

## POLICY NOTE

### THE BANKRUPTCY AND DEBT ARRANGEMENT SCHEME (MISCELLANEOUS AMENDMENT) (SCOTLAND) REGULATIONS 2023

#### SSI 2023/9

1. The above instrument is made by Scottish Ministers in exercise of the powers conferred by sections 5(4) and 7 of the Debt Arrangement and Attachment (Scotland) Act 2002, sections 2(5) and 205(1) of the Bankruptcy (Scotland) Act 2016 and all other powers enabling them to do so. The instrument is subject to the affirmative procedure.

**The purpose of this instrument is to extend the application criteria for a payment break in the Debt Arrangement Scheme where there is a reduction in disposable income which may be caused by an increase in living costs. It removes the minimum debt threshold for entry to a Minimal Asset Process (MAP) bankruptcy and extends the criteria for waiving bankruptcy application fees including the removal of all application fees for MAP bankruptcy. The instrument increases the deposit that must be paid by creditors where AiB is nominated as trustee in bankruptcy following a court petition.**

#### Policy Objectives

2. The aim of the Bankruptcy and Debt Arrangement Scheme (Miscellaneous Amendment) (Scotland) Regulations 2023 is to amend and improve the existing statutory debt solutions in Scotland. These changes are aimed at: providing improved access to debt relief for the most financially vulnerable through MAP bankruptcy; providing additional protections to those participating in a debt payment programme under the Debt Arrangement Scheme (DAS); to promote the sustainability and success of these programmes where increased living costs impact on the ability to meet payments; providing wider access to fee exemption in both Full Administration and MAP routes to bankruptcy; and increasing the deposit that must be paid by creditors where Accountant in Bankruptcy (AiB) is nominated as trustee in bankruptcy following a court petition - with the aim of limiting the pressures on the public purse created in cases where no funds are recovered through the bankruptcy process and by the implementation of reforms to reduce income derived from bankruptcy application fees.
3. The specific measures included to improve access to MAP bankruptcy include the removal of the minimum debt level of £1,500 that currently forms part of the eligibility criteria. Additionally, the criteria for fee exemption for those applying for bankruptcy is extended to include those who, at the date of making the application, have been assessed by the Common Financial Tool as having no surplus income. This is additional to the existing fee exemption that applies to those in receipt of certain benefits. DAS measures provide for additional criteria under which a deferment of payment of up to 6 months can be accessed. This now includes applications resulting from a reduction in disposable income of 50% or more and it is envisaged that the disposable income will be reduced for the period of deferment.
4. In brief, these Regulations amend the Bankruptcy (Scotland) Act 2016, the Debt Arrangement Scheme (Scotland) Regulations 2011 and the Bankruptcy Fees (Scotland) Regulations 2018 to:

- 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;
  - 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 payable for the administration of sequestration where AiB is appointed trustee following the award of sequestration from £300 to £750.
5. The changes to fees made by these Regulations have no effect in relation to sequestrations where the petition was presented or the debtor application was made before 6 February 2023.
  6. In relation to the removal of the minimum debt level to access MAP bankruptcy, the policy intention is for this to apply to all applications submitted on or after the date these Regulations come into force. This is achieved without need for specific saving provision as the wording of the provision being amended (section 2(2)(b)) provides that these debt levels apply at the date the application is made. In any event, there would be no effect in practice as if a debtor met the criteria before this amendment comes into force then they would continue to meet the criteria after since the minimum threshold is being removed altogether.
  7. In relation to the amendment extending the criteria for applying for a payment break in DAS, the policy intention is for this to apply for all new and existing DAS programmes. This is achieved without need for specific provision since regulation 37 allows applications for variation of a debt payment programme to be made and, as of 6 February 2023, the extended criteria will be available regardless of when the programme was entered into.

## **Background**

### *Background on bankruptcy*

8. Bankruptcy or sequestration is the state of being legally and publicly declared unable to meet debts when they fall due. Declaration of bankruptcy, by either a sheriff or the Accountant in Bankruptcy, results in the debtor's estate being transferred to a trustee to administer for the benefit of the individual's creditors. Some items will be exempt from transfer including items deemed essential. In administering the estate, the trustee may ingather funds and sell non-essential assets or property. The trustee will distribute these ingathered funds in order of priority (see section 129 of the 2016 Act) with bankruptcy administration fees being paid first.
9. This process has the effect of removing the liability to pay debts incurred prior to the date of bankruptcy. This is subject to a number of exceptions, including student loans and fines. There may be a requirement to make some payment from disposable income towards the pre-bankruptcy debts. At the end of bankruptcy, a debtor is afforded a fresh start.

### *Background on the Debt Arrangement Scheme*

10. The Debt Arrangement Scheme was introduced on 30 November 2004 and provides a facility for the orderly repayment of debt. It is a formal debt solution that allows people

who are unable to pay their debts as they fall due, but who have a reasonable level of surplus income, to pay those debts over a longer period. This is achieved through a debt payment programme, helping those with debt problems manage their way out of debt and offering them the potential to start over when their debts are cleared. The Debt Arrangement Scheme provides protection from the threat of any action to enforce payment of the debt. All interest, fees and charges are frozen from the date of application and written off at the end of the debt payment programme provided that the programme is completed.

## Consultation

11. 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 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, 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.
12. 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.
13. 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, such as the recent significant increases in energy bills, resulting in difficulty in 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.

14. There has been targeted consultation on limited reform to the fee arrangements associated with bankruptcy administration. This action 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.
15. 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.

### **Impact Assessments**

16. A Business and Regulatory Impact Assessment has been completed on the effects of the instrument and published when this instrument was laid before the Parliament. A copy can be found on [www.legislation.gov.uk](http://www.legislation.gov.uk).
17. While no equality issues were raised as part of the consultation process a full Equality Impact Assessment (EQIA) has been completed and is published on the Scottish Government website . There have been no negative impacts identified for any of the equality groups and the measures included have not been assessed as directly or indirectly discriminatory under the Equality Act 2010. The changes introduced are primarily associated with reducing cost and improving accessibility to debt relief for the most financially vulnerable. Bankruptcy and DAS are accessible to all, irrespective of their age, race, gender, disability or sexual orientation.
18. AiB administers each bankruptcy and DAS debt payment programme 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 and in accordance with the law. AiB regularly consults with stakeholders, service users and the public on reforms to debt solutions to ensure that the needs of all groups of society in bankruptcy are considered and that no groups are disadvantaged or excluded more than others.
19. In view of the Fairer Scotland Duty regarding socio-economic inequalities which exists under the Equality Act 2010, the impact of these proposals on those with low wealth and low income has been considered. The proposed changes will make bankruptcy more

accessible and removes perceived barriers to bankruptcy by further removing fees for the applicants. Removing fees for those assessed as having no surplus income through the Common Financial Tool ensures the protection bankruptcy offers is more accessible than ever to the most financially vulnerable.

### **Financial Effects**

20. The changes introduced to the fees levied where AiB is appointed trustee following the award of bankruptcy in the court will impact on the overall funding of AiB and the operation of the existing fees order. This will reduce the burden on the public purse in funding any deficit in the Scottish bankruptcy system. Although this change will increase the initial fees charged to creditors in those cases where AiB is appointed as trustee, these costs are reimbursed in full where funds have been realised during the bankruptcy process. A Business and Regulatory Impact Assessment has been completed outlining these funding implications.
21. The extension of the current fee remission criteria to include those who have no disposable income will have limited financial impact on Accountant in Bankruptcy who will see a small reduction in the fees collected from those seeking their own bankruptcy. There will be a positive financial impact for those that meet the revised fee waiver criteria. Although the changes to the payment break criteria in DAS will have some impact on creditors in terms of the payment scheduling, practical implications would see debts being repaid over a longer timescale. In addition, the flexibility afforded through payment deferral should improve the sustainability of payments programmes, resulting in more DAS cases concluding successfully. This is a beneficial outcome for creditors.

**The Accountant in Bankruptcy on behalf of the Scottish Government**  
**November 2022**

## Annex

### Specific Provisions

1. **Regulation 2:** Removes the Minimal Asset Process bankruptcy debt threshold – allowing access to this form of bankruptcy for those with lower levels of unsustainable debt.
2. **Regulation 3:** Introduces a new criteria for payment variation (payment break) applications in the Debt Arrangement Scheme where disposable income has reduced by 50% or more and it is envisaged that the disposable income will be reduced for the period of the deferment of payments.
3. **Regulation 4:**
  - a. Extends the eligibility for fee waiver in bankruptcy applications to include those that have been assessed by the Common Financial Tool as having no surplus income.
  - b. Increases the creditor fee levied where AiB is appointed trustee following a court award of sequestration from £300 to £750.