing the findings and conclusion of the review will be published.

Summary and recommendation

Option	Total benefit per annum; economic, environmental, social	Total cost per annum; economic, environmental, social, policy and administrative
1. Immediate action is taken to draft and lay secondary legislation	The proposals would ensure immediate help is given to people in severe financial difficulty because of cost of living - alleviating some concerns by potentially giving them a fresh start	While the reforms provide social benefit, there remains a cost to the public purse in administration of bankruptcy processes – as highlighted in the financial implication section above. This

	<p>with easier access to debt relief. Additionally, it would introduce protections to help ensure that DAS payment programmes can remain viable where possible over a challenging time. Bankruptcy fee revisions will provide immediate assistance to those that meet the revised waiver criteria and the overall cost to the public purse will be reduced through the revised creditor petition fee arrangements.</p>	<p>would amount to an £1,124,299 annual shortfall in a high activity scenario based on the difference between the total cost to the public purse of £1,945,429 less the fees ingathered under the current structure which total £821,130. This sum reduces to £396,529 with the revision to the fee structure in force.</p>
<p>2. Reviewing the position after further consultation on the specific provision</p>	<p>This option would not derive immediate benefits of the measures included.</p>	<p>There has been a considerable amount of consultation and evidence gathered through different forums on reforms required to the current statutory debt solutions. Stakeholders agree that these proposals will assist in providing immediate help to people with problem debt and in severe financial difficulty due to the cost of living. Any delay could be detrimental to the people of Scotland with problem debt. There would be no mitigation of the costs to the public purse that will be achieved through the revised fee structure.</p>
<p>3 Do nothing</p>	<p>This option would not derive any benefits from the measures included.</p>	<p>The current cost of living is particularly affecting the most vulnerable in our society, especially those with problem</p>

		<p>debt. The Scottish Government recognises the need to take action to help the people of Scotland and the do nothing option would be considered as detrimental to this effort. There would be no mitigation of the costs to the public purse that will be achieved through the revised fee structure.</p>	
<p>Recommendation</p> <p>Our recommendation is to take immediate action to draft and lay secondary legislation as out lined in Option 1 above.</p>			

Declaration and publication

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 TOM ARTHUR

Date 24/11/22

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